

BOARD OF ACCOUNTANCY: Governor may make recess appointments of members; members qualify on the date the required oath is taken.

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October 17, 1947

Mr. D. P. Williams, Secretary
Missouri State Board of Accountancy
Jefferson City, Missouri

Dear Mr. Williams:

This is in reply to your letter of October 10, 1947, in which you request an opinion from this department as follows:

"The Missouri State Board of Accountancy desires to have your opinion regarding the conditions to be met to qualify an individual to exercise the functions of a Board member, and thereupon be entitled to receive per diem compensation therefor as provided under Section 14909; Revised Statutes.

* * * * *

"It is our understanding that appointments made by the Governor are subject to confirmation by the Senate.

"The propositions which we wish to submit to you for a ruling are as follows:

"(1) If the term of a member of the Board has expired and the Governor has made an appointment of a successor at a time the Missouri Senate is not in session, may such appointee be deemed to have been appointed and qualified as a member of this Board to actively participate in its operation and be entitled to compensation for such services and reimbursement of expenses as set out in Section 14,909?

"(2) Section 14,905 provides that the terms of the Board members (after the

initial appointees) shall be for the unexpired term. Your opinion is requested as to which of the following dates determine the time from which such term commences:

- (a) Date of appointment by the Governor;
- (b) Date of confirmation of appointment by the Senate;
- (c) Date of commission;
- (d) Date required oath taken."

Assuming that the appointments of successor members of the Board are subject to confirmation by the Senate, your inquiry is rather fully answered in a Missouri case, *State ex inf. v. Williams*, 222 Mo. 268, which gives the rule in this State, reaffirming the holding and adopting the language in *State ex rel. v. Stonestreet*, 99 Mo. 361, an early case on this question. Inasmuch as the Court, in the Williams case, adopted the language of the Stonestreet case, we will quote the pertinent parts from the Williams case, l.c. 283 and 284:

"The General Assembly provided for the first appointment to be made at a time when the Senate would not be in session. It must have known that the Senate would not be continuously in session, and would not likely be in session at the time when further appointments were made. The law contemplates that such appointments shall be made at the proper time, and that the Senate will act upon the appointment at the next session thereafter. The law does not contemplate that there can be no occupant of the office until both the Governor and Senate have acted. * * * In the meantime, such appointee, after having otherwise qualified under the act, is entitled to the office until such time as the Senate may pass adversely upon his appointment. Should the Senate refuse to confirm, the Governor would then have to appoint another. This at least has been the uniform course pursued by all prior administrations dealing with legislative enactments of this character."

A second part of your inquiry seeks to determine, for pay purposes, a date on which the appointment takes effect. In *State ex inf. v. Williams*, above, the Court stated, l.c. 277, 279 and 280:

" * * * The power to fix one means a power to fix the other, and it is immaterial at which end of the term this power operates. It can say in the first instance that this term shall begin on a certain date and run so long, or it can say this appointment is made under the law with the understanding that it shall end upon a certain date. In either case the power recognized as having the right to designate the beginning and ending of the term has acted.

* * * * *

" * * * But if the Legislature, being possessed of the power, had fixed the date of the commencement of the first appointee's official term, it would not be questioned that such initial point, being once made sure and steadfast, would recur at every corresponding period of two years.

* * *

* * * * *

" Under statutory provisions substantially identical with these under discussion, it has been held that the true rule was to construe the word "term" as designating consecutive periods of six years, following each other in regular order, the one commencing where the other ends, and treating the incumbent appointed in any such period as the incumbent in the particular term or period to which his appointment relates, his office expiring with the expiration of his term. (*People ex rel. v. McClare*, 99 N.Y. 83, 93.) * * *"

Section 14905, Laws of 1943, page 957, fixes an expiration date for the terms of the appointees, and is as follows:

"The term of one of the initial appointees shall expire with July first of the calendar year immediately succeeding that in which his appointment was made; and the terms of the other initial appointees shall expire, respectively, with the first day of July, one, two, three and four years after the expiration of the shortest term aforesaid. * * *"

Therefore, the Legislature must have meant that the new terms of the successor appointees were to commence on July 1. However, it may take some time for the appointment and qualification of a successor, so provision was made for the incumbent holding over, to wit: "Every member shall, however, hold office until his successor is appointed and qualified."

In 43 Am. Jur., page 137, the rule is stated:

"Sec. 543. Effect of Holding Over. - A public officer entitled to hold over after the expiration of his term until his successor qualifies, may be entitled to the compensation of the office during the time in which he so holds over. * * *"

What qualifies a Board member? Section 14905, above, states:

"To every member appointed by the Governor there shall be issued a commission or certificate of appointment; and every appointee, before entering upon his duties, shall take the oath of office required by the Constitution of all officers under the authority of this State."

In the Williams case, above, these facts were set forth, l.c. 273:

"On May 6, 1907, the Governor sent to the Senate the following communication:

"Office of the Governor.
"State of Missouri, City of Jefferson.
"May 6th, 1907.
"To the Senate:

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"I have the honor to advise that I have this day, by and with the advice and consent of the Senate, appointed Jesse W. Sikes, of the city of St. Louis, to the office of Factory Inspector, vice J. C. A. Miller, resigned, for a term ending May 13, 1909.

"Respectfully,

"Jos. W. Folk,

Governor."

"This appointment was confirmed by the Senate at such extra session. The commission was of date May 11, 1907, and Sikes qualified May 17, 1907. * * *"

It will be noted that the Governor appointed Sikes on May 6, 1907, the commission was of date May 11, 1907, and "Sikes qualified" May 17, 1907.

The pertinent provisions of the statute under consideration in the Williams case were as follows:

"Before entering upon his official duties the inspector shall make oath to support the constitution and faithfully demean himself in office; he shall also execute a bond to the state of Missouri, in such sum as the governor may prescribe, with two or more solvent sureties, to be approved by the governor, conditioned upon his faithful performance of the duties imposed upon him by this act."

Therefore, in order to qualify, it was necessary that Sikes make an oath and give a bond. We have a somewhat similar reading in Section 14905, excluding the bond proviso, of course.

In order for a member to be qualified, it is necessary that the Governor issue a commission and that the member take the oath of office.

In the light of the Williams case, above, we think that the date the oath is taken after the issuance of the commission is the first day for which compensation may be paid the incoming Board member, but that the terms of office commence on July 1 of each year, which is provided for by statute. The terms for the successor appointees are to be for five years. "Upon the expiration of each of said initial terms, the term of office of each member thereafter appointed shall be five years. Vacancies shall be filled by the Governor for the unexpired term."

Conclusion.

It is the opinion of this department that:

(1) The Governor may make recess appointments of members of the Missouri State Board of Accountancy, and said members may participate in its operation and be entitled to compensation for such services and reimbursement of expenses.

(2) The terms of the successor Board members date from July 1 of the year in which they are appointed.

(3) A Board member is not qualified until he takes the oath.

(4) A Board member may not receive compensation for performing the duties of the office until he has qualified, i.e., been issued a commission and taken the oath of office.

Respectfully submitted,

JOHN R. BATY
Assistant Attorney General

APPROVED:

J. W. TAYLOR
Attorney General

JRB:ml