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ATTORNEY GENERAL OPINION NO. 91- 35

Arthur H. Griggs
Acting Secretary of Administration
Department of Administration
State Capitol, Room 263-E
Topeka, Kansas 66612

Re: State Boards, Commissions and Authorities--Board of Tax Appeals; Miscellaneous Taxation Provisions--Creation of State Board of Tax Appeals; Appointment and Confirmation; Term

Synopsis: Terms of office of the members of the state board of tax appeals were originally set by statute and appointments were made accordingly. The terms of all subsequent appointees must be made with reference to the initial terms, each commencing at the end of the preceding term. Any appointments made mid-term are for an unexpired term. Cited herein: K.S.A. 1990 Supp. 74-2433; L. 1982, ch. 347, § 33; L. 1969, ch. 369, § 1.

* * *

Dear Mr. Griggs:

You request our opinion regarding the date of expiration of a term of office. The office in question is the position on the state board of tax appeals currently held by Mr. Conrad Miller. You provide the following information:

"Mr. Miller was appointed to the Board of Tax Appeals, effective August 18, 1987, to succeed the holdover appointee, John P. Bennett, whose term of office expired on June 30,

1987. The commission issued to Mr. Miller provides that his appointment will expire on August 17, 1991, four years from the effective date of his appointment.

. . . .

"From the initial appointment in 1969 to the position now occupied by Mr. Miller, until the appointment of Mr. Miller, each appointment provided for an expiration date of June 30, initially with a two-year term expiring June 30, 1971, and then at four year intervals thereafter."

K.S.A. 1990 Supp. 74-2433 is the statute by which the board of tax appeals was created. It provides for the composition of the board and states:

"Members shall hold office for terms of four years. If a vacancy occurs on the board, the governor shall appoint a successor to fill the vacancy for the unexpired term."

This statute does not currently provide a specific date for the commencement or termination of terms of office. However, when the board was reconstituted in 1969, the statute did set out commencement and termination dates for the terms of the original appointees, and provided for the staggering of terms. L. 1969, ch. 369, § 1. This language was deleted in 1982 apparently as a cleanup measure because it directed action which had already been taken. L. 1982, ch. 347, § 33. There is nothing in the legislative history of K.S.A. 74-2433 to indicate an intent to discontinue the staggered terms or to allow the governor to change commencement or termination dates for the terms.

Generally, if no dates are set for the beginning and ending of a term of office, the appointive power has the ability to fix the commencement of the term when the office is first filled. After the term is fixed by that first appointment, "all subsequent terms of office necessarily have reference to such initial period, and each term commences at the end of the preceding term." 63A Am.Jur.2d Public Officers and Employees, § 160 (1984). The Kansas Supreme Court adopted this general rule in Hale v. Bischoff, 53 Kan. 301, 304 (1894) and State, ex rel. v. Briedenthal, 55 Kan. 308, 312 (1895). Thus, even if the statute had not set the commencement date for the original appointment, it would have been set when the appointment was made, and subsequent terms

would begin and end with reference to the first. Delays in subsequent appointments do not change the term.

Further, general principals for holding over past the expiration of one's term dictate that the term of office is not affected by holding over.

"A holdover does not change the length of the term, but merely shortens the tenure of the succeeding officer. Accordingly, when the term of an office holder has expired and the officer holder remains in office as a holdover for a period of time until his successor is appointed and qualified, the successor's appointment must be made for the term commencing on the date the office holder's term expired rather than on the date of appointment, and the duration of the appointed successor's term will be the unexpired balance of the term that commenced on the expiration of the original office holder's term." 63A Am.Jur.2d Public Officers and Employees, § 169 (1984) (footnotes omitted).

Tresner v. Rees, 154 Kan. 581 (1941) is cited as authority for the position that an appointee to the board of tax appeals is entitled to a full four year term without regard to the commencement and expiration dates set by L. 1969, ch. 369, § 1 and the original appointment. In Tresner, the statute in question contained this language:

"The governor shall appoint [the commissioner's] successor for the same term of [four] years; and in case of death, resignation or removal of the commissioner of elections, the appointment shall be for the unexpired term. . . ."

The court held that since the statute specifically provided for appointment of an unexpired term in three instances, it necessarily precluded a less than four-year term in any other situation.

"In accordance with the maxim 'expressio unius est exclusio alterius,' the statute having prescribed three certain events

upon which a vacancy might occur, is to be construed as excluding a vacancy upon any event not specified." 154 Kan. at 584.

K.S.A. 1990 Supp. 74-2433 does not limit its terms to certain occurrences; nor does it narrowly define the term "vacancy." Pursuant to the statute, any time a vacancy exists, for whatever reason, the governor is to appoint for the unexpired term.

Similarly, in State, ex rel. v. Wentworth, 55 Kan. 298 (1895), the statute examined contained no provision for unexpired or fractional terms and therefore the court held that anyone appointed to those offices held for four years regardless of when the appointment took effect. K.S.A. 1990 Supp. 74-2433 does recognize unexpired terms. Under the provisions of K.S.A. 1990 Supp. 74-2433, any time an appointment is delayed beyond the expiration of the predecessor's term, there is a "vacancy" and the new appointment is for the unexpired term.

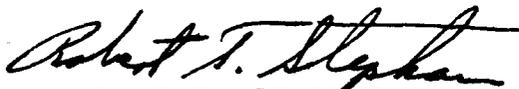
Tresner also cites State, ex rel. v. Breidenthal, supra, for support. In that case, however, the defendant was held entitled to a full four year term, even though not in line with his predecessor's term, because his predecessor's appointment was held to be only a temporary one. Thus, the defendant was the original official appointee to the office and the commencement date was set by his appointment (having not been set by statute).

We note that the commission issued to Mr. Miller provides that his term expires four years from the date of his appointment rather than four years from the expiration of his predecessor's term. In our opinion, a term of office cannot be extended by the terms of a commission. See State, ex rel. Sihes v. Williams, 121 S.W. 64 (Mo. 1909).

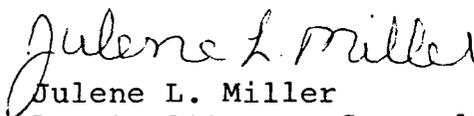
In conclusion, the term of office of a member of the board of tax appeals expires four years from the date of the expiration of that member's predecessor's term, the terms having been set

by statute and the original appointments. Mr. Conrad
Miller's term expires June 30, 1991.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Julene L. Miller
Deputy Attorney General

RTS:JLM:jm