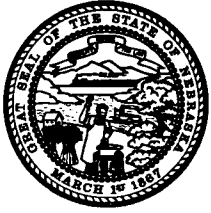


STATE OF NEBRASKA

POWER REVIEW BOARD



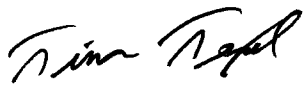
Mike Johanns
Governor

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MEMORANDUM

DATE: July 3, 2002

TO: Rick Morehouse, Board Member

FROM: Tim Texel 

SUBJECT: Power Review Board Members Not Appointed During Legislative Sessions

Governor Johanns has appointed Robert Hall as the new PRB member to ~~you're~~ your seat. Your term of office expired January 1, 2002, but you have continued to serve until the position is filled. In an e-mail, you asked me whether you should attend and participate in the July 19 meeting, or whether Mr. Hall should. It is my legal opinion that you continue to hold your seat until the Legislature confirms Mr. Hall.

The statute controlling PRB membership states "Members of the board shall be appointed by the Governor subject to the approval of the Legislature." Neb. Rev. Stat. § 70-1003. The question then becomes: At what point does an appointee officially become a member – when appointed by the Governor, or when approved by the Legislature?

I consulted with the Attorney General's office on this issue. Evidently there is some difference of opinion within that office. The Governor's office told me it leaves this matter up to the discretion of each individual Board or Commission.

After performing some brief research, it seems to me that the stronger legal answer is that an appointee does not officially take office until approved by the Legislature, so long as the current member continues to serve. The Nebraska Constitution states that if any nonelective state office is vacated by death, resignation or otherwise, then the Governor can fill the office by appointment. Neb. Const., art. IV, § 12. If the Legislature is not in session, the Governor makes a temporary appointment until the next Legislative session. Id. It also states "All appointees shall hold their office until their successors shall be appointed and qualified." Id. A vacancy does not occur simply by the ending of a fixed term of office itself. See Att'y Gen. Op. No. 90010 (1990). Therefore, absent death, resignation, etc. of the incumbent member, there is simply no vacancy to fill. Id.

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July 3, 2002

Support for allowing the incumbent member to continue to hold office until his successor is appointed and qualified is provided in State ex rel. County Attorney v. Willott, 103 Neb. 798, 174 N.W. 429 (1919). The case dealt with an official appointed to an elected position, and who then continued to hold office because the winner of the election died several days prior to the election. The Nebraska Supreme Court stated that an appointee filling a vacancy is protected by a general statutory provision that officers shall hold over until their successors are elected and qualified. 103 Neb. at 799-800, 174 N.W. 429 at 429. Here, we have a Constitutional provision providing that same language. In the present case, we do not even have what qualifies as a "vacancy."

In general, where an appointment is made as the result of a nomination by one authority and confirmation by another, the appointment is not valid and complete until the action of all bodies concerned has been taken. 67 C.J.S. *Officers* §42. The Nebraska Supreme Court, quoting an Arizona case, stated that "The governor's power to appoint is in conjunction with the senate and that when the latter has acted favorably upon an appointment made by him, the appointment is final and complete and entitles the appointee to the office." State ex rel. Johnson v. Hagemeister, 161 Neb. 475, 73 N.W.2d 625 (1955), quoting McBride v. Osborn, 59 Ariz. 321, 127 P.2d 134, (1942). Under the above language, until the Legislature approves Mr. Hall's appointment, he has not been "qualified" (as used in the Constitution) to be seated, so long as you continue to serve.

It seems that 1) the end of a term, by itself, does not create a vacancy, 2) so long as the incumbent member continues to serve there is no vacancy, and 3) a new member is not "qualified" until approved by the Legislature. It is therefore my opinion that when the Governor appoints a replacement for a PRB member whose term has expired, but the Legislature is not in session, and the current member continues to serve, the incumbent member remains in office until the Legislature approves his or her replacement. Although I am not necessarily in support of making an appointee wait until the next Legislative session to be seated, I believe this position has considerably stronger legal support than seating a new member who is not yet approved by the Legislature (unless the incumbent member resigns or otherwise leaves office).

I think the issue will be settled by the August meeting. The Governor's office informed me that Mr. Hall's appointment will be taken up by the Legislature during its special session which begins July 30. The Board will consider NPPD's Beatrice generation facility (PRB-3363) at the July meeting. Since there is some controversy surrounding the issue, it may be best to avoid creating a basis on which someone could challenge the PRB's decision.