THE ATTORNEY GENERAL OF TEXAS

AUSTIN 11, TEXAS

PRICE DANIEL
ATTORNEY GENERAL

July 30, 1949

Hon. Robert S. Calvert
Comptroller of Public Accounts
Austin, Texas

Opinion No. V-868

Re: Status of office and salary of Hon. E. V. Spence as member of the Board of Water Engineers

Dear Sir:

The request for opinion is stated in your letter as follows:

"Under the facts stated below, please give me your opinion as to whether E. V. Spence is still a member of the Board of Water Engineers and as such is entitled to the salary incident to the position until such time as he qualifies as Interstate Compact Commissioner, or until his successor on the Board of Water Engineers is appointed.

"He was originally appointed to the Board of Water Engineers as an interim appointee to fill the vacancy which occurred upon the death of Mr. A. H. Dunlap. This appointment was made by the Honorable Coke Stevenson and was duly and regularly confirmed by the Senate. He qualified in due course and at the expiration of the interim term was reappointed to the Board by Honorable Beauford Jester and thereafter qualified on November 6, 1947, by taking the statutory oath and making the required bond. His name was submitted to the 51st Legislature for confirmation. The Senate of such Legislature never acted on this appointment and his name was withdrawn by Governor Jester on June 23, 1949, with the

consent of the Senate. Governor Jester did not submit another name for confirmation,has not requested his resignation and has not appointed anyone else to the Board of Water Engineers.

"By H.B.594, 51st Legislature, the office of Interstate Compact Commission for the Canadian, Red and Sabine Rivers was created and appropriated the funds necessary to pay the salaries and carry out the duties incidental to such office. This appropriation does not become effective until the biennium beginning September 1, 1949. Governor Jester has appointed Mr. Spence Interstate Compact Commissioner, and he was confirmed by the Senate on June 23, 1949. He has not qualified for such office by taking the oath required by said bill."

In addition to the facts stated in your letter, we have ascertained that the appointee's name for the Board position never came out of committee and that no vote or other official action was ever taken by the Senate on the appointment other than to consent to the withdrawal.

The answer to your question is dependent upon the solution of two separate problems. First, it is necessary to determine the effect of the Governor's withdrawal, the Senate consenting, of the appointment to the Board position upon such appointee's right to continue as a member of the Board of Water Engineers. Second, if this has no effect upon the right to membership, then is his right to the office in any way affected by his appointment and Senate confirmation to the Office of Interstate Compact Commissioner? The question of the right to salary as a member of the Board is dependent upon the right to the office.

The solution to the problem raised by the Governor's withdrawal of his appointee's name from the Senate with its consent is in part dependent upon the following statutory and constitutional provisions:

Article 7478, Vernon's Civil Statutes:

"Said Board (Board of Water Engineers) shall be composed of three members, one of whom shall be appointed from each of the respective water divisions described in Article 7475. The members of such Board shall be appointed by the Governor, by and with the advice and consent of the Senate, and shall each hold office for a term of six years, and until his successor is appointed and qualified."

Article IV, Section 12, Constitution of Texas:

"All vacancies in State or district offices, except members of the Legislature, shall be filled unless otherwise provided by law, by appointment of the Governor, which appointment, if made during its session, shall be with the advice and consent of two-thirds of the Senate present. If made during the recess of the Senate, the said appointee, or some other person to fill such vacancy, shall be nominated to the Senate during the first ten days of its session. If rejected, said office shall immediately become vacant, and the Governor shall, without delay, make further nominations, until a confirmation takes place. But should there be no confirmation during the session of the Senate, the Governor shall not thereafter appoint any person to fill such vacancy who has been rejected by the Senate; but may appoint some other person to fill the vacancy until the next session of the Senate or until the regular election to said office, should it sooner occur. Appointments to vacancies in offices elective by the people shall only continue until the first general election thereafter."

Article XVI, Section 17, Constitution of Texas:

"All officers within this State shall continue to perform the duties of their offices until their successors shall be duly qualified."

