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STATE OF ALABAMA
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Honorable Gerald J. Collins
Board President
Alabama State Board of Chiropractic Examiners
126 Chilton Place
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Chiropractic Examiners Board – Holdovers –
Boards – Term of Office

A member of the State Board of Chiropractic Examiners (“Board”) whose second consecutive term expires may continue to hold over in office as a de facto member until a successor is duly elected. Because there is a vacancy in the office, the Board should call an election every August until the vacancy is filled.

Dear Dr. Collins:

This opinion of the Attorney General is issued in response to your request.

QUESTION

When the second consecutive term of a member of the State Board of Chiropractic Examiners expires, and when no qualified individual is seeking election from his or her district, does that board member continue to serve?

FACTS AND ANALYSIS

According to your request, a current member of the Board has reached the expiration of his second consecutive term in office. Currently, no person has qualified to run for election to this seat on the Board, and the qualifying period has ended.

Section 34-24-140 of the Code of Alabama establishes the State Board of Chiropractic Examiners. ALA. CODE § 34-24-140 (Supp. 2013). The Board is

composed of nine members: one elected from each congressional district in the state, one African-American elected from the state at-large, and one consumer member appointed by the Governor. *Id.* Members of the Board serve for a term of four years, and no member may serve more than two consecutive terms. ALA. CODE § 34-24-141 (2010). The Code makes no provision for an incumbent to hold over past the expiration of his or her term.

This Office has previously stated the following in summarizing the law regarding the ability of an official to serve beyond the expiration of his term:

Section 397. HOW WHEN AUTHORIZED TO
HOLD OVER. --

It is usually provided by law that officers elected or appointed for a fixed term shall hold not only for that term but until their successors are elected and qualified. Where this provision is found, the office does not become vacant upon the expiration of the term if there is then no successor elected and qualified to assume it, but the present incumbent will hold until his successor is elected and qualified, even though it be beyond the term fixed by law.

Where, however, no such provision is made the question of the right of the incumbent to hold over is not so clear, but the prevailing opinion in this country seems to be that, ***unless such holding over be expressly or impliedly prohibited***, the incumbent may continue to hold until some one else is elected and qualified to assume the office.

Such a rule seems to be demanded by the most obvious requirements of public policy, for without it there must frequently be cases where, from a failure to elect or a refusal or neglect to qualify, the office would be vacant and the public service entirely suspended.

Opinion to Honorable E.B. McClain, Member, Alabama State Senate, dated March 20, 2000, A.G. 2000-108 (emphasis added). *Also see*, opinion to Honorable Lowell Barron, Member, Alabama State Senate, dated August 2, 1996, A.G. No. 96-00283; opinion to Honorable Fred G. Mott, City Administrator/Clerk, City of Foley, dated September 23, 1980, A.G. No. 80-00586; opinion to Honorable A.H. Collins, State Superintendent of Education, dated March 21, 1933, 152 Op. Att'y Gen. 52 (1933), *citing Mechem on Public Officers and Offices* at 257.

Additionally, in an opinion issued to Honorable Robert L. Gonce, this Office stated the following:

Thus, when no provision governs the right of an incumbent to hold over, the incumbent may continue to hold office until such time as his or her successor is elected and qualified to assume the office.

The Alabama Supreme Court has explained that the purpose of provisions authorizing officers to hold over is “to prevent a hiatus in the government pending the time when a successor may be chosen and inducted into office, for, in *the absence of any provisions to the contrary*, public interest requires that public offices should be filled at all times, without interruption.” The Court, in *Danner*, further stated that, “[i]n all cases the right of an officer to hold over after the expiration of his term exists only where there is no legally elected and qualified successor, for when the rights of the successor vest those of the incumbent holdover terminate.

Opinion to Honorable Robert L. Gonce, Attorney, Florence-Lauderdale County Tourism Board, dated February 10, 2010, A.G. No. 2010-043, *quoting* opinion to Honorable Peblin W. Warren, Member, House of Representatives, dated March 24, 2008, A.G. No. 2008-064; *Danner v. Crawford*, 527 So. 2d 711, 712 (Ala. 1988) (emphasis added).

The crux of the issue raised by your inquiry is whether the statute, by stating that no member may serve for more than two consecutive terms, either expressly or impliedly prohibits the incumbent board member from holding over until someone else is elected and qualified. Similar inquiries have been raised in the opinions to Honorable E.B. McClain, Member, Alabama State Senate, dated March 20, 2000, A.G. No. 2000-108 and to Honorable Lowell Barron, Member, Alabama State Senate, dated August 2, 1996, A.G. No. 96-00283. Both of these opinions took a balancing approach with respect to what a court of competent jurisdiction might determine.

