

the Division of State Police may have the benefit of the knowledge and opinions of such parties before promulgating the regulation. These considerations apply to all the regulations, regardless of whether they are the original or constitute amendments or supplements thereto.

Yours very truly,

THEODORE D. PARSONS,  
*Attorney General,*

By: THOMAS P. COOK,  
*Deputy Attorney General.*

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JUNE 9, 1953.

HON. RUSSELL E. WATSON, JR.,  
*Secretary to the Governor,*  
State House,  
Trenton, New Jersey.

FORMAL OPINION—1953. No. 25.

DEAR MR. WATSON:

Receipt is acknowledged of your inquiry of June 5th in which you state: "The Governor has requested an opinion as to his power of appointment from now to the end of his term of office. Among other conditions, he is concerned about his power of appointment of an individual whose present term expires after that of the Governor's."

The State Constitution, by Article V, Section IV, paragraphs 2 and 3, provides:

"2. Each principal department shall be under the supervision of the Governor. The head of each principal department shall be a single executive unless otherwise provided by law. Such single executives shall be nominated and appointed by the Governor, with the advice and consent of the Senate, to serve at the pleasure of the Governor during his term of office and until the appointment and qualification of their successors, except as herein otherwise provided with respect to the Secretary of State and the Attorney General.

"3. The Secretary of State and the Attorney General shall be nominated and appointed by the Governor with the advice and consent of the Senate to serve during the term of office of the Governor."

Pursuant to said paragraph two, the head of each principal department, who is a single executive, shall serve at the pleasure of the Governor during his term of office, and thereafter until the appointment and qualification of his successor. By virtue of said paragraph three, the Secretary of State and the Attorney General shall serve only during the term of office of the Governor.

The Constitution, by Article V, Section IV, paragraph 4, provides:

"4. Whenever a board, commission or other body shall be the head of a principal department, the members thereof shall be nominated and appointed by the Governor with the advice and consent of the Senate, and may be removed in the manner provided by law. Such a board, commission or other body may appoint a principal executive officer when authorized by law, but the appointment shall be subject to the approval of the Governor. Any principal executive officer so appointed shall be removable by the Governor, upon notice and an opportunity to be heard."

The members of any such board, commission or other body, who have been appointed by the Governor with the advice and consent of the Senate, shall serve for the respective terms of office for which they have been severally commissioned, even though such terms extend beyond the term of the present Governor. There is no limitation upon these terms of office such as is contained in paragraphs 2 and 3 of Article V, Section IV of the Constitution above cited.

A vacancy occurring in any office by reason of the expiration of term, appointment to which may be made by the Governor with the advice and consent of the Senate, may be filled by the Governor, during his present incumbency, and the appointee shall be commissioned and serve for the term prescribed by law.

The Constitution, by Article V, Section I, paragraph 13, provides:

"13. The Governor may fill any vacancy occurring in any office during a recess of the Legislature, appointment to which may be made by the Governor with the advice and consent of the Senate, or by the Legislature in joint meeting. An ad interim appointment so made shall expire at the end of the next regular session of the Senate, unless a successor shall be sooner appointed and qualify;  
\* \* \*"

The second part of your query reads: "Among other conditions, he is concerned about his power of appointment of an individual whose present term expires after that of the Governor's."

Substantially stated, your query is: Has the Governor the lawful authority and right to appoint, to fill an anticipated vacancy in a public office, the term of which could not begin until after his own term of office has expired.

I can find no case, text or general rule of law which would support such a power of appointment. The cases are to the contrary.

In the leading case of *State of Ohio ex rel James C. Morris vs. John Sullivan* (Ohio Supreme Court—81 Ohio St. 79; 90 N. E. 146—1909), the Ohio Supreme Court, in considering and passing upon the identical question, held:

"On January 4, 1909, the relator, James C. Morris, was appointed by Andrew L. Harris, then Governor of the State of Ohio, to be a member of the railroad commission of this state for the term of six years; said term to commence on the first Monday in February, 1909, and to terminate on the first Monday of February, 1915. On the same day the senate of Ohio, being then in session, assented to and confirmed said appointment. On the following day, January 5th, Gov. Harris issued to said James C. Morris a commission to serve as a member of said railroad commission for said term of six years commencing on the first

