State of New Jersey

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
25 MARKET STREET
PO Box 080
TRENTON, NJ 08625

ANDREW J. BRUCK
Acting Attorney General

MICHELLE L. MILLER
Director

January 30, 2022

Via Electronic Filing

Honorable Robert T. Lougy, J.S.C.
Superior Court of New Jersey
Mercer County New Criminal Courthouse
400 South Warren Street
Trenton, NJ 08650-0068

Re: Sweeney v. Leroy J. Jones, Jr., et al.
Docket No.: MER-C-7-22

This office represents Defendant, Tahesha Way, the Acting Secretary of State, with regard to the above-captioned matter. Please accept this letter in lieu of a formal brief in opposition to Plaintiff's Motion for a Preliminary Injunction.

On January 26, 2022, Defendant Secretary of State Tahesha Way received a letter from Defendant Leroy J. Jones, Jr., the Chair of the New Jersey Democratic State Committee, stating that he was removing Plaintiff from the New Jersey Apportionment Commission ("Commission") and was appointing Defendant Laura Matos to fill the vacancy. See Ex. A. The Secretary subsequently certified the appointment of Ms. Matos to the Commission. See Ex. B. As this brief explains, the Secretary's recognition of a vacancy and

subsequent certification of Ms. Matos's appointment was lawful in light of Article IV, Section III of the New Jersey Constitution, which establishes that the Apportionment Commission must consist of "five [appointees] to be appointed by the chairman of the State committee of each of the two political parties whose candidates for Governor receive the largest number of votes at the most recent gubernatorial election," and the rule that an appointing authority enjoys the plenary power to remove an appointee in the absence of any constitutional or statutory provision to the contrary.

This default rule is well established all across the Nation, from its earliest days and to the present, including by the United States Supreme Court. See, e.g., Shurtleff v. United States, 189 U.S. 311, 314–16 (1903) ("It cannot now be doubted that, in the absence of constitutional or statutory provision, the President can, by virtue of his general power of appointment, remove an officer, even though appointed by and with the advice and consent of the Senate. . . . The right of removal would exist if the statute had not contained a word upon the subject."); Collins v. Yellen, 141 S. Ct. 1761, 1782 (2021) ("When a statute does not limit the President's power to remove an agency head, we generally presume that the officer serves at the President's pleasure."); Spicer v. Biden, No. 21-2493 (DLF), 2021 WL 5769458, at *3 (D.D.C. Dec. 4, 2021) (citing cases to establish that "[t]he Supreme Court has consistently held that the power of removal from office is

incident to the power of appointment absent a specific provision to the contrary"); 1 Annals of Congress 596 (Joseph Gales & William W. Seaton eds., 1834)) (Elbridge Gerry stating "it is in the nature of things, that the power which appoints, removes also. If there are deviations from this general rule, the instances are few, and not sufficient to warrant our attention.").

New Jersey courts have likewise recognized this default rule. In Mathis v. Rose, 64 N.J.L. 45 (Sup. Ct. 1899), aff'd, 64 N.J.L. 726 (E. & A. 1900), the New Jersey Supreme Court considered whether the Atlantic City council enjoyed the power to remove a street supervisor that the council had previously appointed. The court first noted the city's charter gave the city council the plenary power to appoint the supervisor. See id. at 47 (citing charter provision that "the said city council shall have power to assemble from time to time to elect and appoint such other and all other ordained officers of said city"). Although nothing in the charter stated the council's removal powers, the court nonetheless held that "[t]he charter itself furnished ample authority to appoint and remove at the pleasure of the council." Id. at 49. The court concluded that a later ordinance that attempted to restrict the powers of the city council was "void." Ibid. And the Court of Errors and Appeals affirmed the decision in full. 64 N.J.L. 726. See also Uffert v. Vogt, 65 N.J.L. 621, 623 (E. & A. 1901) (applying

Mathis and holding that the Newark city council had power to remove a tax receiver and appoint their replacement).

Still more, other state courts have acknowledged this default rule. See, e.g., State ex rel. Archer v. Cty. Ct. of Wirt Cty., 144 S.E.2d 791, 794 (W. Va. 1965) (holding an entity with "the power to appoint . . . has the power to remove a person so appointed in the absence of any constitutional or statutory limitation or restriction of such power"); Gowey v. Siggelkow, 382 P.2d 764, 773 (Idaho 1963) (describing the "general rule, almost universally accepted," that "the power to remove is incident to the power to appoint, and that the authority to appoint an officer carries with it the authority to remove such officer in the absence of any constitutional or statutory restriction"); State ex rel. Bonner v. Dist. Ct. of First Jud. Dist. in & for Lewis & Clark Cty., 206 P.2d 166, 169–70 (Mont. 1949) ("Where an office is filled by appointment, and a definite term of office is not fixed by a constitutional or statutory provision, the office is held at the pleasure of the appointing power, and the incumbent may be removed at any time."); Morris v. Parks, 28 P.2d 215, 216 (Or. 1934) ("The power of appointment generally carries with it as an incident the power to remove."); Wright v. Gamble, 71 S.E. 795, 796 (Ga. 1911) ("It seems now to be the universally accepted rule that, where the tenure of the office is not prescribed by law, the power to remove is an incident to the power to appoint."); State ex rel. Moore v.

Archibald, 66 N.W. 234, 241 (N.D. 1896) ("[T]he power of arbitrary removal is vested in the person or board vested with the appointing power, as incidental to the power of appointment, unless the law places a limitation on such power."); People ex rel. Corrigan v. City of Brooklyn, 43 N.E. 554, 556 (N.Y. Ct. App. 1896) ("It is a well-established rule of law that the power to appoint to an office or position, where the term or tenure is not defined by statute or otherwise, necessarily carries with it the power of removal.").

A significant body of treatises are in accord. See, e.g., 67 C.J.S., Officers & Public Employees, § 229 ("In the absence of a statutory limitation, the power of appointment generally carries with it the incidental authority to remove so long as no definite term of office is fixed by law."); 63C Am. Jur. 2d, Public Officers & Employees § 174 ("With regard to offices created to be filled by appointment, if the legislature does not designate the term of the office, the appointee may be removed at the pleasure of the appointing authority."); 91 A.L.R. 1097 (originally published in 1934) (collecting case law); Throop § 304, at 309 ("Where an office is filled by appointment, and a definite term of office is not fixed by a constitutional or statutory provision, the office is held at the pleasure of the appointing power, and the incumbent may be removed at any time."); Mechem § 406 at 260 ("So where the

officer is appointed to hold during the pleasure of the appointing power, his holding is terminable at the will of the latter.").[1]

Defendant Secretary of State's certification of appointment of a new member to the Commission is valid because no language in the New Jersey Constitution, statutory law, or the Commission's bylaws overcomes the default rule that appointing authorities have power to remove an appointee. The Constitution provides that the state committee chair has the plenary authority to appoint members of the relevant delegation. See N.J. Const. art. IV § III ¶ 1 (noting the composition of the Apportionment Commission includes "ten members, five to be appointed by the chairman of the State committee of each of the two political parties whose candidates for Governor receive the largest number of votes at the most recent gubernatorial election"). As Plaintiff himself acknowledges, that provision of the Constitution is otherwise silent as to particular standards for removal. See Compl. ¶ 13. As a result, the default rule that allows for the removal by the appointing authority would logically apply, leaving open a vacancy that the Chair of the New Jersey Democratic State Committee was empowered by law to fill and that the Secretary was required to certify.

Moreover, nothing in the Commission's bylaws provides a basis to limit the appointing authority's removal power either. Although

[1] For the Court's convenience, the cited excerpts of treatises are attached as Exhibit E.

the bylaws make clear vacancies in offices of the Apportionment Commission "shall be filled within five days of the occurrence of the vacancy, in the same manner as the original appointment of the person whose position became vacant," N.J. Apportionment Comm. R. art. III; Compl., Ex. B, at 4-6, the bylaws are silent as to when a vacancy occurs, and they say nothing regarding the removal of a member. See Compl. ¶ 26. That silence once again indicates the default rule applies. Moreover, in the same bylaws, the Commission "adopt[ed] Robert's Rules of Order Revised (12th Ed.)" to "organize and operate under Robert's Rules of Order Revised, as standard authority, when not in conflict with its constitutional mandate or these rules." N.J. Apportionment Comm. R. art. II(1). Robert's Rules of Order establishes the same removal rule as the default principle – that the power to appoint includes the power to remove, unless there is a specific authority to the contrary. See Robert's R., § 13:23 at 167 ("Unless the . . . governing rules provide otherwise . . . the appointing authority has the power to remove or replace members of the committee: If a single person . . . has the power of appointment, he has the power to remove or replace a member so appointed . . . .").

