

Grand Army of the Republic—Custodian of Records of the Grand Army of the Republic—Vacancy in the Office of Custodian of the Records of the Grand Army of the Republic.

When a vacancy exists in the office of Custodian of the Records of the Grand Army of the Republic, the Department Commander may recommend a suitable person for the position and it is the duty of the Governor to appoint the person so recommended but when no vacancy exists the Department Commander cannot recommend a person to be appointed custodian, and by such recommendation compel the Governor to remove the person then occupying such office and appoint the person so recommended thereto.

July 15th, 1918.

Hon. S. V. Stewart, Governor,
Helena, Montana.

Dear Sir:

I am in receipt of your letter of recent date requesting a construction of Chapter 97, Laws of the 14th Legislative Assembly.

It appears from your letter that Mr. C. H. Frady was regularly recommended by the Department Commander of the G. A. R. and appointed by you to the position of Custodian of the archives, records, documents, etc., of the Grand Army of the Republic, in accordance with the provisions of said Chapter; that recently the Grand Army of the Republic held its annual session and elected a new Department Commander of the State. The new Commander has formally recommended George H. Taylor as Custodian for the ensuing year. Mr. Frady has not resigned and now occupies the position in question.

You desire to know whether or not the recommendation is binding on the Governor.

Section 270, Revised Codes of 1907, provided for the setting apart of a suitable room in the Capitol Building for the storage and safe keeping of the records, etc. This section was amended by Chapter 32, Laws of the 13th Legislative Assembly, which provided for the appointment of a custodian "selected by the Department Commander of the Department of Montana of the Grand Army of the Republic, and their successors in office."

Chapter 32 was repealed by Chapter 97, Laws of the 14th Legislative Assembly. Section 1 of said Chapter 97 provides:

"The Governor of the State of Montana is hereby authorized and directed to appoint a custodian * * * The Department Commander, Department of Montana of the Grand Army of the Republic, may recommend to the Governor a suitable person to be appointed as such custodian. * * *"

The term of office of such custodian is not provided for and the act is silent as to the method of removal from office.

There is no vacancy in the office. A vacancy in office exists only where there is no person authorized by law to discharge the duties of the office.

29 Cyc. 1400 (3).

It is a well established rule of law that when the term of office is not fixed by law, the officer is regarded as holding at the will of the appointing power on the theory that the power of removal is incident to the power of appointment.

29 Cyc. 1395.

People vs. Board of Fire Com'rs, 73 N. Y. 437.

People vs. Robb, 126 N. Y. 180.

People vs. Brooklyn, 149 N. Y. 215.

State vs. Archibald, 66 N. W. 234.

Mechem. Pub. Off. 445, pp.

Throop, Pub. Officers, pp. 304-361.

Wyman's Administrative Law, pp. 49-50.

The fundamental rule in statutory construction is to ascertain and give effect to the intention of the legislature. This intention, however, must be the intention as expressed in the statute, and where the meaning of the language used is plain, it must be given effect, but where the language is of doubtful meaning it becomes necessary to ascertain the true meaning.

Chapter 97 simply authorizes the Governor to make the appointment, but some meaning must be attached to that provision which provides that the Department Commander may recommend. Statutory authority is not necessary to give a citizen the right to recommend one for appointment to office; that is a privilege enjoyed by all citizens, so it would indicate that the legislature intended that the Department Commander should have some voice in the selection of the custodian.

I am therefore of the opinion that *when a vacancy exists in the office*, the Department Commander may recommend a suitable person

for the position and it is the duty of the Governor to appoint the person so recommended, to hold the office, otherwise that portion of the statute would be rendered meaningless; but when no vacancy exists in the office, the Department Commander cannot recommend a person to be appointed custodian, and by such recommendation compel the Governor to remove the person then occupying such office and appoint the person so recommended thereto.

Respectfully,

S. C. FORD,

Attorney General.