In *McClain*, this Office was asked to determine whether an incumbent member of the Jefferson County Judicial Commission (“Judicial Commission”) may be permitted to continue to serve until a qualified successor was named if the current nominee was disqualified from serving. The provisions applicable to members of the Judicial Commission authorized such members to hold office for six years, but prohibited succession to that position by that same member. In essence, members of the Judicial Commission were limited to one term of six years. This Office interpreted the applicable language regarding terms of office

for members of the Judicial Commission as being silent with respect to whether a member may hold over. In ultimately determining that the incumbent member could or should holdover, this Office stated, in pertinent part, the following:

It could be argued that the limitation on the eligibility of the Jefferson County Judicial Commission to succeed himself prevents the member from holding over in this instance. *See* Attorney General's Opinion to Honorable Lowell Barron, Member, Alabama Senate, dated August 2, 1996, A.G. No. 96-00283, p. 3. The lack of a holdover provision ("until his successor is elected and qualified") could also, arguably, prevent the preceding member of the Judicial Commission from holding over.

Alternatively, the holdover principle could be applied to conclude that the member of the Judicial Commission holds over as a de facto officer for a reasonable time until his successor is selected and qualified. *Id.* at p. 4. This is particularly true where there is no qualified nominee who has been selected to serve on the Judicial Commission. We pretermitt discussion of the time a holdover is permitted. *See*, for instance, *James v. Langford*, 695 So. 2d 1158 (Ala. 1997), rehearing denied, 695 So. 2d 1164 (Ala. 1997).

McClain at 6.

In the *Barron* opinion, this Office was asked to determine whether Act 89-265 allowed members of the Jackson County Water Authority to hold over. The language used in Act 89-265 is most analogous to the provisions found in the statutory authority relevant to the Board of Chiropractic Examiners. After noting that general public-policy concerns favor a person holding over, this Office balanced the varying interests raised by the inquiry as follows:

Thus, there is an exception from the general rule regarding holdovers where such holding over is expressly or impliedly prohibited. Section 4 of Act No. 89-265, in pertinent part, states:

“. . . Directors shall not be eligible to serve for more than two consecutive terms.”
(Emphasis supplied.)

Arguably, a court could find that the limitation on eligibility to serve for more than two successive terms prevents an officer from holding over in this instance. The Alabama Supreme Court has held that a duly elected official may vacate his office by statutory disqualifications. See, State of Alabama ex rel. Graddick v. Ronnie Rampey, 407 So. 2d 823 (Ala. 1981). Since the statute states that directors are not “eligible to serve” for more than two successive terms, a court could find this to be a statutory disqualification, and the office is vacant by operation of law. It is our understanding that the individual in question completed his second consecutive term on April 27, 1996.

Alternatively, a court could apply the holdover principle and rule that these Directors hold over as de facto officers for a reasonable time after completing two consecutive terms. However, de facto officers continue to hold office after the expiration of a term only for a reasonable time until the successor is elected and qualified. Opinions to Honorable John R. Phillips, Oxford City Attorney, under date of March 27, 1979 (File No. 110), citing State ex rel. Benefield v. Cottle, 49 So. 2d 224 (Ala. 1950) and City Council of Montgomery v. Hughes, 64 Ala. 201; Honorable Freddy Harden, Mayor of Newton, under date of December 9, 1980 (A.G. No. 81-00119); Honorable Lawrence Lee Alley, Mayor of Midway, under date of January 28, 1981 (A.G. No. 81-200) and Honorable Al Shumaker, Town Attorney for Centre, under date of June 29, 1987 (A.G. No. 87-00237). Most importantly, a vacancy in office occurs at the expiration of the term and the holdover serves only as a de facto officer. Opinion to Honorable John R. Phillips, supra. We note that pursuant to Code of Alabama 1975, § 36-1-2, the official acts of a person in possession of a public office as a de facto officer and exercising the functions of that office shall be binding and valid as to all persons interested in or affected thereby. However, such person may be liable to all penalties imposed by law for “usurping or unlawfully holding office or for exercising the functions thereof without lawful right or without being qualified according to law.”

We note that under Act No. 89-265 it would appear that the appointment process is simple and that an

appointment could and should be made expeditiously. Because of this, the reasonableness of the holdover period would be subject to greater scrutiny.

Barron at 3-4. This Office opined that the member of the Jackson County Water Authority no longer validly held office. This determination may have been based on a perception or awareness that the appointment process was being unreasonably stalled. Specifically in the last paragraph, this Office stated that appointments should be done expeditiously and that the reasonableness period of a holdover would receive greater inspection. *Id.*

Although both the *McClain* and *Barron* opinions are instructive, both matters are distinguishable from your current inquiry. In these previous opinions, the filling of the term of office was dependent on an appointment by either the Governor or some other appointing authority. The members of the State Board of Chiropractic Examiners, however, exercise an election process to fill a vacancy. This process is initiated every time a vacancy in office occurs. ALA. CODE § 34-24-140(d) (Supp. 2013). Thus, when a vacancy occurs, the Board should call an election every August until such vacancy is filled. *Id.*

The guiding standard that has been repeatedly expressed by this Office has been to favor the holdover principle. Although a court of competent jurisdiction may determine that the language used in section 34-24-141 creates a statutory disqualification, such a determination would merely prohibit that person from being qualified to serve another term in office. That determination should not be interpreted as preventing a person from holding over as a de facto member of the Board for a reasonable time until another person is elected and qualified.

