

I see no infirmity in the lease by reason of the cancellation privilege inserted therein pursuant to the requirement of the statute just referred to.

Your second question is whether the Board of Directors of the Morris Canal and Banking Company have the legal authority to cancel the lease if in their judgment such action is justified at the present time, or whether the lease must be continued for the full five year period. The lease in question is now in force and has a period of nearly three years yet to run. It can be terminated upon giving the required thirty days' notice as provided in R. S. 13:12-18, but the reason for such cancellation I think should be inserted in your minutes, if such action should be taken.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: THEODORE BACKES,
Deputy Attorney General.

TB:B

JULY 28, 1950.

DANIEL BERGSMAN, M. D., M. P. H.,
State Commissioner of Health,
Department of Health,
State House, Trenton, N. J.

FORMAL OPINION—1950. No. 51.

DEAR DOCTOR:

This is in response to your letter concerning the term of Dr. Richard E. Shope, who was appointed as a member of the Public Health Council.

It appears from your letter that Dr. Shope was confirmed by the Senate on March 13, 1950. Previously, a Dr. Harvey N. Davis had been appointed as a member of the Public Health Council for a term of one year beginning July 1, 1947. His term would expire on July 1, 1948. However, no appointment was made to fill the office held by Dr. Davis at that time. In March of 1950, Dr. Shope was nominated by the Governor to membership on the council and confirmed by the Senate on March 13, 1950, as indicated above.

The question for determination is when does the term of office of Dr. Shope expire. Does he hold for a term of seven years from the time of the confirmation of his appointment, or does he hold for a term of seven years from July 1, 1948, the date when the term of Dr. Davis expired?

In my opinion, Dr. Shope holds for a term of seven years from the date of the confirmation by the Senate, to wit, March 13, 1950.

The statute relating to the appointment of members of the Public Health Council, to wit, Chapter 177, P. L. 1947, Article II, Section IV, provides as follows:

"Each member shall be appointed by the Governor, by and with the advice and consent of the Senate, for a term of seven years and until his successor is

appointed and qualified; provided, that the first appointments hereof shall be for terms which shall commence on the first day of July, 1947, and shall continue one for one year, one for two years, one for three years, one for four years, one for five years, one for six years and one for seven years . . ."

"Any vacancy occurring in the membership of the Council for any cause shall be filled in the same manner as the original appointment but for the unexpired term only."

It will be seen from the above quote that the term specifically set forth is seven years. The statute, however, does provide when the term shall commence for first appointments. It is silent, however, upon the question of whether subsequent appointments shall have a specific beginning date. The statute does, however, provide that vacancies occurring in membership shall be filled for the unexpired term. This then raises the question whether the expiration of the term of Dr. Davis constituted a vacancy in the membership. If it did, then, of course, the term of Dr. Shope would begin on July 1, 1948, to wit, the date that the term of Dr. Davis expired. In my opinion, there was no vacancy in the membership by reason of the expiration of the term of Dr. Davis. The statute provides that each member shall be appointed for a term of seven years and until his successor is appointed and qualified. As a result, on the expiration of the term the incumbent continues to hold membership until his successor is appointed and qualified. By reason of this fact, no vacancy occurred in the membership of the Council. No vacancy is created if there is a holdover provision in the statute and there is no appointment at the end of the term. *Mount vs. Howell*, 85 N. J. L. 487; *Stilsing vs. Davis*, 45 N. J. L. 390; *Kimberling vs. State*, 29 N. E. 773. An office is vacant only when it is without an incumbent who has a right to exercise its functions. In other words, where there is an office but no legally qualified incumbent, there is a vacancy in the office. *Board of Education of Newark vs. Civil Service*, 98 N. J. L. 417.

On July 1, 1948, the term of Dr. Davis expired. Had Dr. Shope been appointed to the Council at that time, he would have held for a term of seven years. However, because no appointment was made at the end of such term, Dr. Davis continued to hold membership in the council by reason of the holdover provision in the statute. As a result, no vacancy in the membership occurred. Since the statute provides that the appointment shall be for a term of seven years but only provides that an appointment shall be for an unexpired term in the case of a vacancy, and no vacancy occurred by reason of the holdover provision, therefore, I must conclude that Dr. Shope holds office for the full term of seven years from the time he was confirmed by the Senate (*Height vs. Love*, 39 N. J. L. 476). His term of office, therefore, will expire on March 13, 1957.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: JOSEPH A. MURPHY,
Assistant Deputy Attorney General.

JAM:MB