In a related context, the Office of Legislative Services (OLS) recognized the default rule likely applies to the most analogous scenario. In 2010, Plaintiff, who was then Senate President, asked whether he "may remove an appointee to the New Jersey Redistricting

Commission" whom a previous Senate President had appointed to that commission. Ex. C. Like the power Article IV, Section III of the New Jersey Constitution grants to state committee chairs to appoint Apportionment Commission members, Article II, Section II grants to the Senate President the authority to appoint two members of the Redistricting Commission (which handles congressional, rather than legislative, redistricting). In neither provision is there a specific constitutional statement as to removal. In interpreting the Senate President's authority, OLS explained "[t]he usual rule where the law does not fix an officer's term is that the officer holds his office at the will of the appointing power." Ex. C, at 1 (citing some of the authorities listed above). And while OLS hypothesized the rule may differ after the first organizational meeting for the Commission takes place, ibid., the memorandum gave no reason why that would be so, and none of the cases and treatises cited above would support a theory that the power to remove changes after the appointee participates in their first meeting. Instead, the bulk of cases considered the removal of officials who have already begun discharging their duties - which is no different than what happened here - and nevertheless found that appointing officials retain their power to remove their appointees.

Finally, Plaintiff's claim that the Secretary's certification of Ms. Matos's appointment was unlawful because it took place "after the deadline for certifying appointments," Compl. ¶ 41, is

simply wrong. Nothing in the Constitution suggests that a vacancy on the Commission must be left unfilled if the vacancy occurs after that original certification deadline. Rather, the provision that "Appointments to the Commission shall be made on or before November 15 of the year in which such census is taken and shall be certified by the Secretary of State on or before December 1 of that year" merely sets the process by which initial appointments are made so that the Commission's work can begin. N.J. Const. art. IV § III ¶ 2. Moreover, the Commission's bylaws provide that any vacancy "shall be filled within five days of the occurrence of the vacancy, in the same manner as the original appointment of the person whose position became vacant" – i.e., appointed by the state committee chair and then certified by the Secretary. See N.J. Apportionment Comm. R. art. III. Any contrary rule would prove far too much, as it would suggest that no new members could be certified even if some of the original members resigned or passed away after December 1. Such a reading would prevent the Commission from carrying out its constitutional duties.

Historical practice also roundly forecloses any argument that the Secretary erred in certifying a new member of the Apportionment Commission after December 1. Most importantly, in 2001, a member of the Commission resigned after the December 1, 2000 certification date. See Ex. D at 2 (Mar. 13, 2001 resignation letter of Donald DiFrancesco). The relevant state committee chair then appointed

a new member to fill that vacancy, and the Secretary of State at the time certified that appointment on March 20, 2001, without anyone raising legal concerns. See id. at 4-5 (Mar. 19, 2001 letter from chair of Republican state committee appointing John O. Bennett to "fill the vacancy," and March 20, 2001 certification by Secretary of State). Indeed, that member then participated in the Commission's work. The Secretary did not err in following that established historical practice.[2]

In light of these settled legal principles, and the language of Article IV, Section III of the New Jersey Constitution, the certification of a new member to the Commission was lawful.

[2] Finally, the Secretary need not address arguments regarding the geographic makeup of a delegation to the Apportionment Commission, because Plaintiff rightly does not claim that the Secretary herself has any duty to assess geographic considerations in certifying members, and no Secretary has ever done so. Compare Compl. ¶¶ 39 & 40 (alleging that Defendant Chair Jones improperly appointed Defendant Ms. Matos both "after the deadline" and "without due consideration to the representation of southern New Jersey"), with id. ¶ 31 (only alleging that the Secretary improperly certified Ms. Matos "after the deadline," without alleging that she failed to assess geographic considerations). In any event, it is not clear whether Plaintiff has standing to void the Secretary's certification on this particular ground, as it would not lead to Plaintiff's own reinstatement.

CONCLUSION

This Court should deny Plaintiff's Motion for a Preliminary Injunction.

Respectfully yours,

ANDREW J. BRUCK
ACTING ATTORNEY GENERAL OF NEW JERSEY

By: /s/ Jeremy M. Feigenbaum
Jeremy M. Feigenbaum (117762014)
State Solicitor

c: William M. Tambussi, Esq.
Michael J. Miles, Esq.
Carmen Y. Day, Esq.

THE DEMOCRATIC PARTY OF NEW JERSEY

January 26, 2022

Honorable Tahesha Way
Secretary of State
20 West State St., 4th Floor
Trenton, New Jersey 08625

Re: NJ Democratic State Committee Appointment to Apportionment Commission

Dear Secretary Way:

As you know, I am the Chair of the New Jersey Democratic State Committee and write regarding our party's appointments to the New Jersey Apportionment Commission.

Article IV, Section III of the New Jersey Constitution and the bylaws adopted by the New Jersey Apportionment Commission authorize the Chair of each political party to select and replace up to 5 commission members. The Chair's authority is plenary, provided that "[e]ach State chairman, in making such appointments, shall give due consideration to the representation of the various geographical areas of the State."

Today, in my capacity as State Party chair, I am removing Stephen Sweeney as a Commission member. To fill this vacancy, after due consideration to geographic representation, I submit Laura Matos of Belmar to you for certification as a Commissioner consistent with Article III of the Apportionment Commission's bylaws. Kindly consider this letter as confirmation of my appointment.

Respectfully,

LeRoy J. Jones, Jr.
Chair, New Jersey Democratic State Committee

cc: Saily Avelenda, Executive Director
Raysa Kruger-Martinez, Secretary, New Jersey Apportionment Commission

Paid for by the New Jersey Democratic State Committee
196 West State Street
Trenton, New Jersey 08608

State of New Jersey

Department of State

I, ***TAHESHA WAY,*** Acting Secretary of State of the State of New Jersey, DO HEREBY CERTIFY that the New Jersey Democratic State Committee has selected the following named individual to serve as a member on the New Jersey Apportionment Commission, to fill a vacancy, pursuant to Article IV, Section III of the New Jersey State Constitution and the bylaws adopted by the New Jersey Apportionment Commission:

Laura Matos (Monmouth County)

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Official Seal of the Secretary of State at Trenton, this 26th day of January 2022.

TAHESHA WAY
ACTING SECRETARY OF STATE

Office of Legislative Services
Memorandum

Office of Legislative Counsel
(609) 292-4625

TO: Albert Porroni
Legislative Counsel

FROM: Gabriel R. Neville GRN
Senior Legislative Counsel

DATE: February 4, 2010

SUBJECT: REMOVAL OF MEMBERS OF NJ REDISTRICTING COMMISSION

You have asked whether hypothetically the current Senate President may remove an appointee to the New Jersey Redistricting Commission (hereinafter "the commission") appointed by a previous Senate President. You have also asked whether the current Senate President may remove such an appointee at will or only for cause with notice and a hearing.

These are novel questions of law. The commission was created in 1995 by a constitutional amendment adding a new Section II to Article II of the New Jersey Constitution. Only one round of redistricting has been conducted under the current framework, and the provisions of Section II have not been the subject of a reported decision. The first paragraph provides that the Senate President shall appoint two of the first 12 members. Though the drafters obviously contemplated litigation over appointments to the commission,[1] no provision of the Constitution or statutory law addresses their removal or terms. Similarly, nothing said at the public hearing held on the assembly concurrent resolution that proposed the amendment addressed these issues.

The usual rule where the law does not fix an officer's term is that the officer holds his office at the will of the appointing power. 67 C.J.S., Officers and Public Employees, §87 at 305 ("Where the term of office is not fixed by law, the officer is regarded as holding at the will of the appointing power . . . ."); 63C Am. Jur. 2d, Public Officers and Employees, §175 ("With regard to offices created to be filled by appointment, if the legislature does not designate the term of the office, the appointee may be removed at the pleasure of the appointing authority at any time without notice or hearing.") Thus, it appears the answer to your questions is the current Senate President may remove the appointee of a previous Senate President to the commission at will, at least until June 15, 2011, the last day for appointing any of the first 12 members. A different analysis may apply to removing a member after that date because the commission will have begun its work.

[1] See N.J. Const. (1947) Art. II, Sec. II, par. 7 (stripping all State courts, except the State Supreme Court and except as required by federal law, of jurisdiction over challenges to appointments).

The conclusion that appointees serve at will, at least prior to the commission commencing work, is consistent with what appears to have been a basic purpose for the commission's creation: ensuring bipartisanship in the redrawing of congressional districts. A contrary interpretation could give rise to circumstances that undermine the commission's bipartisan composition.

State of New Jersey
OFFICE OF THE GOVERNOR
PO Box 001
TRENTON NJ 08625-0001

DONALD T. DIFRANCESCO
Acting Governor

DARLENE J. PEREKSTA, ESQ.
Deputy Chief of Staff

MEMORANDUM

TO: DeForest B. Soaries, Jr.
Secretary of State

FROM: Darlene J. Pereksta
Deputy Chief of Staff

DATE: March 13, 2001

Attached is a copy of the letter to Chairman Haytaian from Acting Governor Donald DiFrancesco, which I believe is self-explanatory.

DJP

FILED
MAR 2 0 2001
DEFOREST B. SOARIES, JR.
SECETARY OF STATE

State of New Jersey
OFFICE OF THE GOVERNOR
PO BOX 001
TRENTON NJ 08625-0001

DONALD T. DIFRANCESCO
Acting Governor

March 13, 2001

Honorable Garabed Haytaian
Chairman
New Jersey Republican State Committee
28 West State Street
Suite 305
Trenton, New Jersey 08608

Dear Chairman Haytaian:

When I was appointed to the Apportionment Commission, I made a commitment to allocate the time necessary to work on the development of the 40 legislative districts in accordance with the Official Census numbers. As you know, a lot has changed since my appointment to the Commission in November 2000. When Governor Whitman left the Office of Governor to join President Bush's Administration, I became Acting Governor of the State of New Jersey under our Constitution.

