

No. 40

GOVERNOR—INTERIM APPOINTMENTS TO FILL VACANCIES—TERM OF OFFICE—BOARD OF EDUCATION MEMBERS

Held: Where Governor makes appointment of members to State Board of Education to fill vacancy during recess of Senate, such appointee holds office until next meeting of Senate. Section 7, Article VII, Constitution, controls over Section 831, in case of conflict office becomes vacant at that time. Any confirmation by Senate on such appointment where Governor has not submitted a nomination has no legal effect, and is futile.

March 6, 1941.

Honorable Sam C. Ford
Governor of the State of Montana
The Capitol
Helena, Montana

Dear Governor Ford:

You have submitted the following:

“A vacancy existed in the office of Member of the State Board of Education, caused by the resignation of a member whose term of office expired February 1, 1942. On October 4, 1939, William T.

Boone was appointed by the then Governor to fill the vacancy caused by such resignation.

"Another vacancy existed in the said office of Member of the State Board of Education, caused by the death of a member of that Board, whose term of office would have expired on February 1, 1940. On October 4, 1939, William T. Cowan was appointed by the then Governor to fill the vacancy. Thereafter, and on February 21, 1940, William T. Cowan was reappointed a member of said Board for a term of four years.

"Another vacancy existed in said Board, caused by the resignation of a member whose term of office expired February 1, 1940. On January 4, 1940, John P. Fabrick was appointed to fill the vacancy. On February 21, 1940, John P. Fabrick was reappointed for a term of four years.

"Thereafter, and subsequent to the convening of the Twenty-seventh Legislative Assembly, the names of the three members appointed by my predecessor, as above indicated, were by me transmitted to the Senate, and on February 6, 1941, by resolution adopted, the nomination of said members was confirmed.

"Will you please advise me at your earliest convenience when the terms of office of said members expire?"

In expressing an opinion on the foregoing, it is necessary to look to the Constitution of the State of Montana and the statutes dealing with this subject. We find in Section 7 of Article VII of the State Constitution the following provision:

"Sec. 7. The Governor shall nominate, and by and with the consent of the Senate, appoint all officers whose offices are established by this constitution, or which may be created by law, and whose appointment or election is not otherwise provided for. If during a recess of the Senate a vacancy occur in any such office, the Governor shall appoint some fit person to discharge the duties thereof until the next meeting of the Senate, when he shall nominate some person to fill such office. If the office of Secretary of State, State Auditor, State Treasurer, Attorney-General or Superintendent of Public Instruction shall be vacated by death, resignation or otherwise, it shall be the duty of the Governor to fill the same by appointment, and the appointee shall hold his office until his successor shall be elected and qualified." (Emphasis mine.)

In conformity with said constitutional provision, the statutory provision provided by Section 515 of the Revised Codes of Montana, 1935, is as follows:

"Section 515. Vacancies Occurring During Recess of the Legislative Assembly. Vacancies occurring in office during the recess of the Legislative Assembly, the appointment to which is vested in the Governor and the Senate, or in the Legislative Assembly, must be filled by appointment made by the Governor; but the person so appointed can only hold the office until the adjournment of the next session of the Legislative Assembly."

It will be noted that, under the constitutional provision and also under Section 515, supra, the Governor appoints some person to fill the vacancy and, under the constitutional provision, such appointed person discharges the duties of said office until the next meeting of the Senate, while Section 515 provides that said appointed person can only hold the office until the adjournment of the next session of the Legislative Assembly. Under such constitutional and statutory provision the longest period such an appointed person could hold his office would be until the next meeting of the Senate. We have in the foregoing dealt with the appointment by the Governor of such persons to fill vacancies.

The next part of Section 7 of Article VII deals with nominations of persons by the Governor to fill such vacancies, which is as follows,

“ . . . when he (the Governor) shall nominate some person to fill such office,” and the corresponding Section 424, Revised Codes of Montana, 1935, provides:

“Section 424. Nominations to Senate Must Be in Writing. Nominations made by the Governor to the Senate must be in writing, designating the residence of the nominee and the office for which he is nominated.”

No other provision is found in the constitution providing for the filling of such vacancies; and therefore, Section 7, Article VII, which is clear, unambiguous and certain, must control.

Attention has been called to Section 11 of Article XI of the Constitution, which is as follows:

“Section 11. The general control and supervision of the State University and the various other state educational institutions shall be vested in a State Board of Education, whose powers and duties shall be prescribed and regulated by law. The said Board shall consist of eleven members, the Governor, State Superintendent of Public Instruction, and Attorney General, being members ex-officio; the other eight members thereof shall be appointed by the Governor; subject to the confirmation of the Senate, under the regulations and restrictions to be provided by law.”