The problem is essentially this. When a recess appointment is made and submitted to the Senate as required by Article IV, Sec.12, but the name is withdrawn before the Senate affirmatively confirms or rejects the appointee, does that portion of Art. IV, Sec. 12, which provides that if such appointee is "rejected, said office shall immediately become vacant", apply so as to bar the appointee of all right to the office from the time his name is withdrawn and prevent his holding over as required by Art.XVI, Sec.17, until another appointment is made?

We find no authority directly in point on this question. Insofar as we have been able to ascertain, the question is one of first impression in Texas. With respect to the situation where there has been an affirmative rejection by the Senate, we find only one case. Even this case leaves some doubt as to the effect, if any, which the holdover provisions of Art. XVI, Sec. 17 have in the case of an affirmative rejection. Denison v. State, 61 S.W.2d 1017 (Tex.Civ. App. 1933, error ref., 122 Tex. 459, 61 S.W.2d 1022).

There are, however, two prior opinions by this office which have construed the effect of Art. IV, Sec.12 upon Art. XVI, Sec.17, where the Senate has affirmatively rejected an executive appointment. These opinions reach opposite conclusions. See Opinion O-3343, approved March 28, 1941, and Conference Opinion 1809, written by the then Attorney General, Hon. B. F. Looney, under date of August 18, 1917.

We quote from Conference Opinion 1809 as follows:

> "I am in receipt of your communication of the 17th inst., on behalf of Senate Committee on public debts, claims and accounts of which you are Chairman, in which you state that during the regular session of the Thirty-fifth Legislature the Senate refused to confirm C. W. Woodman as Labor Commissioner; that during the first called session the Governor submitted to the Senate the name of Frank Swor for confirmation as Labor Commissioner, and he was confirmed by the Senate. You furthermore state that Mr. Swor has failed to take the oath of office as Labor Commissioner,

and, in fact, has failed altogether to accept and qualify to said office, and that C. W. Woodman is continuing to discharge the duties of the office, and is drawing the salary as Labor Commissioner.

"You call attention to the provisions of Section 12, Article 4 of the Constitution. . .

"After making this statement you propound the following question:

"Does this article of the Constitution, under the statement of facts set out herein, authorize the said Woodman to continue to fill the office of Labor Commissioner and to draw his salary therefor?

"If the article of the Constitution just quoted was the only provision in the Constitution relating to the subject, your question should be answered in the negative. In this connection, however, I beg to call attention to Section 17 of Article 16 of the Constitution, as follows:

"'All officers within this state shall continue to perform the duties of their offices until their successors shall be duly qualified.'

"Construing these different provisions of the Constitution together, and they must be so construed as to give meaning to each, I am of the opinion that Mr. Woodman, under the facts stated, will continue to discharge the duties of the office until his successor shall be appointed and qualified.

"The term 'vacancy' is used with varying meanings. There may be a constructive vacancy and yet the office may

be physically occupied. You will note the language of Section 17 just quoted. It does not say that the incumbent after his term expires shall hold the office, but 'shall continue to perform the duties of their offices until their successors shall be duly qualified. . . .'

"I beg, therefore, to answer your first question just quoted in the affirmative; that is to say, until the successor of Mr. Woodman qualifies he is by virtue of the Constitution, authorized to discharge the duties of the office and to collect the salary therefor.

"If the Governor, instead of nominating Woodman to succeed himself, had nominated Brown, and if on the rejection of Brown by the Senate, the Governor had nominated Jones, and if Jones after being confirmed had refused to accept the office and qualify, as Swor has done, no one would entertain a doubt but Mr. Woodman could, under the circumstances, continue to discharge the duties of the office, pending the appointment and qualification of his successor."

We quote from Opinion O-3343 as follows:

"We beg to reply to your letter of March 17, 1941, requesting our opinion as to whether your tenure of the office of State Auditor and Efficiency Expert ended when the Senate rejected your appointment, or whether it is your duty to hold the office 'de facto' until another official is appointed and has qualified. Pertinent facts are as follows: Your prior term in the office ended on September 13, 1940, at which time you were appointed by the Governor to succeed yourself, after which you seasonably filed your oath and bond; on January 22, 1941, the Governor submitted your name to the Senate for confirmation; and on March 6, 1941, such confirmation was rejected. . . .