As Acting Governor, I have assumed a new set of responsibilities, and I have dedicated myself to provide the leadership necessary to lead our State forward and advance the interests of our citizens.

I understand the importance of the task which the Apportionment Commission must undertake in drawing the new legislative districts. This process deserves the full attention of all ten members of the Commission. My duties as Acting Governor would preclude me from attending all the meetings of the Apportionment Commission, as well as meetings of the Republican Caucus of the Commission. Therefore, I am submitting my resignation as a member of the Apportionment Commission. My resignation shall take effect upon the valid appointment of a replacement for me on the Commission.

Sincerely,

Donald T. DiFrancesco
Acting Governor

FILED
MAR 2 0 2001
DEFOREST B. SOARIES, JR.
SECETARY OF STATE

lab

State of New Jersey

Department of State.

I, ***DeFOREST B. SOARIES, JR.***, Secretary of State of the State of New Jersey, DO HEREBY CERTIFY that the foregoing is a True and Correct Copy of **Acting Governor Donald T. DiFrancesco's Resignation from the New Jersey Apportionment Commission, effective March 13, 2001.**

I, FURTHER CERTIFY, that the original was Filed and Recorded in this office under the date of March 20, 2001.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Official Seal of the Secretary of State at Trenton, this twentieth day of March, 2001.

DeFOREST B. SOARIES, JR.
NEW JERSEY SECRETARY OF STATE

NJGOP
NEW JERSEY REPUBLICAN STATE COMMITTEE

March 19, 2001

DeForest B. Soaries, Jr.,
Secretary of State
Department of State
125 West State Street
P.O. Box 300
Trenton, NJ 08625

Dear Secretary Soaries:

As you have been notified, the Honorable Donald T. DiFrancesco has resigned as a Republican Member of the New Jersey Apportionment Commission.

Pursuant to Article IV, Section III, Paragraph 1 of the New Jersey State Constitution, please accept the following appointment to fill the vacancy established by the afore mentioned resignation:

The Honorable John O. Bennett
Senate Majority Leader
48 Paag Circle
Little Silver, NJ 07739

Should you have any questions or require additional information, please contact me at Republican State Committee, (609) 989-7300. Thank you for your attention to this matter.

Sincerely,

Garabed "Chuck" Haytaian
Chairman

FILED
MAR 2 0 2001
DEFOREST B. SOARIES, JR.
SECETARY OF STATE

28 West State Street • Suite 305 • Trenton, New Jersey 08608 • (609) 989-7300 • Fax (609) 989-8685 • Email: NJGOP@aol.com • www.NJGOP.org
Garabed "Chuck" Haytaian, Chairman • Clifford M. Sobel, Finance Chairman

State of New Jersey

Department of State.

I, *DeFOREST B. SOARIES, JR.*, Secretary of State of the State of New Jersey, DO HEREBY CERTIFY that the following named individual was duly selected by the Republican State Chairman to serve on the Apportionment Commission pursuant to Article IV, Section 3 of the New Jersey State Constitution in order to fill the vacancy caused by the resignation of Acting Governor Donald T. DiFrancesco from the Apportionment Commission:

The Honorable John O. Bennett
Senate Majority Leader
48 Paag Circle
Little Silver, New Jersey 07739

IN TESTIMONY WHEREOF, I have Hereunto set my hand and affixed the Official Seal of the Secretary of State at Trenton, this twentieth day of March 2001.

DeForest B Soaries, Jr.

DeFOREST B. SOARIES, JR.
NEW JERSEY SECRETARY OF STATE

New Jersey Democratic State Committee

Thomas P. Giblin
Chairman

November 14, 2000

Via UPS Overnight

Honorable DeForest B. Soaries, Jr.
Secretary of State
125 West State Street
Trenton, New Jersey 08625

Re: New Jersey Legislative Apportionment Commission

Dear Mr. Secretary:

Please be advised that I am appointing to the above referenced commission, effective November 15, 2000, the following individuals:

Senator Richard J. Codey
449 Mt. Pleasant Avenue
West Orange, NJ 07052

Sonia Delgado
10 Belmont Circle
Trenton, NJ 08618

Thomas P. Giblin
40 Montague Place
Montclair, NJ 07042

Assemblyman Louis D. Greenwald
231 Route 70 East
Cherry Hill, NJ 08034

Assemblywoman Bonnie Watson Coleman
226 West State Street
Trenton, NJ 08608

I am confident that these same individuals will represent the interest of New Jerseyans with their important responsibility on the New Jersey Legislative Apportionment Commission.

Should you need further information, please contact the undersigned.

Very truly yours,

Thomas P. Giblin
Chairman

150 West State Street • Trenton, New Jersey 08608 • Tel. 609-392-3367 • Fax 609-396-4778

IN TESTIMONY WHEREOF, I have Hereunto set my

NJGOP
NEW JERSEY REPUBLICAN STATE COMMITTEE

FILED
DEC 0 1 2000
DEFOREST B. SOARIES, JR.
SECETARY OF STATE

November 14, 2000

DeForest B. Soaries, Jr.,
Secretary of State
Department of State
125 West State Street
P.O. Box 300
Trenton, NJ 08625

Dear Secretary Soaries:

Pursuant to Article IV, Section III, paragraph 1 of the New Jersey State Constitution, please accept the following list of names as the Republican appointees to the 2000 Legislative Apportionment Commission:

The Honorable Donald T. DiFrancesco
Senate President
1939 W. Broad Street
Westfield, NJ 07090

The Honorable Glenn Paulsen
Chairman, Burlington County GOP
805 Thomas Avenue
Riverton, NJ 08077

The Honorable Jack Collins
Assembly Speaker
173 Sand Bridge Road
Pittsgrove, NJ 08318

The Honorable Lois Johnson
Chairman, Morris County GOP
7 Point View Place
Mountain Lakes, NJ 07046

Garabed Haytaian
Chairman, New Jersey Republican State Committee
PO Box 268
Hackettstown, NJ 07840

Should you have any questions or require additional information, please contact me at Republican State Committee, (609) 989 – 7300. Thank you for your attention to this matter.

Sincerely,

Garabed "Chuck" Haytaian
Chairman

28 West State Street • Suite 305 • Trenton, New Jersey 08608 • (609) 989-7300 • Fax (609) 989-8685 • Email: NJGOP@aol.com • www.NJGOP.org
Garabed "Chuck" Haytaian, Chairman • Clifford M. Sobel, Finance Chairman

State of New Jersey

FILED
DEC 01 2000
DEFOREST B. SOARIES, JR.
SECETARY OF STATE

Department of State.

I, *DeFOREST B. SOARIES, JR.*, Secretary of State of the State of New Jersey, do HEREBY CERTIFY that the following named individuals were duly selected by their respective State Chairman to serve on the Apportionment Commission pursuant to Article IV, Section 3 of the New Jersey State Constitution:

Donald T. DiFrancesco
Senate President
1939 W. Broad Street
Westfield, NJ 07090

Richard J. Codey
Senator Minority Leader
449 Mt. Pleasant Avenue
West Orange, NJ 07052

Jack Collins
Assembly Speaker
173 Sand Bridge Road
Pittsgrove, NJ 08318

Louis D. Greenwald
Assemblyman
231 Route 70 East
Cherry Hill, NJ 08034

Garabed Haytaian, Chairman
NJ Republican State Committee
P.O. Box 268
Hackettstown, NJ 07840

Thomas P. Giblin, Chairman
NJ Democratic State Committee
40 Montague Place
Montclair, NJ 07042

Glen Paulsen, Chairman
Burlington County GOP
805 Thomas Avenue
Riverton, NJ 08077

Bonnie Watson Coleman
Assemblywoman
226 West State Street
Trenton, NJ 08608

Lois Johnson, Chairman
Morris County GOP
7 Point View Place
Mountain Lakes, NJ 07046

Sonia Delgado
10 Belmont Circle
Trenton, NJ 08618

IN TESTIMONY WHEREOF, I have Hereunto set my hand and affixed the Official Seal of the Secretary of State at Trenton, this first day of December, 2000.

De Forest B. Soaries, Jr.

DeFOREST B. SOARIES, JR.
NEW JERSEY SECRETARY OF STATE

67 C.J.S. Officers § 229

Corpus Juris Secundum | November 2021 Update

Officers and Public Employees
Francis C. Amendola, J.D. , James Buchwalter, J.D. , Lonnie E. Griffith, Jr., J.D., Sonja Larsen, J.D., Stephen Lease, J.D., William Lindsley, J.D., Eric Mayer, J.D., Jeanne M. Reiser, J.D.