Monday in February, 1909. By operation of law the term of office of Andrew L. Harris as Governor of Ohio expired at noon on January 11, 1909, and Judson Harmon then became Governor. On January 21, 1909, Gov. Harmon appointed the defendant, John Sullivan, to be a member of said railroad commission for and during the same term for which Gov. Harris had theretofore named and appointed the relator, Morris. Said appointment so made by Gov. Harmon was on the 3d day of March, 1909, assented to and confirmed by the Senate, and on March 8, 1909, the defendant, Sullivan, having received his commission, qualified and entered upon said office of railroad commissioner and has ever since continued to hold the same and to discharge the duties thereof, under and by virtue of said appointment. These facts being admitted, the question here presented is: Had Andrew L. Harris, as Governor of Ohio, the lawful authority and right to appoint the relator Morris to fill an anticipated vacancy in a public office the term of which could not begin until after his own term of office had expired? It admittedly is the well-established general rule of law that an officer clothed with authority to appoint to a public office cannot, in the absence of express statutory authority, make a valid appointment thereto for a term which is not to begin until after the expiration of the term of such appointing officer.

"Meehem, in his work on Public Offices and Officers, at section 133, states the general rule as follows: 'The appointing power cannot forestall the rights and prerogatives of their own successors by appointing successors to office expiring after their power to appoint has itself expired.'"

This case is considered and reviewed in 26 L. R. A. p. 514 (New Series 1910) as follows:

"Note:—May officer make a prospective appointment the term of which cannot begin until after his own term has expired.

"The statement in the foregoing case of the common-law rule on this point is fully borne out by the authorities.

"An appointment to office in anticipation of a vacancy therein is good only in case the officer making the appointment is still in office when the vacancy occurs. *People vs. Fitzgerald*, 180 N. Y. 269, 73 N. E. 55; *Towne vs. Porter*, 128 App. Div. 717, 113 N. Y. Supp. 758.

"A board of officers has no power to make a prospective appointment to an office that will not become vacant during the term of the board's official life. *People ex rel Sweet vs. Ward*, 107 Cal. 236, 40 Pac. 538."

In *Bownes vs. Meehan*, 45 N. J. L. 189, 191 (Sup. Ct., 1883) the Court held that an outgoing board of chosen freeholders cannot fill an office that will not become vacant during the term of its own official life.

In *Dickinson vs. Jersey City*, 68 N. J. L. 99, 102 (Sup. Ct., 1902) the Court held:

"It is a well-recognized principle, under the decisions in this State, that an existing municipal board or body cannot appoint to an office which is to come into existence or become vacant in the life of the same board or body at a time when it will be differently constituted. The official board or body of a municipality which is or will be in office at the time an appointee is to take his office can alone make an appointment to such office, unless there be express legislative authority otherwise. This rule is founded in sound public policy."

In *Pashman vs. Friedbauer*, 1 N. J. Super. 616, 620 (Superior Court, 1949) the Court said:

"The vacancy and the power of appointment must coincide. As was held in *Dickinson vs. Mayor, &c., of Jersey City*, 68 N. J. L. 99, 102:

"The official board or body of a municipality which is or will be in office at the time an appointee is to take his office can alone make an appointment to such office, unless there be express legislative authority otherwise. This rule is founded in sound public policy. Any other rule would work for confusion and disorganization in municipal affairs. If an existing board can appoint to an office falling within the term of the next incoming board, why not for one falling in the term of the same board two or five years hence?"

"The same is true of an individual appointing power."

In 43 Am. Jur., Section 160, pp. 18-19, the rule is summarized: "At common law, an officer clothed with authority to make appointments to a public office may not forestall the rights and prerogatives of his successor by making a prospective appointment to fill an anticipated vacancy in an office the term of which cannot begin until after his own term and power to appoint have expired."

Upon a consideration of the Constitution and the cited cases, it would seem that the power of appointment to fill an anticipated vacancy does not extend beyond the constitutional term of the Governor.

Very truly yours,

THEODORE D. PARSONS,  
*Attorney General,*

By: JOSEPH LANIGAN,  
*Deputy Attorney General.*

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JUNE 12, 1953.

HON. RUSSELL E. WATSON, JR.,  
*Secretary to the Governor,*  
State House,  
Trenton, New Jersey.

FORMAL OPINION—1953. No. 26.

DEAR MR. WATSON:

Your inter-communication of June 5th, requests an opinion as to the legality of the loyalty oath, which it is assumed each State employee takes, pursuant to R. S. 41:1-3 (P. L. 1949, chapter 22, page 68).

In considering said chapter 22, together with statutes of a similar nature (chapters 21, 24 and 25 of the Laws of 1949) in the case of *Imbrie vs. Marsh*, 5 N. J. Super. 239, 247 (1949) the Appellate Division of the Superior Court held, that these statutes are invalid insofar as they relate to the Governor, Senators and members of the General Assembly, and candidates for these offices (p. 247). While this judgment was affirmed in the Supreme Court, 3 N. J. 578, 593, the opinion was broadened so as to include State officials.