"As already noted, Article 16, Section 17 is a general provision, while Section 12 of Article 4 is a special one dealing with this identical problem. To hold that Section 17 is effective here, in our opinion, would be to nullify a part of said Section 12 of Article 4, and thus a general provision would be held to control the special one, which is contrary to the well established rule of construction. On the other hand, there is ample room for Article 16, Section 17, to operate without applying it to this kind of situation. Under the interpretation which we have given both provisions survive and function.

"It is our considered opinion that your duties and tenure of office ended on March 6, 1941, when your appointment was rejected by the Senate."

It is evident that the point of conflict between these opinions is whether Art. IV, Sec.12 and Art. XVI, Sec.17 should be construed together so as to permit a rejected appointee to hold over. This precise question was not before the court in Denison v. State, supra. The court mentioned both constitutional provisions. But it mentioned them only in connection with the contention by the rejected appointee, Denison, that Art. IV, Sec.12 had no application to his situation (in effect that the Senate was not required to confirm his appointment) since under Art. XVI, Sec.17 there was no vacancy in office, it being the duty of the incumbent, one Johnson, to hold over after the expiration of his term. The court found that in Texas the expiration of a term of office creates a vacancy, which the Governor may fill by appointment under Art. IV, Sec.12. However, the court did say that Art. IV, Sec.12 "denies to a nominee, whose confirmation has been rejected by the Senate, any right whatever to occupy the office or to discharge, after such rejection, any of the duties thereof." If the court intended by this to say that a rejected appointee may not hold over under Art. XVI, Sec. 17 until a confirmation is had, then it is obvious that a hiatus in office may result. Had Denison instead of Johnson been the incumbent and had he been appointed to succeed himself, could he have held

over under Art. XVI, Sec.17? Since this question and because the matter of who held over in the office, if anyone, was not before the court, the case is not authority except perhaps in the case of an affirmative rejection.

On the question of whether or not the end of a term of office creates a vacancy in office, Texas appears to be in the minority. People v. Christian, 123 P.2d 368-372 (Wyo. Sup.1942); Denison v. State, supra, and cases therein cited. Under the rule followed by the majority of states, the incumbent holds over after his term, either by virtue of constitutional or statutory provisions, and unless he resigns, dies or abandons the office, remains in the office until the new appointee has been confirmed by the Senate and until he qualifies. Under this rule a recess appointee would not be entitled to the office by virtue of appointment alone but would be required to wait until the next meeting of the Senate and confirmation by that body before he could enter the office, the incumbent in the meantime holding over. However, if the incumbent resigns, dies, or abandons the office, a vacancy occurs in the sense that the new appointee may enter the office. People v. Christian, supra. Since in Texas the end of a term of office creates a vacancy, in the sense that a new appointee can enter the office, a new appointment may be made and such appointee is entitled to the office. The real basis of the distinction between the majority view and the view in Texas is with respect to the time when and the circumstances under which the new appointee may undertake the office.

In adopting the so-called minority view, we doubt that the Texas courts intended to thereby create a situation under which a hiatus in office could or might occur. As stated in the decisions of the courts adopting either view, their purpose is to prevent a hiatus in office. This is done in Texas by permitting the new appointee to at once take office even though the appointment be incomplete, and in other states by insuring holding over by the incumbent until the new appointment is in fact complete. It is obvious that no hiatus could occur under the majority view. It is equally obvious that in Texas unless the new appointee be permitted to hold over until his successor qualifies, a hiatus will result. To apply the holding of Opinion O-3343 or construe the holding in Denison v. State as applicable to the facts here, would tend

to create rather than prevent hiatus in office, and would be going further than we believe the Texas courts intended to go in adopting their minority view. In addition, Art. XVI, Sec.17 is denied any application. Opinion O-3343 and the court's opinion in Denison v. State, supra, are predicated upon the express language of Art. IV, Sec.12, relating to rejections. Clearly then, unless there is an express rejection, Art. IV, Sec. 12 must be construed together with Art. XVI, Sec.17 as indicated by Conference Opinion 1809. Where, as here, the Senate takes no action on the appointment, the appointee holds over pursuant to Art. XVI, Sec.17 until he resigns, dies, abandons the office, or until his successor is appointed.