VIII. Removal or Demotion

A. In General

1. Power and Authority to Remove

§ 229. Power and authority to remove—As incident of authority to appoint

Topic Summary | References | Correlation Table

West's Key Number Digest
- West's Key Number Digest, Public Employment 254

In the absence of a statutory limitation, the power of appointment generally carries with it the incidental authority to remove so long as no definite term of office is fixed by law.[1]

The power of appointment generally carries with it the power to remove[2] at least if no definite term of office is fixed by law.[3] The power of removal is not included within the power of approving an appointment made by another person, however.[4]

If the constitution provides that appointive officers may be removed at the pleasure of the power by which they have been appointed, the power of removal ordinarily is lodged in that appointing authority[5] and only in that body.[6]

Footnotes

1 **U.S.—Carlucci v. Doe, 488 U.S. 93, 109 S. Ct. 407, 102 L. Ed. 2d 395 (1988) (Secretary of Defense had authority to terminate employment of National Security Agency employee under National Security Agency Act).**

2 U.S.—Snyder v. City of Moab, 354 F.3d 1179 (10th Cir. 2003) (Applying Utah law).
Mass.—Whalen v. City of Holyoke, 13 Mass. App. Ct. 446, 434 N.E.2d 650 (1982).
Ohio—State ex rel. Hamilton Cty. Bd. of Commrs. v. Hamilton Cty. Court of Common Pleas, 126 Ohio St. 3d 111, 2010-Ohio-2467, 931 N.E.2d 98 (2010).

N.Y.—Melendez v. Board of Educ. of Yonkers City School Dist., 34 A.D.3d 814, 828 N.Y.S.2d 67, 215 Ed. Law Rep. 1049 (2d Dep't 2006).
Wyo.—Carlson v. Bratton, 681 P.2d 1333 (Wyo. 1984).

3 Idaho—Gowey v. Siggelkow, 85 Idaho 574, 382 P.2d 764 (1963).
La.—Foti v. Montero, 136 So. 2d 784 (La. Ct. App. 1st Cir. 1961), judgment aff'd, 243 La. 734, 146 So. 2d 789 (1962).
N.Y.—Beers v. Nyquist, 72 Misc. 2d 210, 338 N.Y.S.2d 745 (Sup 1972).
W.Va.—State ex rel. Archer v. County Court of Wirt County, 150 W. Va. 260, 144 S.E.2d 791 (1965).

4 Ind.—Sheridan v. Town of Merrillville, 428 N.E.2d 268 (Ind. Ct. App. 1981).

5 U.S.—PAAC v. Rizzo, 502 F.2d 306 (3d Cir. 1974).

6 Pa.—Foster v. Com. State Civil Service Commission, 314 A.2d 539 (Pa. Commw. Ct. 1974), on reargument, 14 Pa. Commw. 251, 321 A.2d 409 (1974).

End of Document

63C Am. Jur. 2d Public Officers and Employees § 174

American Jurisprudence, Second Edition | November 2021 Update

Public Officers and Employees
Noah J. Gordon, J.D.; Sonja Larsen, J.D.; Jack K. Levin, J.D.; and Karl Oakes, J.D.

VIII. Termination, Suspension, or Other Adverse Action as to Office or Employment

F. Removal and Dismissal, in General

2. Grounds for Removal or Dismissal

a. General Considerations

§ 174. Removal or dismissal of public officer or employee as affected by failure of legislature to designate term; removal at will or pleasure

Topic Summary | Correlation Table | References

West's Key Number Digest
- West's Key Number Digest, Public Employment 254, 256, 257

With regard to offices created to be filled by appointment, if the legislature does not designate the term of the office, the appointee may be removed at the pleasure of the appointing authority.[1] This rule applies even though the appointing power attempts to fix a definite term.[2] Where the tenure of appointment is unlimited or indefinite, the power to remove at will may be implied, the removal thus becoming solely a manner of executive discretion.[3] This implied power to remove may not be contracted away so as to bind the appointing authority to retain a minor officer for a definite period.[4]

Statutes sometimes provide that certain officers will, within the tenure prescribed, be removable at pleasure.[5]

While public employees are not necessarily terminable at will,[6] they generally serve at the pleasure of their employer and thus have no legitimate entitlement to continued employment.[7] Public employers retain wide latitude in hiring and firing employees who serve in at-will, statutorily created positions.[8] A public official chosen by the voters to serve the public's interest holds the power and discretion to terminate the employment of subordinates and is accountable to no one other than the voters for his or her conduct.[9] An at-will government employee may be terminated for cause or for no cause whatsoever.[10]

Observation:
A "class of one" equal protection claim, under which the plaintiff alleges that he or she has been treated differently from other similarly situated persons without any rational basis, but does not allege that the differential treatment was due to the plaintiff's membership in a particular class, is not cognizable in the public employment context, as employment decisions are often subjective and individualized, and government employment, absent legislation, is at-will.[11]

A public employee who is serving at the pleasure of the appointing authority and is subject to removal without judicially recognized good cause may not be dismissed as a result of the exercise of a constitutionally protected right,[12] such as the right

to free speech.[13] However, statutes providing that public employees "may freely participate in any political activity and express any political opinion," do not prohibit a government employer from firing an at-will employee if the employer does not have the utmost confidence in the employee's ability to carry out the employer's policies.[14]

Footnotes

1 Gowey v. Siggelkow, 85 Idaho 574, 382 P.2d 764 (1963); Eads v. City of Boulder City, 94 Nev. 735, 587 P.2d 39 (1978); Jones v. Bayless, 1953 OK 92, 208 Okla. 270, 255 P.2d 506 (1953).

2 Gowey v. Siggelkow, 85 Idaho 574, 382 P.2d 764 (1963); State ex rel. Bonner v. District Court of First Judicial Dist. in and for Lewis and Clark County, 122 Mont. 464, 206 P.2d 166 (1949).

3 State ex rel. Raslavsky v. Bonvouloir, 167 Conn. 357, 355 A.2d 275 (1974).
A city department head's employment was at will where the department head was not hired for a definite term of employment, and the city's personnel policies and practices were legally insufficient to create an implied contract for a definite term of employment. Goddard v. City of Albany, 285 Ga. 882, 684 S.E.2d 635 (2009).

4 Gowey v. Siggelkow, 85 Idaho 574, 382 P.2d 764 (1963); State ex rel. Bonner v. District Court of First Judicial Dist. in and for Lewis and Clark County, 122 Mont. 464, 206 P.2d 166 (1949).

5 Stetson v. Board of Selectmen of Carlisle, 369 Mass. 755, 343 N.E.2d 382 (1976).

6 Zerbetz v. Alaska Energy Center, 708 P.2d 1270 (Alaska 1985); Barton v. Jefferson Parish School Bd., 171 So. 3d 316, 321 Ed. Law Rep. 590 (La. Ct. App. 5th Cir. 2015) (nontenured teacher under contract).

7 Elmore v. Cleary, 399 F.3d 279 (3d Cir. 2005) (applying Pennsylvania law).

8 Potente v. County of Hudson, 378 N.J. Super. 40, 874 A.2d 580 (App. Div. 2005), judgment rev'd on other grounds, 187 N.J. 103, 900 A.2d 787 (2006).

9 Colorado County v. Staff, 510 S.W.3d 435 (Tex. 2017).

10 Segal v. City of New York, 459 F.3d 207, 212 Ed. Law Rep. 21 (2d Cir. 2006).

11 Engquist v. Oregon Dept. of Agr., 553 U.S. 591, 128 S. Ct. 2146, 170 L. Ed. 2d 975 (2008).

12 McCormick v. Edwards, 646 F.2d 173 (5th Cir. 1981); Abel v. Cory, 71 Cal. App. 3d 589, 139 Cal. Rptr. 555 (3d Dist. 1977); Battaglia v. Union County Welfare Bd., 88 N.J. 48, 438 A.2d 530 (1981).

13 Wilderman v. Nelson, 467 F.2d 1173 (8th Cir. 1972); Simmons v. Stanton, 502 F. Supp. 932 (W.D. Mich. 1980).
As to actions for wrongful discharge based on the retaliatory discharge of a public employee's exercise of free speech, generally, see Am. Jur. 2d, Wrongful Discharge § 75.

14 Newell v. Runnels, 407 Md. 578, 967 A.2d 729 (2009).

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91 A.L.R. 1097 (Originally published in 1934)

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Implied power of appointing authorities to remove officer whose tenure is not prescribed by law, but who has been appointed for definite term

[Cumulative Supplement]

The reported case for this annotation is Potts v. Morehouse Parish School Board, 177 La. 1103, 150 So. 290, 91 A.L.R. 1093 (1933).

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Generally as to power to abolish or discontinue office, see annotations in 4 A.L.R. 205, and 37 A.L.R. 815.

And an annotation as to reconsideration of appointment, or confirmation of appointment, to office, will be found in 89 A.L.R. 132.

The purpose of the present annotation is to collect cases in which the appointing (public) authority attempts to create a definite term during which the appointed officer shall serve, although no definite tenure for the office has been prescribed by law, and in which the same authority, or his or its legal successor, then removes the officer before the expiration of such term, justification for which removal is claimed under an implied power to remove.

The removal of employees who are clearly not regarded as officers is beyond the present annotation's scope (in which connection, see, as to right to dismiss teacher because services not needed, annotation in 63 A.L.R. 1416).

