Opinion No. 20.

Public Employees Retirement System—Public Officers, Removal of—Term of Office.

HELD: 1. Members of the Board of Administration of the Public Employees Retirement System who were appointed for a fixed and definite term and who still have an unexpired portion of that term to serve, may not be removed from office under the provisions of Chapter 225, Laws of 1953.

2. Neither the Legislature nor the Governor has the power to remove an officer who has been appointed for a fixed and definite term, unless there is a valid reorganization of the duties of the office in order to effect a more economical and efficient administration of the office or unless the office is abolished by the power which created the office.

May 9, 1953.

Mr. John F. Sasek, Secretary
Public Employees Retirement System
Sam Mitchell Building
Helena, Montana

Dear Mr. Sasek:

You have requested my opinion on the following question:

"Does House Bill No. 282, now Chapter 225, Laws of 1953, supersede the appointment and terminate the term of members of the present Board of Administration of the Public Employees Retirement System?"

In your letter, you have informed me that three members of the present board have been appointed for terms which will expire in the future. One member's term will expire on May 9, 1953, another on March 20, 1955, and the other on May 9, 1955.

On the 31st day of March, 1953, the Governor purported to appoint a new board under the provisions of Chapter 225, Laws of 1953. By this appointment, which is to take effect on the first day of July, 1953, the terms of three members of the Public Employees Retirement Board have been terminated.

The question, therefore, becomes:

"Does the Governor or the Legislature have the power to abolish existing terms of office when the officer has been appointed, for a fixed and definite term?"

Chapter 225, Laws of 1953, amended the existing law, Section 68-501, R. C. M., 1947, as follows:

" . . . Terms of office shall be for five (5) years provided, however, that those first appointed after this Act takes effect, shall be for terms, respectively, of one (1), two (2), three (3), four (4) and five (5) years but their successors which hold office for terms of five (5) years . . . "

Prior to its amendment, Section 68-501, supra, which created the Board of Administration for the Public Employees Retirement System, provided three-year terms for all members of the board. Acting under that authority, the members of the board had been appointed by the previous Governor for three-year terms. These unexpired terms are now in dispute.

It is a general rule of law that an elective or appointive officer properly qualified and serving, is such an officer until removed or the office becomes vacant by expiration of law, 67 C. J. S., Officers, Sec. 46, p. 199. Also, it has been held that statutes will not be construed to change the term of incumbent officers unless the intent is

plainly and clearly expressed. State v. Light, 68 N. D. 513, 281 N. W. 777.

It does not clearly appear that it was the intent of the legislature to abolish the terms of existing officers when that body approved Chapter 225, Laws of 1953, and under the authorities above quoted, that intent cannot be presumed.

In the case of State ex rel Hammond v. Maxfield, 103 Utah 1, 132 Pac. (2d) 660, the Utah court thoroughly discussed the power of the legislature to truncate the incumbency of an officer who has been appointed for a fixed term. Therein the court stated:

* * * * * * * * *

"In our structure of reasoning, we consider another facet of the problem: It is generally admitted that the legislature has the power to shorten the term of an existing office. Groves v. Board of Ed. of Chicago, 367 Ill. 91, 10 N. E. 2d 403; Malloy v. City of Chicago, 369 Ill. 97, 15 N. E. 2d 961; 23 Am. & Eng. Ency. of Law, 404, 12 C. J. 1017; 16 C. J. S., Constitutional Law, § 314. But here again it must be done in good faith.

"If the terms as shortened result in an opportunity to appoint a new officer and appears to be for the purpose, there is grave doubt as to the validity of the Act, for in such case the legislature would be in reality removing the incumbent. Unless the power of removal lay with the legislature it would be exceeding its powers.

"If the shortening of the term is required to fit into a bona fide scheme of reorganization in order to consolidate offices under one officer or set of officers to take over the duties of another office for the sake of economy or efficiency, we can see no constitutional objection. The loss of office by the incumbent is merely an incident and not the objective of the general scheme.