At the end of any term in office, there is the potential for a vacancy to occur. Black's Law Dictionary, in defining a vacancy, states that a vacancy occurs when a particular post is not occupied. BLACK'S LAW DICTIONARY 1688 (9th ed. 2009). Although a person may hold over in a particular position, the person serving as a holdover is not entitled to another term of office. Instead, according to Black's Law Dictionary, in defining the term "holding over," stated that anyone serving as a holdover merely serves beyond his tenure because a successor has not been elected or cannot assume office. *See, generally*, BLACK'S LAW DICTIONARY 800 (9th ed. 2009).

As such, a person who succeeds an incumbent who has been holding over may only complete the unexpired term for that position, unless otherwise provided by law. Opinion to Honorable Bob Riley, Governor of the State of Alabama, dated February 12, 2004, A.G. No. 2004-070 (stating that a person filling a vacancy serves for the time remaining in the term of the person he or she replaces and that the terms of the appointees are limited to the remaining unexpired term of the vacating official). Having a person serve in the position as a holdover does not

mean that a vacancy in office has been filled. Instead, allowing a person to hold over permits stability and continuity of government. *See, generally*, opinion to *Gonce*.

The provisions of American Jurisprudence with respect to holdover officers further substantiates the notion that a person holding over in a particular position should be favored. In particular, sections 148, 149, and 150 of 63C AM. JUR. 2d *Public Officers and Employees* states respectively as follows:

While there is some authority to the contrary, as a general rule, apart from any constitutional or statutory regulation on the subject, an incumbent of an office may hold over after the conclusion of his or her term until the election and qualification of a successor. This general rule applies notwithstanding a provision rendering one elected to an office ineligible to succeed herself or himself.

63C AM. JUR. 2d *Public Officers and Employees* § 148 (2013) (internal citations omitted).

A hold-over officer has all the authority to act in that capacity and receive compensation. An officer is not prevented from continuing to discharge the duties of his or her office after his or her term where no successor has been chosen, even by a provision of a constitution stating that the duration of an office should not exceed a given number of years. In this regard, a mandatory constitutional time limit within which appointments were required to be made was not applicable where the existence of a vacancy was precluded by an incumbent lawfully holding over.

One who holds over until his or her successor is qualified continues as the incumbent of the office, although he or she has formally resigned and the resignation has been accepted. Once the appointing authority has appointed an individual, and such person has qualified for the position, this activity effectively terminates title and tenure of one holding over in that position.

63C AM. JUR. 2d *Public Officers and Employees* § 149 (2013) (internal citations omitted).

A term of office is not affected by the holding over of an incumbent beyond the expiration of the term for which he or she was appointed. The period between the expiration of an officer's term and the qualification of his or her successor is as much a part of the incumbent's term of office as the fixed constitutional or statutory period. This is true even where a person is elected as his or her own successor. Thus, 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 office holder remains in office as a holdover for a period of time until his or her 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.

63C AM. JUR. 2d *Public Officers and Employees* § 150 (2013) (internal citations omitted).

The fundamental rule of statutory construction is to ascertain and give effect to the intent of the Legislature in enacting the statute. *Ex parte Ala. Dep't of Mental Health & Mental Retardation*, 840 So. 2d 863, 867 (Ala. 2002). In ascertaining a dubious legislative intent, great weight should be given to the practical effect that a proposed construction will involve. *Odum Lumber Co. v. S. States Iron Roofing Co.*, 36 Ala. App. 270, 272, 58 So. 2d 641, 643 (1951).

By not allowing a member of the Board of Chiropractic Examiners to hold over, a vacancy would be created and certain chiropractors within the state would not have any representation. The Legislature arguably expressed an intent against vacancies by authorizing two or more members of the Board to serve their entire term, despite the fact that those members represented the same congressional district because of redistricting. *See, generally*, ALA. CODE § 34-24-141 (2010).

It is the opinion of this Office that an incumbent member of the Board of Chiropractic Examiners may hold over for a reasonable amount of time because the Code makes no provision against an incumbent holding over and there are valid public-policy concerns disfavoring a vacancy in office. Although this Office does not make a recommendation as to what constitutes an unreasonable amount of time, previously this Office determined that a person was authorized to hold over in a position for a year where there was authority clearly setting forth the manner by

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which a vacancy would be filled in one year's time. *See, generally*, opinion to Honorable A.H. Collins, State Superintendent of Education, dated March 21, 1933.

The opinion to Honorable Lowell Barron, Member, Alabama State Senate, dated August 2, 1996, A.G. No. 96-00283, is hereby modified to the extent it conflicts with this opinion.

CONCLUSION

A member of the State Board of Chiropractic Examiners whose second consecutive term expires may continue to hold over in office as a de facto member until a successor is duly elected. Because there is a vacancy in the office, the Board should call an election every August until the vacancy is filled.

I hope this opinion answers your question. If this Office can be of further assistance, please contact Ben Baxley of my staff.

Sincerely,

LUTHER STRANGE
Attorney General
By:



BRENDA F. SMITH
Chief, Opinions Division

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