Nor is it concerned with constitutional or statutory provisions expressly authorizing removal, whether absolutely or for cause (see, for example, Parsons v. Breed (1907) 126 Ky. 759, 104 S.W. 766, and Ehret v. Jefferson Parish (1914) 136 La. 391, 67 So. 176), or with those provisions where removal is expressly authorized, as where the officer's term is fixed for a definite period "unless sooner removed" (see State ex rel. Williams v. Kennelly (1903) 75 Conn. 704, 55 Atl. 555), or where one is appointed for a fixed time or until his successor shall be appointed and qualify (see Higgins v. Cole (1893) 100 Cal. 260, 34 Pac. 678).

"When the term or tenure of a public officer is not fixed by law, the general rule is that the power of removal is incident to the power to appoint. The tenure not having been declared by law, the office is held during the pleasure of the authority making the appointment. Hence, in the absence of all constitutional or statutory provision as to the removal of public officers, the power of removal is considered as incident to the power of appointment." 22 R. C. L. p. 562.

The general rule to the above effect, which appears to have been adopted almost universally, has been applied in a considerable number of cases in which the appointing authority has attempted to fix a definite term for the particular officer.

Arkansas
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State ex rel. Engelke v. Kilmartin (1912) 86 Conn. 56, 84 Atl. 100

Georgia
Wright v. Gamble (1911) 136 Ga. 376, 71 S.E. 795, 35 L.R.A. (N.S.) 866, Ann. Cas. 1912C, 372
Idaho
Conwell v. Culdesac (1907) 13 Idaho, 575, 92 Pac. 535
Illinois
Lightfoot v. Evergreen Park (1917) 207 Ill. App. 411
But see Burris v. Board of Education (1920) 221 Ill. App. 397
Kentucky
Johnson v. Cavanah (1890) 21 Ky. L. Rep. 1246, 54 S.W. 853
Louisiana
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New Jersey
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Teed v. Roseland (1929) 7 N.J. Mis. R. 43, 144 Atl. 121
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Barbor v. Mercer County Ct. (1920) 85 W. Va. 359, 101 S.E. 721
Thus, the school board's implied power to remove its own appointee, an assistant superintendent of schools, whose tenure of office was not fixed by statute, but whose appointment purported to be for seventeen and onehalf months, is upheld in the reported case (Potts v. Morehouse Parish School Bd. (La.) ante, 1093), where he was discharged about six months after he was appointed,—the court noting the absence of any statutory provision expressly authorizing removal of such appointee.

In holding that a school superintendent whom a board appointed for thirty-six months could lawfully be discharged by it after serving about a year, the court in Jensen v. Independent Consol. School Dist. (1924) 160 Minn. 233, 199 N.W. 911, relied largely on a statutory provision that a superintendent should hold office during the board's pleasure, and said: "There should be some restriction on the power of the board to employ superintendents for long periods of time, or otherwise the board might tie the hands of its successor, and wrest from the control of the people the school which they are required to support. Moreover, a sound public policy requires that there should be a way of promptly dispensing with a superintendent who is not working in harmony with the board."

So, in Keehan v. Perry (1859) 24 Tex. 253, where the superintendent of a state lunatic asylum was appointed by the governor for a four-year term, under a statute which did not prescribe the duration of the office and was silent with respect to the power of removal, the court regarded it as a sound and necessary rule to consider the power of removal as incident to the power of appointment, and accordingly upheld the governor's arbitrary removal of such officer within a year from the time of his appointment.

Notwithstanding that the ordinance under which a highway supervisor was appointed purported to fix his term of office at one year, a city council's removal of such officer without reconsidering its former action, less than a month after it appointed him, was upheld in Mathis v. Rose (1899) 64 N.J.L. 45, 44 Atl. 875 (affirmed without opinion in (1900) 64 N.J.L. 726, 49 Atl. 1135), the court remarking that ample authority to appoint and remove at the pleasure of the council was afforded by a general charter provision.

In Wright v. Gamble (1911) 136 Ga. 376, 71 S.E. 795, 35 L.R.A. (N.S.) 866, Ann. Cas. 1912C, 372, where a county board of commissioners of roads and revenue passed a resolution fixing the term of its clerk at two years and elected its clerk for that term, but no statutory term for his office was fixed, and the board's arbitrary action, four months thereafter, in declaring his office vacant and revoking its previous action, was upheld, the court said in its headnote: "Where the tenure of an office is not prescribed by law, the power to remove is an incident to the power to appoint. In such case the appointee holds at the pleasure of the appointing power, although it attempts to fix a definite term; and no formalities, such as the preferring of charges or the granting of a hearing to the incumbent, are necessary to the lawful exercise of the authority of removal."

The fiscal court of a county which appointed for two years a manager of the county workhouse, an office specially provided for by a statute that did not fix any tenure therefor, was held entitled to remove him, under its implied power to do so, even before he took charge of the workhouse, in Johnson v. Cavanah (1890) 21 Ky. L. Rep. 1246, 54 S.W. 853.

In regard to an appointment, by a board of village sewer commissioners, of a supervising engineer for a term of one year and until the construction of the village sewerage system should be completed (which position lasted only about twenty days because of the village's annexation to the city of New York, which refused to recognize the contract), the principle that the power of appointment carried with it the power of removal, in the absence of limiting words or of a fixed term, was applied in Mack v. New York (1902) 37 Misc. 371, 75 N.Y. Supp. 809 (affirmed on opinion below in (1903) 82 App. Div. 637, 80 N.Y. Supp. 1139, which is affirmed without opinion in (1903) 176 N.Y. 573, 68 N.E. 1119).

In State ex rel. Moore v. Archibald (1896) 5 N.D. 359, 66 N.W. 234, where the superintendent of a state hospital was appointed for a year by the institution's trustees, who removed him during the year, the court pointed out that no term of office was fixed by statute, in holding that he was properly removed; and said that a certain statute by necessary implication conferred upon the board unlimited power of removal, and remarked that if the board might lawfully fix a term of one year it might likewise give the incumbent a life tenure.

A village board's appointment of a marshal for a year was held not to elevate him above the board's power to dismiss him within that time, his term of office not being fixed by statute, in Conwell v. Culdesac (1907) 13 Idaho, 575, 92 Pac. 535; in which case a statutory method provided for removing civil officers was held to afford only a cumulative remedy.

The implied power of a new board of county commissioners to remove a superintendent of the poor house and farm who had within three months been appointed, for a term of one year, by the preceding board to that office, the term of which was not fixed by statute, and appoint another to that position, was upheld in Sanders v. Belue (1907) 78 S.C. 171, 58 S.E. 762, where the statutory scheme of general supervision by the board and subordinate supervision by the superintendent was said to repel the idea that a retiring board could impose a superintendent on a succeeding board.

In State ex rel. Engelke v. Kilmartin (1912) 86 Conn. 56, 84 Atl. 100, where the tenure of a city health officer was declared by the president of the appointing body, at the time of the appointment, to be for four years, but the term of office was not fixed in the charter, his summary dismissal by such body after he had served about two years was upheld upon the ground that the power of removal was incident to that of appointment.

In Horstman v. Adamson (1903) 101 Mo. App. 119, 74 S.W. 398, where a clerk of court who was alleged to have appointed a deputy clerk for a fouryear period was held not liable to him by reason of discharging him after less than two years' service, the court noted that the statute failed to define the period for which the deputyship should continue, said that "where the law conferring the authority, under which the appointment is made, is silent as to any limitation of the right of removal, and the official term is unlimited, the absolute power of removal is an incident to the power of appointment to be invoked and applied at pleasure, without notice, and without legal liability for the results;" and added that "subject to the supervisory control

conferred by the law on the court, the discretionary right of appointment by the statute is unrestricted, and the like boundless authority of terminating the appointment by discharge must necessarily exist in the appointing official."

In holding that supervisors of a county dog control district, who had appointed an enforcing officer (in February) under a contract which he claimed was for the balance of the calendar year, were entitled to remove him at any time, as they did after he had served only three months, the court in Morris v. Parks (1934) — Or. —, 28 Pac. 2d 215,—after upholding the board's contention that he was an officer and his contract for a fixed term was void as against public policy, and noting a constitutional provision that when the duration of any office was not provided for by the Constitution or declared by law, the office should be held during the pleasure of the authority making the appointment,—said that the power of appointment generally carried with it as an incident the power to remove, and that implied power to remove could not be contracted away so as to bind the appointing bodies to retain an officer for a definite fixed period, and also quoted the rule laid down in 22 R. C. L. 562.

And it was ruled that "where a statute conferring the power to appoint fixes no definite term of office, but provides that the tenure shall be at the pleasure of the appointing body, the implied power to remove such appointee may be exercised at its discretion, and cannot be contracted away so as to bind the appointing body to retain him in such position for a definite, fixed period," in Barbor v. Mercer County Ct. (1920) 85 W. Va. 359, 101 S.E. 721, where a statute provided for appointment of a manager to take care of the poor of the county, by a county court, which undertook to give its appointee a contract for three years and then discharged him in about five months.

Under a general statutory provision that all borough officers should hold office during the pleasure of the council, it was held to be authorized to remove, after about six months' service, a borough recorder whose appointment had been for a year, in Teed v. Roseland (1929) 7 N.J. Mis. R. 43, 144 Atl. 121.

