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ATTORNEY GENERAL OPINION NO. 91- 117

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Re: State Departments; Public Officers and Employees --
Department on Aging -- Advisory Council on Aging;
Appointment of Members; Expiration of Terms

Synopsis: The terms of office for members of the advisory council on aging were originally set by statute. All subsequent appointments must be made by reference to the initial terms and each term commences at the end of the preceding term. Any appointments made mid-term are for the remainder of the unexpired term. Appointments made mid-term or following the expiration of a previous term cannot be made to exceed the term set by statute. Thus, the term of the office to which the requestor was appointed expired on June 30, 1991. Cited herein: K.S.A. 75-5911; 75-5912.

* * *

Dear Mr. Foster:

In connection with your previous gubernatorial appointment to serve as a member of the state advisory council on aging, you request our opinion concerning expiration of your term of office. Information concerning the history of appointments to this council has been provided to this office by legal staff

with the department of administration. As we do not act as fact-finders when issuing formal opinions, we must necessarily rely upon the accuracy and completeness of information provided in connection with an opinion request.

K.S.A. 75-5911 et seq. create the advisory council on aging and state that the council shall consist of fifteen members, eleven of whom are appointed by the governor. K.S.A. 75-5912 sets forth the terms of members to this council and provides:

"(a) Any member appointed to fill a vacancy occurring prior to the expiration of the term for which the member's predecessor was appointed shall be appointed for the remainder of such term.

"(b) Any member appointed to fill a vacancy occurring upon the expiration of the term for which the member's predecessor was appointed shall be appointed for a period of three years. Members shall be eligible for reappointment.

"(c) Members appointed by the president of the senate, the minority leader of the senate, the speaker of the house of representatives and the minority leader of the house of representatives shall serve at the pleasure of the person holding the office held by the person appointing such members." (Emphasis added).

The advisory council was originally established in 1977. See L. 1977, ch. 288, §§ 11 through 14. The original council consisted of eleven members, all of whom were appointed by the governor. The original members were appointed to staggered terms, and "upon the expiration of the initial terms set forth herein, members appointed to subsequent terms shall be appointed for a period of three (3) years." L. 1977, ch. 288, § 12. This initial staggering of terms followed by a set number of years for every term is a common practice for assuring that future boards retain some experienced members.

L. 1978, ch. 375 amended K.S.A. 75-5911 and 75-5912. Among the changes thus enacted, the membership of the council was

increased from eleven to fifteen. K.S.A. 75-5912 was changed to address the length of the terms of the four new members:

"Of the four members appointed to fill the positions on the advisory council on aging which are created by this act, as designated by the governor at the time of each appointment, two members shall serve on the council for a term of three years and two members shall serve for a term of one year."

Thus, once again, the legislature provided for staggered terms of initial appointees, with subsequent terms for a set number of years.

The 1979 legislature changed portions of K.S.A. 75-5911 and 75-5912, raising membership from fifteen to nineteen. L. 1979, ch. 299, provided that the additional four members were to be appointed by entities other than the governor and their terms expired at the pleasure of these alternative appointing authorities.

The final amendment to the two pertinent statutes took place pursuant to L. 1988, ch. 354. The membership was reduced from nineteen to the current fifteen, with the governor appointing only eleven members on the council. Thus, in 1988 the governor essentially "lost" authority over four appointments. With regard to those appointments still retained by the governor, K.S.A. 75-5912 was changed to its current form.

Attorney General Opinion No. 91-35 examined terms of office of appointed individuals. The common law rule is that after a term is fixed by the 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). Kansas adopted this general rule in Hale v. Bischoff, 53 Kan. 301, 304 (1894) and State, ex rel. v. Briedenthal, 55 Kan. 308, 312 (1895). However, as discussed in Tresner v. Rees, 154 Kan. 581 (1941), specific statutory directives can alter the general rule to allow a term to commence upon appointment. We must therefore determine whether the statutes in question have altered the common law rule.

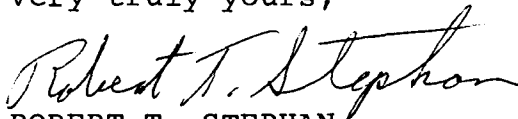
The 1988 amendment to K.S.A. 75-5912(b), cited above, does not contain a clear statement. However, when examined closely, it addresses appointments to vacancies occurring because a term expires. When such expiration occurs and appointments are made, the term of office is three years. Subsection (a) of that statute addresses appointments made "mid-term", and provides that such appointees complete the term. This codifies the common law rule discussed in Attorney General Opinion No. 91-35. Thus, whether an individual is appointed upon the expiration of a previous term or during a current term, it is our opinion that the term of office on the advisory council on aging lasts only three years. While holdovers may lawfully occur, an appointment of an individual made after a term commences does not entitle the individual to serve beyond the expiration of the term to which they were appointed.

Therefore, the remaining issue becomes the pertinent dates of the term in question. This issue would be easier to answer if there had always been the same number of members on the council. If this were the case, all that would be required would be to determine the position to which you were appointed and trace each subsequent term to the present. However, the number of persons serving on the council has changed over the years, making it difficult to determine which office, and thus term, a specific individual fills.

Facts provided to this office from the department of administration indicate a valiant effort by that department to determine which office and term you were appointed to fill. By tracing backwards every appointment ever made to this council, that office decided that you succeeded the office and term previously filled by Lloyd Kerford. This was in part determined by reference to every other member ever appointed by any governor. Mr. Kerford's appointment did not indicate which individual he was succeeding. However, the department of administration legal staff concluded, and we agree, that Mr. Kerford could have only succeeded to the office/term previously filled by Howard Brown. This conclusion was based in part on the lack of availability of other alternative offices/terms as a result of the legislative abolishment of those positions. In other words, Mr. Kerford either succeeded Howard Brown or he could not have been appointed by the governor because all other appointments by the governor had already been filled or had been legislatively abolished. The position filled by Mr. Brown can be traced without interruption back to the original term, which expired in 1979.

Determining the office/term you succeeded allows us to trace the history of that specific office/term forward from its initial period. The initial term in question expired June 30, 1979. Following that initial term expiration date, each succeeding appointee was entitled by statute to a three year term. However, as often happens, not every individual completed the full three years, some terms were served by more than one person, not every appointment was made immediately after expiration of the previous term, and some individuals held over past the expiration of the term to which they were appointed. The result of such mid-term vacancies or longer than three-years service possibly created the appearance that the three year term set forth in the statute could be ignored or altered by the appointing authority. This is not the case. Legislative amendment is necessary to alter a statute establishing a fixed term. Thus, despite possible attempts or appearances to the contrary, any appointment made to or during a term which legally began on June 30, 1988 would expire on June 30, 1991. On that date, the current governor had the authority to make appointments for the next term, which will expire on June 30, 1994. It is our opinion that the term of the office to which you were appointed expired on June 30, 1991.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Theresa Marcel Nuckolls
Assistant Attorney General