Our answer to the problem raised by the appointment and confirmation of E. V. Spence to the office of Interstate Compact Commissioner is dependent upon whether or not he now occupies such office.

Membership on the Board of Water Engineers and holding the office of Interstate Compact Commissioner, both offices of emolument, would clearly be in violation of Art. XVI, Sec.40 of the Constitution of Texas. When the same person occupies two such offices, his acceptance and qualification for the second office ipso facto and as a matter of law vacates the first office. But until there is an acceptance and qualification for the second office he does not occupy it and there is no abandonment or vacation of the first office. Biencourt v. Parker, 27 Tex. 558 (1864); State v. Brinkerhoff, 66 Tex.45, 17 S.W.109 (1886); Odem v. Sinton Ind. School District, 234 S.W. 1090 (Com. App. 1921); Martin v. Grandview Ind. School District, 266 S.W.607 (Tex.Civ.App.1924, error ref.); State v. Valentine, 198 S.W. 1006 (Tex.Civ.App. 1917, error ref.); Pruitt v. Glen Rose Ind. School District, 126 Tex.45, 84 S.W.2d 1004, 100 A.L.R.1158 (1935); 34 Tex. Jur. 352.

There appears to be some conflict in Texas whether acceptance and entering the duties of the second office, without formal qualification by taking the oath or making the bond, will vacate the first office, or whether there must be in addition a formal qualification to the second office before the first is vacated. Compare Odem v. Sinton Ind. School District (supra) with Martin v. Grandview Ind. School District (supra) and

Keel v. Railroad Com., 107 S.W.2d 439 (Tex.Civ.App. 1937, error ref.). Nevertheless, we understand the facts here to be that E. V. Spence is still serving on the Board, has not begun his duties as Commissioner, has not qualified as Commissioner by taking the oath, and has otherwise made no formal acceptance of the office of Interstate Compact Commissioner. It seems clear that he does not occupy the second office to which he has been appointed and confirmed under circumstances which would constitute an ipso facto vacation of his Board membership.

It is our opinion that E. V. Spence is still a member of the Board of Water Engineers by virtue of Article XVI, Sec.17 of the Constitution and will so remain until his successor is appointed and qualifies, or until he accepts and qualifies for the office of Interstate Compact Commissioner. Such being the case, he is entitled to the salary incidental to his Board membership.

According to House Bill 594, 51st Legislature, the salary of the Interstate Compact Commissioner does not commence until September 1, 1949. Even though the Act by virtue of its emergency clause and passage by the necessary vote became effective upon its passage, we doubt that the Legislature intended that the office be occupied by the appointee, or that he accept and qualify, until the salary to which the office is entitled becomes available.

SUMMARY

A recess appointee, requiring Senate confirmation, who was appointed to succeed himself and whose name is withdrawn with the consent of the Senate, continues to hold over in office under Article XVI, Sec.17, Constitution of Texas, until his successor is appointed and qualifies.

Executive appointment and Senate confirmation of the same person for a second office of emolument does not vacate the first office until there has been an acceptance and qualification for the second office. Odem v.

Sinton Ind. School District, 234 S.W. 1090 (Comm. App.1921); Pruitt v. Glen Rose Ind. School Dist., 126 Tex.45, 84 S.W.2d 1004 (1935).

Yours very truly

ATTORNEY GENERAL OF TEXAS

H.D. Pruett, Jr.

By H. D. Pruett, Jr.
Assistant

HDP:bt

APPROVED

Price Daniel

ATTORNEY GENERAL