And the implied power to remove an officer whose tenure was not fixed was noted in McGregor v. Cain (1929) 180 Ark. 746, 22 S.W. 2d 393, where a county judge's appointment for a year, of a probation officer, was held invalid so far as such time extended beyond the judge's term of office.

Upon the ground that the power to remove is incidental to the power to appoint, a village attorney who was appointed for the period of one year by the village board of trustees was held to have been regularly removed by a resolution of the board dismissing him before the end of the year, in Lightfoot v. Evergreen Park (1917) 207 Ill. App. 411; but a district board of education which appointed a truant officer for a school year of ten months, although the time that such an appointment should run was not fixed by statute, was held not entitled to remove such officer before the expiration of the ten months, except for cause, even though the board's implied power to remove its appointee was recognized, in Burris v. Board of Education (1920) 221 Ill. App. 397.

CUMULATIVE SUPPLEMENT

Former administrative employee of school district sufficiently alleged facts to support her claim against superintendent, deputy superintendent, and school district, under New York Civil Service Law, providing covered employees property interest in employment that required notice and hearing prior to termination, including employees' allegations that she was constructively discharged by her coerced resignation, that she was covered civil service employee, and that she was removed without hearing. N.Y.McKinney's Civil Service Law § 75(1). Illiano v. Mineola Union Free School Dist., 585 F. Supp. 2d 341 (E.D. N.Y. 2008).

County deputy elections commissioner in New York held politically sensitive position and, thus, discharge on basis of political disagreements with commissioner over internal political party matters did not violate Fourteenth Amendment. N.Y.McKinney Election Law §§ 3"200, subd. 4, 3"204, 3"300; N.Y.McKinney County Law § 401, subd. 3; U.S.C.A. Const.Amend. 14. Hering v. Hill, 814 F. Supp. 356 (S.D. N.Y. 1993).

A power of appointment to government service carries with it the power of removal, which is unrestricted, except as controlled by pertinent law, and an employee does not have a vested right, title or interest in or to his position of employment, except as the governing statutes may protect his tenure or regulate or limit the right of appointing power to dismiss him. Phaire v. Merwin, 161 F. Supp. 710 (D.V.I. 1958).

Power of appointment to public office, unless limited by constitution or federal statute, carries with it the right of removal. McEachern v. U.S., 212 F. Supp. 706 (W.D. S.C. 1963).

In action brought against Governor of West Virginia by former employees of West Virginia Department of Highways in which they sought injunctive relief, reinstatement with back pay and other employment benefits, and compensatory and punitive damages, Governor was not entitled to absolute immunity with respect to his actions involving state budget under immunity accorded elected representatives performing in their legislative capacities, where Governor functions respecting budget were essentially executive and by no means encompassed state entire legislative power with respect to budget. W.Va. Const. Art. 6, § 51; 42 U.S.C.A. § 1983. Douglas v. Galloway, 568 F. Supp. 966 (S.D. W. Va. 1983).

Refusal to renew a school employee contract was not unconstitutional punishment where plaintiff failed to show any constitutional right to continued employment and failed to show that nonrenewal violated his First Amendment rights. 42 U.S.C.A. § 1983; U.S.C.A.Const.Amends. 1, 14. Burris v. Willis Independent School Dist., 537 F. Supp. 801, 4 Ed. Law Rep. 501 (S.D. Tex. 1982).

Employment contract between former internal auditor of county and county specified that board of commissioners of county could terminate internal auditor at any time as long as commissioners adopted resolution for removal of county auditor and paid auditor any unpaid balance of his earned salary plus 90 daysseverance pay, so that internal auditor served as at-will employee and possessed no property interest in his continued employment with county, and county was not required to provide internal auditor with hearing or other procedure when they terminated his contract. U.S.C.A. Const.Amend. 14. McGregor v. Board of Com'rs of Palm Beach County, 674 F. Supp. 858, 3 I.E.R. Cas. (BNA) 403 (S.D. Fla. 1987).

District of Columbia Self-Government and Governmental Reorganization Act did not grant President power to remove previous President appointed member of District of Columbia Judicial Nomination Commission prior to expiration of Commissioner term. D.C.Code 1977 Supp., Tit. 11 App. §§ 434, 434(a), (b)(2). Borders v. Reagan, 518 F. Supp. 250 (D.D.C. 1981).

Removal of postmaster of first class by postmaster general is presumed in law to be act of President. Hargett v. Summerfield, 137 F. Supp. 876 (D. D.C. 1956).

City charter provision that limited tenure appointments might be terminated by appointing officer for good cause with approval of civil service commission prevented appointing officer from terminating employment of limited tenure motorman employed by public utilities commission of city and county without approval of the civil service commission. McGill v. City and County of San Francisco, 231 Cal. App. 2d 35, 41 Cal. Rptr. 568 (1st Dist. 1964).

Since there is no provision for or power of removal of member of redevelopment agency of city of Derby in statute or in ordinance creating Derby redevelopment agency, mayor could not, except for cause, remove a member of the Derby redevelopment agency who had been appointed for definite term. C.G.S.A. § 8 "126. State ex rel. Doherty v. Finnegan, 25 Conn. Supp. 390, 206 A.2d 477 (Super. Ct. 1964).

Term of appointed office, not prescribed by statute, expires with expiration of term of appointing body. Rawlins v. Levy Court of Kent County, 235 A.2d 840 (Del. 1967).

District court lacked jurisdiction, either by direct appeal or by way of certiorari, to consider question of whether county court could mitigate sentence and withhold adjudication after having not withheld adjudication originally, notwithstanding that both defendant and State desired resolution of question; State admitted that sentence imposed by county court was lawful and that county court had jurisdiction within time period to modify sentence, and district court is without authority to afford review by way of certiorari unless State has right to direct appeal. West F.S.A. R.App.P.Rules 9.140(c)(1), 9.160. State v. Magrath, 517 So. 2d 29 (Fla. Dist. Ct. App. 3d Dist. 1987).

City council lacked power to remove directors of downtown development authority, prior to expiration of specific terms provided by downtown development authorities law. O.C.G.A. § 36"42"1 et seq. Hernandez v. Downtown Development Authority of City of St. Marys, 256 Ga. 356, 349 S.E.2d 449 (1986).

Generally, power to remove officer is incident to power to appoint and authority to appoint carries with it authority to remove, in absence of constitutional or statutory restriction. Gowey v. Siggelkow, 85 Idaho 574, 382 P.2d 764 (1963).

Where a term of office is not fixed by constitutional or statutory provision, it is held at appointing power pleasure, and, though that power has attempted to fix a definite term, the constitutional provision prohibiting change in salary during a definite term does not apply, and salary may be raised, lowered, or revoked by the proper authority. S.H.A.Const. art. 9, § 11. Anderson v. City of Jacksonville, 380 Ill. 44, 41 N.E.2d 956 (1942).

Village Chief of Police could not be removed from that office and returned to his prior rank without the filing of charges and the granting of a hearing before Board of Fire and Police Commissioners; statute authorizing municipalities to provide by ordinance for appointment of Police Chief by means other than through the Board did not authorize ordinance providing for discharge other than pursuant to statutory removal procedures. S.H.A. ch. 24, §§ 10 "2.1 "1 et seq., 10 "2.1 "4, 10 "2.1 "17. People ex rel. Wojcik v. Village of Harwood Heights, 17 Ill. App. 3d 478, 308 N.E.2d 240 (1st Dist. 1974).

Phrase minimum of thirty days in order suspending policeman for a minimum of thirty days and pending hearing and disposition by the Police Board had the effect of suspending policeman for more than 30 days in violation of statute authorizing superintendent to impose suspension not exceeding thirty days and policeman, who had not been given notice or hearing, was entitled to his back salary and all other resultant benefits. S.H.A. ch. 24, § 10 "1 "18.1. People ex rel. Maxwell v. Conlisk, 16 Ill. App. 3d 563, 306 N.E.2d 640 (1st Dist. 1973).

Mayor had authority to remove mayoral appointees to city utility service board, pursuant to statute authorizing city executive to suspend or remove from office any officers appointed by him by notifying them to that effect and sending written statement of reasons for suspension or removal to city legislative body; there was no exception prohibiting removal of city utility service board members and no statutory provision authorizing removal only for cause after notice and hearing. IC 36"4"11"2 (1982 Ed.) City of Peru v. Utility Service Bd. of City of Peru, 507 N.E.2d 988 (Ind. Ct. App. 4th Dist. 1987).

Where office is filled by appointment and definite term is not fixed by constitution or statute, the office is held at pleasure of the appointing power, and incumbent may be removed at any time; but power of removal is not incident to power of appointment where extent of term of office is fixed by constitution or statute. State ex rel. Board of Com'rs of Lake Borgne Basin Levee Dist. v. Bergeron, 235 La. 879, 106 So. 2d 295 (1958).

The statute authorizing police juries to combine the offices of parish treasurer and clerk of the police jury is not mandatory, and hence a police jury is not required to combine such offices. Act No. 122 of 1924. Stoker v. Police Jury of Sabine Parish, 190 So. 192 (La. Ct. App. 2d Cir. 1939).

