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V.D. MAGGIORE - Concurred

September 23, 1959  
Opinion No. 59-143

REQUESTED BY: HONORABLE ROBERT E. MORROW, Chairman  
Senate Committee on Highways & Bridges

OPINION BY: WADE CHURCH, The Attorney General

QUESTION: Is the present chairman of the Arizona Highway Commission, Mr. L. F. Quinn, legally holding that office as chairman under A.R.S. §18-104, in view of the fact that the chairman was appointed to fill a vacancy on the Arizona Highway Commission, and was selected by the Arizona Highway Commission as chairman of that Commission while filling the vacancy on the Commission?

CONCLUSION: Yes.

It is the opinion of the Attorney General that the present chairman of the Arizona Highway Commission is the de facto chairman of that Commission and that his official acts in such capacity are valid so far as the public or third parties are concerned.

This opinion is predicated upon the following observations:

A.R.S. §18-104 provides as follows:

"§18-104. Permanent offices; chairman of commission; meetings

- A. Permanent offices of the commission shall be maintained in the building of the department.
- B. The commission may meet, when necessary, at any place within the state and perform all functions and duties with like effect as if performed at its permanent offices. The commission shall meet at its offices for the purpose of organizing on January 31 of each year, and shall meet at its offices not less than five days in each calendar month for the purpose of carrying out its functions and duties.

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- C. The commissioner having the shortest time to serve, and not holding his office to fill a vacancy, shall be chairman and shall preside at all sessions. In case of absence of the chairman, the commissioner having, in like manner, the shortest term to serve, and not holding office to fill a vacancy, shall preside.
- D. The commission shall hold other regular meetings as it may determine. Special meetings may be called by the chairman, with the concurrence of not less than two members, or by the secretary, with the consent and approval of not less than three members. The concurrence, consent and approval shall be in writing or by telegraph.
- E. The concurrence of a majority of all members is necessary for the authorization of any action. As amended Laws 1956, Ch. 127, § 2."

It is true that the present chairman of Arizona Highway Commission was appointed to fill a vacancy on that Commission created by resignation. However, the present chairman of the Commission is, in contemplation of law, a de facto chairman of the Commission and, therefore, the acts of the Commission, during his chairmanship, and the acts of the chairman himself, are valid so far as the public or third persons are concerned.

Generally the rule is stated in 73 C.J.S. 318, 319, Public Administrative Bodies and Procedure, § 25 as follows:

"A person in possession of and actually performing the duties of an administrative office or of a member of an administrative body under color of right or title is an officer de facto . . . and his acts as such officer or member are valid as far as the public or third persons who have an interest in them are concerned . . . Color of right or title within the meaning of the rule may consist in an election and appointment, however irregular or informal . . ."

The Supreme Court of Arizona has followed the foregoing rule in the case of Juliani v. Darrow (1941) 58 Ariz. 296, 119 P. 2d 565. The facts in that case disclose that Juliani was appointed the town attorney of the Town of South Tucson. He was ineligible to occupy that position because he was not a resident of South Tucson. Payment of his salary was refused and he filed an action to recover the salary. The Supreme Court permitted him to recover on the theory that he was a de facto officer and as such was entitled to the salary the office carried. In the course of the decision, the Supreme Court said:

"Plaintiff contends, however, that even if the position of town attorney of the Town of South Tucson was a public office and he was ineligible to occupy it because of his non-residence, he became under the circumstances a de facto officer and as such was entitled to the salary of the office carried, and we think this position is sound. Plaintiff was appointed to the office by the town council, the body authorized by law to make the appointment, whereupon he took charge of the office and performed its duties until the order of disincorporation was made. This gave him color of title to the office and undoubtedly made him an officer de facto, the rule according to 46 C.J. 1056, § 370, being this: 'Persons having color of title may be regarded as de facto officers, even though legally they are not eligible for the position.' This statement is supported by numerous authorities cited in note 40, among which is Germany v. State, 109 Tex. Cr. Rep. 180, 3 S. W. (2d) 798, wherein appears this language: 'A person may be a de facto officer though ineligible to such office.'

And while it is true, as defendant contends, that the weight of authority is that a de facto officer may not recover the emoluments going with an office, even though he performs his duties, there is a larger number of jurisdictions holding that where he discharges the duties pertaining to the office pursuant to apparent authority and in good faith, he may enforce payment of the compensation to which one filling the office is entitled. See a full annotation on the subject in 93 A.L.R. 258. It is sufficient to say that it has been held for many years in this state that a de facto

officer may recover the salary attached to office when there is no de jure officer claiming it. Behan v. Davis, 3 Ariz. 399, 31 Pac. 521; Adams v. Directors of Insane Asylum, 4 Ariz. 327, 40 Pac. 185."

A.R.S. §18-104 confers upon the chairman of the Arizona Highway Commission authority only to preside at meetings of the Commission and to call special meeting with the concurrence of not less than two members of the Commission. Thus the limitation of authority the Legislature has conferred upon the chairman of the Commission confirms the conclusion that the de facto status of the present chairman of the Commission could not invalidate any acts of that Commission as a public body.

In addition to the request which you made for this opinion of the Attorney General, Honorable David H. Campbell, a Member of the House of Representatives, requested an opinion as to whether members who voted to install the present chairman of the Arizona Highway Commission are subject to removal under the provisions of A.R.S. §18-105. That section provides:

"§18-105. Removal

The governor may remove a member of the commission for cause only, subject to review by the superior court. Notice of a review shall be given within fifteen days after notice of the removal."

It is observed from the foregoing statute that the Governor may remove a member of the Highway Commission "for cause only." The quoted words connote something more than mistake or irregularity. There is a limitation upon the power of removal "for cause only", which has been defined by the courts, including the Supreme Court of Arizona. In the case of In re Farish (1916) 18 Ariz. 298, 302, 158 Pac. 845, the Supreme Court, quoting from Board of St. Commrs. v. Williams, 96 Md. 232, 53 Atl. 923, said:

"The phrase 'for cause' does not mean the arbitrary will of the appointing power, for that might be the outgrowth of mere whim, caprice, prejudice or passion, which would, in reality, be no cause at all. But the phrase 'for cause' must mean some cause affecting or concerning the ability or fitness

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of the incumbent to perform the duty imposed upon him. 'The cause must be one affecting the officer's capacity or fitness for the office.' 21 Am. & Eng. Ency. of Law, 2d Ed., 850. Hence it must be inefficiency, incompetency or other kindred disqualification \* \* \*"

Obviously no cause exists under the circumstances surrounding the appointment of the present chairman of the Arizona Highway Commission, and his de facto status, as indicated by the foregoing decisions of the Supreme Court of Arizona, for removal of the members of the Commission who voted for the appointment of the present chairman of the Commission.

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