



STATE OF KANSAS

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April 29, 1982

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ATTORNEY GENERAL OPINION NO. 82- 99

Mr. Marshall Crowther
Executive Secretary
Kansas Public Employees'
Retirement System
400 First National Bank Tower
One Townsite Plaza
Topeka, Kansas 66603

Re: State Boards, Commissions and Authorities -- Public
Employees' Retirement System -- Board Members' Terms
of Office

Synopsis: When the terms of office of current members of the
Board of Trustees of the Kansas Public Employees'
Retirement System expire on May 1, 1982, vacancies
will exist in these offices, but incumbents are
entitled to hold over beyond that date as de facto
officers until their successors are appointed and
qualified. Any such successor appointed subsequent
to May 1, 1982, shall be appointed to fill the re-
mainder of the term of office expiring four years
from May 1, 1982. Cited herein: K.S.A. 74-4905.

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Dear Mr. Crowther:

You have requested our opinion regarding certain provisions
of K.S.A. 74-4905, which establishes the board of trustees
of the Kansas Public Employees' Retirement System and pre-
scribes a four-year term of office for each member thereof.
You indicate that the terms of office of all members of the
board will expire on May 1, 1982, and you have inquired
whether the incumbent members continue in office beyond that
date, if successors have not been appointed and qualified at
the expiration of their terms.

Even though K.S.A. 74-4905 prescribes four-year terms of office for members of the board and is silent as to whether such members continue in office until their successors are appointed and qualified, we believe the law recognizes the right of these officers to "hold over" in office until their successors are appointed and qualified. Pertinent to our conclusion is the long-established general rule that "[s]ince the public interest ordinarily requires that public offices should be filled at all times without interruption . . . in the absence of an express or implied constitutional provision to the contrary, an officer is entitled to hold office until his successor is appointed or chosen and has qualified." 67 C.J.S. Officers, §71. The Kansas Supreme Court has affirmed this principle, noting that it is "[t]he prevailing rule in the United States." Murray v. Payne, 137 Kan. 685, 690 (1933).

At issue in Murray v. Payne, *supra*, was a legislative enactment which cancelled city elections in Kansas City, Kansas in 1933, and (in section 2 of the act) extended the terms of office of the incumbent city officers. The act was adopted as an economy measure, to avoid the "'expense of unnecessary elections'" (137 Kan. at 686) and to provide for uniformity in the commencement of terms of office. The act was challenged on several constitutional and statutory grounds. Plaintiff contrasted the Kansas City, Kansas statutes establishing the terms of city offices with other statutes applicable to cities of the first class generally, as noted in the following:

"The general law relating to cities of the first class provides that the term of all elective officers shall be two years and until their successors are elected and qualified. (R.S. 13-307.) The general commission form of government law provides for the election of a mayor and commissioners who shall hold their offices for a term of two years and until their successors are elected and qualified. The commission form of government statute specially applying to Kansas City (R.S. 13-1707) says 'All commissioners elected shall hold their offices for a term of four years.' Plaintiff makes much of the omission of the usual provision for holding over." (Emphasis added.) 137 Kan. at 690.

But the Court was not persuaded that the absence of the hold-over language in 13-1707 (repealed L. 1953, ch. 97), the Kansas City statute, was a conspicuous omission. The Court said:

"There is no implication here that the legislature thought anything about holding over, much less that it intentionally added another specialty to the act, abrogated the rule relating to public officers generally, and prohibited holding over in Kansas City.

"The result of the foregoing is that if section 2 [of the act in question] had not been inserted in the act, incumbents would hold over until the next election in 1935." (Emphasis added.) 137 Kan. at 690.

In short, in the absence of specific language in a statute authorizing city officers to hold over pending the selection and qualification of successors, the Court affirmed that the above-mentioned general rule, the holdover rule, would have application. In the Murray case, as the Court recognized in the above quotation, the legislature obviated the need for application of the general rule by its insertion of section 2 in the act in question, which section expressly authorized city officers to hold over. But, the Court emphasized that had the legislature not inserted said section 2 the holdover rule would apply.

Other jurisdictions have recognized the holdover rule. In Grooms v. La Vale Zoning Board, 340 A.2d 385 (1975), for example, the Court of Special Appeals of Maryland stated the rule thus:

"It has long been recognized in this State, as elsewhere, that the public interest requires, in the absence of any provisions to the contrary, that public offices should be filled at all times, without interruption In accord with this principle, the [Maryland] Court of Appeals has recognized that an elected or appointed officer may remain in office at the expiration of his term and is entitled to exercise the powers of his office until his successor qualifies, whether or not the statute creating the office so provides." (Citations omitted.) 340 A.2d at 391.