The power to appoint reserve deputy sheriffs inheres in the office of county sheriff. Cape Cod Times v. Sheriff of Barnstable County, 443 Mass. 587, 823 N.E.2d 375 (2005).

The Legislature has determined that supremacy in respect of the continued employment of a superintendent shall, except as to tenure, be in the school committee from time to time in office, and such committee, in deciding what will promote good schools, may not be fettered by action of a past committee beyond the express direction of statute. M.G.L.A. c. 43 § 32. Sullivan v. School Committee of Revere, 348 Mass. 162, 202 N.E.2d 612 (1964).

Accommodation of Attorney General office and her responsibility as the constitutional legal officer of the state did not require allowing her to appear, on the one hand, as a party litigant in appeal of Public Service Commission (PSC) order terminating proceedings in which electric utility requested suspension of its power supply cost recovery clause and, on the other hand, as legal representative of appellee PSC. MRPC 1.7. Attorney General v. Michigan Public Service Com'n, 243 Mich. App. 487, 625 N.W.2d 16 (2000).

Under statute providing for removal at will, mayor of fourth class city, with consent of majority of all members of the board of aldermen, has power to remove city attorney at any time it suits his pleasure. Section 79.240 RSMo 1969, V.A.M.S. Russell v. City of Raytown, 544 S.W.2d 48 (Mo. Ct. App. 1976).

In determining whether initial decision to discharge fish and game department employee was made by Fish and Game Commission or by its director, Supreme Court was concerned with substance, not semantics. R.C.M.1947, §§ 26"104(4), 26"108. State ex rel. Ford v. State Fish and Game Commission, 148 Mont. 151, 418 P.2d 300 (1966).

Evidence warranted governor removal of liquor control commissioner who was also a real estate broker and who had advertised for sale of tavern and package liquor business on ground that commissioner had been employed by operator of beer tavern and operator of package liquor business in violation of statute. R.R.S.1943, § 53-111. State ex rel. Meyer v. Sorrell, 174 Neb. 340, 117 N.W.2d 872 (1962).

Generally, attempt by appointing authority to fix definite term of office for officer, though no term of office has been fixed for him by law, is unavailing to prevent dismissal of officer, without notice and hearing Const. art. 4, §§ 1, 6, 12. State ex rel. Beck v. Obbink, 172 Neb. 242, 109 N.W.2d 288 (1961).

Superintendent and engineer of waterworks and sewer department of borough who accepted annual appointments for a term of one year, and accepted his last reappointment after the adoption of the statute providing for tenure for exempt firemen was precluded from asserting claim to tenure, since he was the holder of an office for fixed term. N.J.S.A. 40:47-63. Smith v. Borough of Matawan, 126 N.J.L. 585, 20 A.2d 516 (N.J. Sup. Ct. 1941).

Generally, term of appointee to office cannot be longer than coterminous with that of appointing power, unless term is fixed by statute, ordinance, or rule under legislative sanction. Skladzien v. Board of Educ. of City of Bayonne, 12 N.J. Misc. 602, 173 A. 600 (Sup. Ct. 1934).

Executive director of housing authority was not public officer whose term of office was governed by Constitution article providing that when duration of office is not specified by constitutional law, office is held during pleasure of authority making appointment; provision of Public Housing Law authorizing employment of executive director neither prescribes duties and powers of secretary/executive director nor does it mandate creation or filling of that position. McKinney Const. Art 13, § 2; McKinney Public Housing Law § 32, subd. 1. Lake v. Binghamton Housing Authority, 130 A.D.2d 913, 516 N.Y.S.2d 324 (3d Dep't 1987).

Even if sections of county charter were totally silent on issue of suspensions, county executive would be legally authorized to suspend appointed county sheriff, with pay, pending hearing and disposition of charges brought against him by executive, as incident to executive power of removal. Civil Service Law § 75, subd. 3. Delaney v. Del Bello, 81 A.D.2d 566, 437 N.Y.S.2d 405 (2d Dep't 1981).

Where a section of the Optional City Government Law empowered the council under plans A, B, and C, and the mayor under plan F, to appoint civil service commissioners, and provided that commissioners might be removed by the council subject to the provisions of the Civil Service Law, and the Civil Service Law gave removal power to the mayor, the council was without power to remove commissioners appointed by the mayor under plan F as that power was vested in the mayor. Laws 1914, c. 444, §§ 47, 72, 74, 77, 80, 84, 89, 90, 102, 103, 105; Civil Service Law, § 11, subd. 6. Cary v. Council of City of Binghamton, 265 A.D. 83, 38 N.Y.S.2d 255 (3d Dep't 1942).

Individual who was appointed by school board as school district attorney was an appointee of school district whose term of office was held at pleasure of the appointing school district, since no definite term was attached to office by statute. Const. art. 13, § 2. Harrison Central School Dist. v. Nyquist, 83 Misc. 2d 1042, 373 N.Y.S.2d 796 (Sup 1975).

Clerk of county election board was in unclassified service of the county and clerk could be removed from that position by action of the commissioners of the county board of elections. Civil Service Law § 35(f); Election Law §§ 31, 36; Laws 1936, c. 879. Starr v. Meisser, 67 Misc. 2d 297, 323 N.Y.S.2d 752 (Sup 1971).

Power to appoint to office or position, where term or tenure is not defined by statute or otherwise, necessarily carries with it the power of removal. Lawson v. Cornelius, 38 Misc. 2d 431, 238 N.Y.S.2d 238 (Sup 1963).

Petitioner had no tenure or vested right in position of senior clerk in supervisor office in town, where petitioner appointment as senior clerk was either illegal because position had been abolished by previous act of downgrading, or provisional because made in higher grade than petitioner permanent grade, without examination. Const. art. 5; Civil Service Law, §§ 20, 40, 65. Pedrick v. Town Bd. of Town of Huntington, 24 Misc. 2d 1066, 209 N.Y.S.2d 370 (Sup 1960).

The discretion of police commissioner whether a patrolman should be dismissed prior to expiration of his probation period is practically unlimited. Suchman v. Kern, 174 Misc. 343, 20 N.Y.S.2d 859 (Sup 1940).

The implied power of appointing authority to remove at pleasure an officer whose term of office is not prescribed by law, cannot be contracted away so as to bind the appointing authority to retain an appointee for a fixed period. Kinsland v. Mackey, 217 N.C. 508, 8 S.E.2d 598 (1940).

Fact that city charter specified no fixed term for office of director of public service did not require that the fixed term be implied for an indefinite period, thereby precluding newly elected mayor from terminating director appointed by prior mayor. State, ex rel. Corrigan v. Noble, 26 Ohio St. 3d 84, 497 N.E.2d 84 (1986).

Under statute providing for election of clerk of board of education for term not to exceed four years but providing no minimum term therefor, clerk of board serves at pleasure of board and may be removed summarily at the will of the board. R.C. § 3313.22. State ex rel. Bd. of Ed. of South Point Local School Dist. v. Miller, 102 Ohio App. 85, 2 Ohio Op. 2d 74, 141 N.E.2d 301 (4th Dist. Lawrence County 1956).

One who claims that the authority which appointed him to a position is not vested with the power of suspension under the general rule of implication, has the burden of establishing such claim. State ex rel. Livingston v. Maxwell, 1960 OK 122, 353 P.2d 690 (Okla. 1960).

As respects right of Governor to remove members of Delaware River Joint Commission, the Governor approval of the statute creating the commission and designating members thereof by description by reference to offices then held by them did not constitute selection of the members of the commission by the Governor. 36 P.S. § 3503, art. 2; P.S.Const. art. 6, § 4. Com. ex rel. Smith v. Clark, 331 Pa. 405, 200 A. 41 (1938).

Town council had jurisdiction to remove tax assessor-building inspector from office even though such power was not expressly stated in statute creating office, as it existed by necessary implication. Pub.Laws 1961, c. 53. Cullen v. Adler, 107 R.I. 749, 271 A.2d 466 (1970).

Under city charter of Warwick, providing that, if city council did not approve mayor nomination to municipal office, council might, after three rejections, proceed to make its own appointment without advice of mayor, the ultimate power of appointment was in city council and by necessary implication, in absence of statutory provisions to the contrary, the power of removal was also vested in council in order to enable it to properly perform the functions prescribed by charter. Pub.Laws 1931, c. 1852, § 1 et seq., § 6, cl. 2, § 9. Lewis v. Porter, 78 R.I. 358, 82 A.2d 399 (1951).

Appointing power has no right to remove officer, in absence of constitutional or statutory provision, where term of office is fixed by law for definite period. Brock v. Foree, 168 Tenn. 129, 76 S.W.2d 314 (1934).

Where commissioners court scheduled public meetings to consider redistricting precincts and declaring offices of incumbent justices of the peace and constables vacant, basic fairness and due process dictated notice to each incumbent in advance of hearings, informing of time, place, and location of hearing, specific subject matters to be considered, possibility that vested offices may be terminated prematurely, absence of assurance that any incumbent would be allowed to retain office, possibility that none of incumbents would be appointed to fill vacancies in offices for new precincts, possibility that each would be denied salary and benefits of office for unexpired portion of original term, and right to appear and defend vested rights and to show cause why offices should not be abolished prematurely without compensation. Vernon Ann.Civ.St. art.