"If a term may be shortened for the last above named purpose, there can be no difference between accomplishing the end in that manner and accomplishing it by keeping the term the same but providing that the incumbents are to be replaced by the appointees of another office, either newly created or existing, when it is done in pursuance of a bona fide reorganization statute. Whether the consolidation is accomplished by the abolition of one or more offices and consolidation of their duties with others under a new or existing office, or whether the consolidation of duties is accomplished by keeping the old office extant but requiring the holders of a new or existing office to perform those duties by also placing such holders as incumbents of the old office, and thus displacing the current officers who occupy that office, should make no difference provided it is done in good faith. Good faith is the test . . . "

* * * * * * * * *

Also, in State's Prison of North Carolina v. Day ..... N. C., ... 32 S. E. 748, that court ruled:

"The contract of the state with the superintendent must be kept. In Throop, Publ. Off. § 21, it is said: 'Nor can the legislature take from the officer the substance of the office, and transfer it to another, to be appointed in a different manner, and to hold by a different tenure, although the name of the office is changed, or the office divided, and the duties assigned to two or more officers under different names.' That principle of law was announced in Warner v. People, 2 Denio, 272, and also in People v. Albertson, 55 N. Y. 50. The section in Throop, and the decisions in Warner v. People and People v. Albertson, supra, are in connection with offices created by constitutional provision. But that makes no difference in North Carolina. Under our decisions, you cannot oust an incumbent of an office, and continue the office afterwards, and this rule applies to offices created by the Constitution as well as to those created by the legislature."

It is to be noted that Chapter 225 (supra) does not reorganize the board or enlarge the powers or duties of the members. It merely changes the term of office of the members and, therefore, cannot be upheld under the rationale of the Maxfield case; rather, it falls within the prohibition of both cases quoted above.

See, also: Trawick v. Gilkey, ... Tenn. ....., 71 S. W. 2nd 647, State ex rel Birdsey v. Baldwin, 45 Conn. 144, 4 A. L. R. 207.

It follows that the legislature has no power to alter the term of a public officer once that officer has been appointed for a fixed and definite term. Chapter 225, Laws of 1953, cannot be construed to authorize the removal of those officers who have been appointed for a fixed term.

The next question which arises is whether the Governor has the power to alter the term of an officer who has been appointed for a fixed and definite term.

Our court discussed this problem at great length in the case of State ex rel Bonner vs. District Court of First Judicial District in and for Lewis and Clark County, 122 Mont. 465, 206 Pac. (2d) 166. Therein the court announced:

> "'. . . It is a general rule that officers appointed for a fixed and definite term are not removable except for cause. . . .' (119 A. L. R. 1437.)
>
> * * * * * * * * *
>
> "'. . . When the term or tenure of a public officer is not fixed by law and the removal is not governed by constitutional or statutory provision, the general rule is that the power of removal is incident to the power to appoint. . . .'" (43 Am. Jur. 31, 32 § 183.)
>
> * * * * * * * * *
>
> "'The only way in which this power of removal can be limited is by first fixing the duration of the term and then providing the mode, if necessary, by which the officer may be removed during the term. . . .'" (People ex rel Attorney General v. Hill, 7 Cal. 97, 102.)

As to the members of the board in question, the term has been fixed by law, and since the Act does not provide for their removal, it is necessary to look to the general law for the power of removal. That power is found in Sections 94-4708 and 94-5501 to 94-5516, R. C. M., 1947.

To the same effect, see Barrett v. Duff, 114 Kansas 220, 217 Pac. 918:

> "Where the term is fixed by statute, the power of removal does not exist in the executive, except so far as provided by statute."

and, Van Brakle v. State Board of Health, 74 Oregon 367, 144 Pac. 1170:

> "Where an officer is appointed for a term, he cannot be removed except by express statutory authority."

Therefore, as to the members of the Board, the Governor can only remove for cause, and where the removal is for cause there must be notice and a hearing. State ex rel Nagle v. Sullivan, 98 Mont. 425, 40 Pac. (2d) 995; State ex rel Holt v. District Court, 103 Mont. 438, 63 Pac. (2d) 1026; State ex rel Ryan v. Norby, 118 Mont. 283, 165 Pac. (2d) 302.

Another obstacle to the removal of the members of the board during their term of office is Section 31 of Article V of the Constitution of the State of Montana, which provides, in effect, that the salary or emoluments of a public officer cannot be decreased during his term of office. To remove the members of the board would be to take away all the emoluments of their office during their term and would also violate the rule that the salary of a public officer cannot be terminated by a legislative act. Poorman v. State Board of Equalization, 99 Mont. 543, 550, 45 Pac. (2d) 307.

It is therefore my opinion that those members of the Board of Administration of the Public Employees Retirement System who were appointed for a fixed and definite term and who still have an unexpired portion of the term to serve may not be removed from office under the provisions of Chapter 225, Laws of 1953.

It is further my opinion that, under the decisions of our Supreme Court, neither the Legislature nor the Governor has the power to remove an officer who has been appointed for a fixed and definite term, unless there is a valid reorganization of the duties of the office in order to effect more economical and efficient administration of the office or unless the office is abolished by the power which created the office.