

MAINE STATE LEGISLATURE

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December 15, 1964

John H. Reed, Governor

Executive

George C. West, Deputy

Attorney General

You have asked this office to look into the term of office of the members of the State Board of Barbers. The reason for the request is a change in the law in 1961. The provision of the law as enacted in 1961, Chapter 359, § 4, and Chapter 417, § 62, now R.S. Chapter 25, § 230-A, which is pertinent reads as follows:

"The tenure of each barber member of the board shall be for 3 years, initially appointed as follows: The present senior barber board member, as appointed under section 213 prior to September 16, 1961, shall serve for a term of 3 years, the junior barber board member, similarly elected, shall serve for a term of 2 years and its 3rd barber member, created by this section, shall serve for a term of one year, and shall be appointed by the Governor with the advice and consent of the Council. Thereafter, each of the barber members of the board shall be appointed by the Governor, with the advice and consent of the Council, for a term of 3 years and until his successor is appointed and qualified."

We interpret this portion of section 230-A to mean that the senior barber board member on September 16, 1961, shall automatically continue on the new board for 3 years to September 15, 1964. The junior barber board member shall automatically continue on the new board for 2 years to September 15, 1963. The Governor with the advice and consent of the Council after September 16, 1961, shall appoint a 3rd member for 1 year.

Reciting the history in reverse order, we find that the 3rd or new member was appointed on October 4, 1961, for one year. On October 30, 1962, he was re-appointed for 3 years to October 30, 1965. These actions were in conformity with the statute.

The junior barber board member was continued in office until his re-appointment on September 18, 1963, for a 3 year term to September 18, 1966. This was in conformity with the statute.

The senior barber board member was, as above indicated, continued on the board by the statute until September 15, 1964. However, on July 18, 1962, when his appointment under the previous law had expired, he was appointed to a 3 year term expiring on July 18, 1965.

It must now be determined whether this latter appointment was proper and whether that person is now serving under the appointment of July 18, 1962, or under the statutory appointment to September 15, 1964, plus a carry-over until his successor is qualified.

The question is whether the Governor with the advice and consent of the Council can make an appointment when there is no vacancy in the office.

"For while it is the right of the executive to determine for its own guidance whether or not a vacancy exists in each particular case, and while every intentment is to be indulged in favor of the action of the executive, it must be borne in mind that the power of the executive to make a valid appointment does not arise until there is a vacancy in fact." (Emphasis supplied.) 42 Am. Jur. s. 129. Public Officers.

"Accordingly, an office is not vacant so long as it is supplied in the manner provided by the Constitution or law with an incumbent who is legally qualified to exercise the powers and perform the duties which pertain to it;" 42 Am. Jur. s. 131. Public Officers.

See the case of Grindle v. Bunker, 115 Me. 108, which held that there was no vacancy in the office of register of deeds where the elected register died after election but prior to qualifying. Hence, there could be no election to fill an unexpired term. (The legislature later amended the law relating to the term of office of a register of deeds.)

In State of Maine v. Harmon, 115 Me. 269, the court held that the Governor with the advice and consent of the Council could appoint a new municipal court judge because the office was vacant. If the office had not been vacant, there was no authority to make another appointment.

We, therefore, conclude that the Governor with the advice and consent of the Council had no authority to make the appointment of July 18, 1962, and that the present incumbent has been holding over from September 15, 1964, when his statutory term ended. Hence, a new appointment is in order.

George C. West
Deputy Attorney General

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