We think the foregoing authorities compel the conclusion that, at the expiration of their terms of office, members of the KPERS Board of Trustees hold over in office until such time as their successors are appointed and qualified. However, because of the absence of any constitutional or statutory provision specifically providing for such holding over, we believe the incumbent board members hold over only

as de facto officers. Grooms v. La Vale Zoning Board, supra; 67 C.J.S. Officers, §271 (1978). The legal principles giving rise to this conclusion are best enunciated in State of Connecticut ex rel., v. Watson, 132 Conn. 518, 45 A.2d 716, 164 A.C.R. 1238 (1946), wherein the court stated:

"If by constitutional provision or valid statute a definite term is established for an office without provision that the incumbent shall continue in office after its expiration, he will, in holding over, be a de facto and not a de jure officer, and a vacancy will result which may be filled by the appointment, under proper authority, of a successor; if, however, the term of office is not only for a definite time but until a successor is appointed and qualified, an incumbent holding over is a de jure officer and unless, from the particular language of the statute or the particular circumstances of the case, a different legislative intent appears, there is no vacancy in the office within a provision authorizing an appointment in such a contingency." (Emphasis added.)

Therefore, because K.S.A. 74-4905 does not specifically provide for a board member to hold over, at the expiration of a member's term there exists a vacancy to be filled by appointment of the governor, subject to confirmation of the senate, and the person so appointed is legally entitled to the office. For this reason, a board member holding over in office until a successor has been so appointed lacks all of the legal requisites to the office and cannot be regarded as a de jure officer. However, the distinction between officers de jure and de facto has relevance primarily with reference to the claim each has upon the office, and has little significance with respect to third persons. As stated in State v. Roberts, 130 Kan. 754 (1930):

"The acts of an officer de facto are as valid and effectual where they concern the public or the rights of third persons, until his title to the office is judged insufficient, as though he were an officer de jure, and the legality of the acts of such an officer cannot be collaterally attacked in a proceeding to which he is not a party.' (46 C.J. 1060, 1061.)" Id. at 756, 757.

Finally, you have inquired as to the length of the terms of office of persons appointed as successors to the incumbent board members. Specifically, you ask whether the persons so

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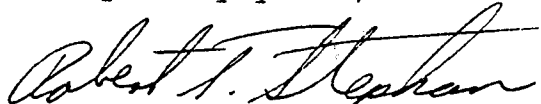
appointed serve for terms of four years, commencing at the respective times they are appointed and qualified, or whether these persons serve until the expiration of four years from May 1, 1982. In our judgment, the latter correctly defines the terms of office.

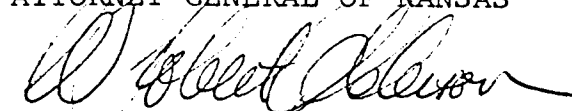
As previously noted, the incumbents' terms of office expire on May 1, 1982, and successors are legally entitled to be appointed as of that date, to serve for terms of four years. Thus, the new terms of office legally commence on this date. If successors are not appointed at that time, vacancies exist in these offices, and any incumbents holding over as de facto officers until their successors are appointed and qualified are serving portions of the new terms of office.

Here, we note that K.S.A. 74-4905 provides that, "[i]n case of a vacancy in the membership of the board a person to fill such vacancy for the remainder of the unexpired term shall be appointed in like manner as appointments for regular terms are made." In our opinion, then, if persons are appointed and qualified as members of the KPERS Board of Trustees subsequent to May 1, 1982, such persons are appointed to fill vacancies in these offices and will serve for the remainder of the terms which commenced on May 1, 1982.

In summary, therefore, it is our opinion that, when the terms of office of current members of the Board of Trustees of the Kansas Public Employees' Retirement System expire on May 1, 1982, vacancies will exist in these offices, but incumbents are entitled to hold over beyond that date as de facto officers until their successors are appointed and qualified. Any such successor appointed subsequent to May 1, 1982, shall be appointed to fill the remainder of the term of office expiring four years from May 1, 1982.

Very truly yours,


ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS


W. Robert Alderson
First Deputy Attorney General

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