It will be noted that after setting up the Board it further provides **“the other eight members thereof shall be appointed by the Governor; subject to confirmation of the Senate, under the regulations and restrictions to be provided by law.”**

We next turn to Section 831 of the Revised Codes of Montana, 1935, to ascertain the regulations and restrictions, said Section being as follows:

“Section 831. Appointive Members—Term of Office—Vacancies. The Governor shall appoint, by and with the advice and consent of the Senate, the remaining eight members of the Board. Such appointments shall be made in the following manner:—The appointees shall be equally divided between the first and second congressional districts of the State of Montana and shall be so selected that not more than four of such members are affiliated with the same political party or organization. Upon the expiration of the term of any present member or members of the Board, appointment shall be made in such manner as to carry into effect the foregoing provisions of this Act.

“The terms of office for members so appointed upon the Board shall be four years, and until their successors are appointed and qualified; provided that any appointment to fill a vacancy occurring before the expiration of the term of the incumbent shall be filled for the remainder of such term only, and by a person a resident of the Congressional District and a member of the political party or organization required to equalize the appointed members of the Board, between territory and political party or organization, as in the case of a full term appointment.”

It will be seen that the appointees are equally divided between the Congressional Districts, and not more than four members to be affiliated with the same political party or organization; the term shall be for four years. The section then attempts to provide for the filling of a vacancy in the Board, but as the Constitution, by Section 7, Article VII, has provided the method of filling vacancies of all officers whose offices are established by this Constitution, such provisions of Section 831, Revised Codes of Montana, if in conflict therewith, must yield.

“If these three provisions differ in effect, the Constitution must prevail over the declaration of the Legislature . . .”

State ex rel. Nagle v. Stafford, 97 Mont. 275, 289, 34 Pac. (2nd) 372.

And the portion of Section 831 reading, "provided that any appointment to fill a vacancy occurring before the expiration of the term of the incumbent shall be filled for the remainder of the term only," sets an outer limitation applying to appointments, whether confirmed or not. The provision is clearly designed to keep unchanged the dates of the endings of the regular terms, to procure an even distribution of the members in the Congressional Districts, and political affiliations. The foregoing interpretation carries out the purposes of Section 831 and the provisions of the Constitution and other statutory requirements. Under Section 125, Revised Codes of Montana, 1935, the Governor within ten days after the meeting of the Legislative Assembly must transmit to it a list of all appointments made by him under Section 515 of this code, made during the recess of the Legislative Assembly.

The foregoing provisions of Section 125 are mandatory, and I presume in compliance therewith you did transmit the appointments of the persons as set forth in your inquiry. This statutory provision is in my opinion for the purpose of advising the Senate of such appointments, as they are a coordinate branch of government and entitled to such information as a matter of course, but for no other purpose, and whether the Senate confirms any or all of such submitted appointees which were to fill vacancies has no legal effect thereon as Section 7, Article VII, provides such appointee holds office only until the next meeting of the Senate, when the Governor shall nominate some person to fill such office. The Senate may not constitutionally act upon such a submitted appointment until the Governor has nominated such a person. Under the provisions of Section 7, Article VII, the Governor, having appointed some person to such an office during a recess, may upon the next meeting of the Senate nominate the same person or he may nominate a different person, the theory of the constitutional provision being that there must be a voluntary joint action or united action of the Governor and the Senate, by the Governor nominating and the Senate confirming.

Under the provisions of Section 125, Revised Codes of Montana, 1935, the Governor is ordered by the legislature to transmit the list of the interim appointments. Therefore, it can be seen that under this statutory mandate the Governor does not in anywise voluntarily nominate such persons. It will be noted Section 424, Revised Codes of Montana, 1935, is as follows:

"Section 424. Nominations to Senate Must Be in Writing. Nominations made by the Governor to the Senate must be in writing, designating the residence of the nominee and the office for which he is nominated."

The section provides for the manner of the nominations of such designated nominees, and with Section 7, Article VII, precludes any action by the Senate on names of appointees transmitted to the Senate under Section 125.

There can be no contention that each of the said appointments was made to fill a vacancy. Many cases dealing with this subject have been read; but none of those cases was governed by a constitutional provision such as contained in Section 7, Article VII, of the Montana Constitution. Under the facts as you have presented them to me and the constitutional and statutory provisions above quoted, it is my opinion that each of the appointees above named would hold office under the respective appointments until the next meeting of the Senate after said interim appointments, and that the term of office of each appointee expired at that time.

Sincerely yours,

JOHN W. BONNER
Attorney General