2351 1/2 (c); Vernon Ann.Const.Art. 1, § 19; Art. 5, § 18. Tarrant County v. Ashmore, 624 S.W.2d 740 (Tex. App. Fort Worth 1981).

The provision of statute authorizing sheriffs to appoint deputies, that deputiestenure should be at pleasure of sheriff, is tantamount to a provision that both appointment and tenure are discretionary with him. Vernon Ann.Civ.St. art. 6869. Murray v. Harris, 112 S.W.2d 1091 (Tex. Civ. App. Amarillo 1938).

Where statute conferring power to appoint fixes no definite term of office, but provides that tenure shall be at pleasure of appointing body, implied power to remove such appointee may be exercised at its discretion, and cannot be contacted away so as to bind appointing body to retain appointee in such position for definite, fixed period. Williams v. Brown, 190 W. Va. 202, 437 S.E.2d 775 (1993).

Generally, power of appointment carries with it power to remove where no definite term of office is fixed by law, absent any limiting provision of Constitution or statute. State ex rel. Archer v. County Court of Wirt County, 150 W. Va. 260, 144 S.E.2d 791 (1965).

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A TREATISE

ON

THE LAW

RELATING TO

PUBLIC OFFICERS

AND

SURETIES IN OFFICIAL BONDS

BY

MONTGOMERY H. THROOP

CHICAGO:
T. H. FLOOD & COMPANY
1892

SEC. 312. Where officer reëlected dies before commencement of new term, person appointed to fill vacancy holds till another elected, etc., and new appointment at commencement of new term void; where officer is commissioned for less than his lawful term, he holds for full term.

313. Commission or certificate of election not required to state length of term, and is not conclusive if length is stated.

314. When term begins, if time not fixed by statute; various rulings.

315. Where statute limiting term is extended, term is extended; where statute creating office is repealed, etc., office abolished.

316. Where elected officers hold for term expiring before election, term is extended till election; where officer elected under military authority, his term ends when civil authority is restored.

317. Officer commissioned for four years "from" March 2, 1845, is in office on March 2, 1849.

318. Officer appointed by governor, during recess of senate, and afterwards confirmed by senate, holds from the original appointment; the beginning of the first officer's term fixes that of his successor's.

319. Whether, in absence of special provision, an officer appointed to fill a vacancy holds for a full term, or for unexpired portion of original term.

320. The same subject; cases holding that he holds for a full term, and cases holding otherwise.

321. Where governor appoints, during recess of senate, he cannot make a new appointment, until senate has acted upon the first.

322. Where term is six years, and no appointment made during first two years, person appointed holds for four years; secretary of state, acting as governor during a vacancy, holds till vacancy filled, although his own term expires earlier.

§ 303. **Meaning of "term;" when officer has no term.**—The word "term" is uniformly used to designate a fixed and definite period of time. And where the constitution of a state provides, that officers of cities and towns "shall

be elected for such terms and in such manner, as may be prescribed by law," a statute which creates a police board for a city, and provides that the members thereof "may be removed at the pleasure of the chancellor, and must be removed, whenever, by a change of political opinion, on their part, or on the part of the mayor, they cease to disagree". . . . fails to comply with the provisions of the constitution, because it provides for a tenure of office, unknown to that instrument, and opposed, not only to its letter, but to its spirit and policy."[1] And an officer, who holds his office at the pleasure of another officer or board of officers, has no official term, within the meaning of a constitutional or statutory provision relating to such terms.[2]

§ 304. **If term not fixed, officer holds at pleasure of appointing power; effect of change, etc., in appointing power.**—Where an office is filled by appointment, and a definite term of office is not fixed by a constitutional or statutory provision, the office is held at the pleasure of the appointing power, and the incumbent may be removed at any time.[3] Where a board of officers has the power to appoint certain officers, to hold during the pleasure of the board, it has been held that the tenure of the offices is not affected by changes in the membership of the appointing board.[4] In the same case, it was said, that if the board is abolished by law, the tenure of the office is thereby determined.[5]

[1] Speed v Crawford, 3 Met. (Ky.) 207.

[2] Id; Gibbs v Morgan, 30 N. J. Eq. 126.

[3] State v Alt, 26 Mo. App. 673;
People v Comptroller, 20 Wend. (N. Y.) 595;
Comm. v Sutherland, 3 S. & R. (Pa.) 145;
Field v Girard College, 54 Pa. St. 233;
Williams v Boughner, 6 Coldw. (Tenn.) 486.
See also, Story Const., 4th ed., § 1527;
Patton v Vaughan, 39 Ark. 211;
People v Hill, 7 Cala. 97;
State v Doherty, 25 La. Ann. 119;
State v Police Com'rs, 88 Mo. 144;
People v Whitlock, 92 N. Y. 191; and *post*, §§ 354 *et seq.*

[4] State v Board of Public Lands, 7 Nebr. 42.

[5] Id. See also Nichols v Comptroller, 4 Stew. & P. (Ala.) 154.

A TREATISE

ON

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OF

PUBLIC OFFICES AND OFFICERS

BY

FLOYD R. MECHEM

AUTHOR OF "A TREATISE ON THE LAW OF AGENCY"

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II.

WHERE DURATION OF TERM IS UNCERTAIN.

§ 405. **Office created for Performance of a single Act terminates upon its Performance.**—Where an office is created, or an officer is appointed, for the purpose of performing a single act or the accomplishment of a given result, the office terminates and the officer's authority ceases with the accomplishment of the purpose which called it into being.[1]

§ 406. **Officer holding during Pleasure of appointing Power removable at Will.**—So where the officer is appointed to hold during the pleasure of the appointing power, his holding is terminable at the will of the latter.[2] This subject belongs more properly to the chapter on Removals from Office, to which the reader is referred.[4]

§ 407. **Office vacated by Abolishment of appointing Power.**—Offices created and filled by an authority which is itself dependent upon and subservient to a higher power, as in the case of municipal officers and officers appointed by local boards, are vacated by the termination of the power which created them, as by the repeal of a municipal charter[5] or the abolishment of a local board.[6]

§ 408. **Office vacated by Repeal of Law creating it.**—So an office will be vacated if the law or ordinance by which it was created be repealed without reservation.[7]

[1] State v. Harrison, 113 Ind. 434, 3 Am. St. Rep. 663, 16 N. East Rep. 884.

[2] Bergen v. Powell, 94 N. Y. 591. See also Mechem on Agency, § 201; Douvielle v. Supervisors, 40 Mich. 585.

[3] Patton v. Vaughan, 39 Ark. 211; State v. Commissioners, 88 Mo. 144; People v. Shear, — Cal. —, 15 Pac. Rep. 92; People v. Whitlock, 92 N. Y. 192; State v. Doherty, 25 La. Ann. 119, 13 Am. Rep. 131; People v. Hill, 7 Cal. 97; Keenan v. Perry, 24 Tex. 253.

[4] See *post* §§ 444–462.

[5] Dillon Mun. Corp. § 64.

[6] State v. Board, 7 Neb. 42. See Mechem on Agency, § 270.

[7] Chandler v. Lawrence, 128 Mass. 213.

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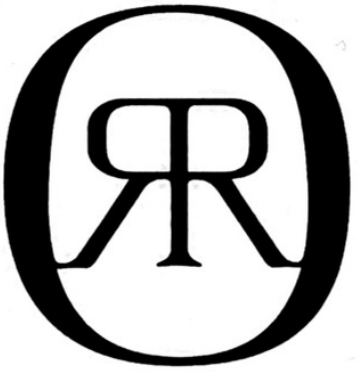

12TH EDITION

Henry M. Robert III,
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GENERAL HENRY M. ROBERT
U.S. Army

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day without permission of the assembly (by a two-thirds vote or unanimous consent; see **15**, **43**). Speeches made in committee of the whole, in quasi committee of the whole, or during informal consideration, however, do not count against a member's right to debate the same question when it is further considered by the assembly under the regular rules. When a question is referred to a committee, any orders limiting or extending the limits of debate (**15**) or for the *Previous Question* (**16**) are thereby exhausted, so that when the question is brought back from the committee, debate in the assembly takes place according to the regular rules, even if at the same session in which the motion to *Commit* was adopted. For the rules relating to the exhaustion of an order prescribing the method of voting on a question, see 30:7.

13:22 **Subsequent Instructions.** After a question has been referred to a committee and at any time before the committee submits its report, even at another session, the assembly by a majority vote can give the committee additional instructions in reference to the referred question (see also 13:8(d)).

13:23 **Vacancies in a Committee.** The power to appoint a committee includes the power to fill any vacancy that may arise in it. The resignation of a member of a committee should be addressed to the appointing power, and it is the responsibility of that power to fill the resulting vacancy (see also 47:57–58). Unless the bylaws or other governing rules provide otherwise (see 50:14, 62:16), the appointing authority has the power to remove or replace members of the committee: If a single person, such as the president, has the power of appointment, he has the power to remove or replace a member so appointed; but if the assembly has the power of selection, removal or replacement can take place only under rules applicable to the motions to *Rescind* or *Amend Something Previously Adopted* (see 50:14). Committee members are presumed to serve until their successors are appointed.