



OFFICE OF THE COUNTY ATTORNEY


Douglas M. Duncan
County Executive


Charles W. Thompson, Jr.
County Attorney

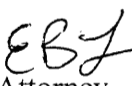
MEMORANDUM

Privileged and Confidential

TO: Isiah Leggett, President
Montgomery County Council

VIA: Charles W. Thompson, Jr. 
County Attorney

VIA: Marc P. Hansen, Chief 
General Counsel Division, County Attorney's Office

FROM: Edward B. Lattner 
Associate County Attorney

DATE: April 13, 1999

RE: **Ethics Commission Hold Over**

QUESTION

Under the common law, a public officer continues in office as a *de facto* officer after his or her term expires until a successor is appointed and qualified, unless the law provides otherwise. While Ethics Commission members are appointed by the County Executive subject to confirmation by the County Council, the ethics law provides that a commissioner serves after his or her term ends until a successor is **appointed**. Does this provision change the common law rule?

ANSWER

Although we believe that the sounder conclusion, in light of the law's legislative history, is that the Council did not intend to change the common law rule, we also believe that a court could reasonably conclude, based on the law's plain language, that the term of a hold-over commissioner ends after the County Executive appoints a successor. When then-County Executive Neal Potter recommended adding the sentence "a Commission member serves until a new member is appointed" to the ethics law, he characterized the change as a "technical amendment" intended to "conform to the common law." In enacting the new law, the Council characterized the change as a "clarification" of commissioners' terms. Nevertheless, the plain

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language of the ethics law provides that the term of a hold-over commissioner ends after the County Executive appoints a successor, regardless of whether the Council confirms that successor. Given the dissonance between the language of the ethics law and its legislative history, we conclude that there is some doubt as to the status of a hold-over commissioner after the Executive appoints a successor.

FACTS

The facts, briefly stated, are as follows. An ethics commissioner's statutory term has ended. The County Executive recently appointed a new commissioner but the hold over commissioner continues to occupy the office and serve as a member of the commission. In fact, since the appointment, the hold over commissioner has fully participated in the last two commission meetings and voted on various matters. The Council has not yet acted on the Executive's appointment.¹

DISCUSSION

Under the common law, a public officer continues to hold office as a *de facto* officer until a successor is appointed and qualified, in the absence of a statutory provision to the contrary.

A 'defacto' officer has been defined as one in actual possession of an office under some colorable or apparent authority, who exercises the duties of the office under such circumstances of reputation and acquiescence by the public authorities and the public as is calculated to induce people, without inquiry, to submit to or invoke his official action, supposing him to be the officer he assumed to be. . . . Color of right may consist of an election or appointment, holding over after the expiration of a term, or by acquiescence by the public for such a length of time as to raise the presumption of colorable right by election, appointment or other legal authority to hold such office.^[2]

Maryland has long recognized this principle.³ The *de facto* officer doctrine is justified because

¹Charter § 215 provides that the County Executive has both the authority and responsibility to appoint members of county commissions; § 215 also gives the Council the authority and responsibility to accept or reject the Executive's appointment. Montgomery County Code § 2-75(b) provides that when there is a vacancy on any board, committee or commission, the County Executive should appoint a successor within 60 days and the Council should confirm or disapprove the appointment within 60 days.

²*Grooms v. LaVale Zoning Board*, 27, Md. App. 266, 272-3, 340 A.2d 385, 390 (1975).

³*See id. at* 274, 340 A.2d 385, 391 (1975) (citing cases since 1853).

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the public interest requires that public offices be filled at all times, without interruption.⁴ This rule applies even where the applicable statute provides for a definite term and does not specifically allow for holding over at the end of the term.⁵

While the Council is certainly free to provide for a different result, there is a presumption that "no alteration of the common law other than that specified and plainly pronounced was meant."⁶

Although the plain language of a statute is always the starting place for effectuating legislative intent, the Maryland Court of Appeals recently reaffirmed that the plain meaning rule of construction is not absolute.

The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature. As we often have said, the starting point for determining legislative intent is the language of the statute itself. Where the statutory language is plain and free from ambiguity, and expresses a definite and simple meaning, courts do not normally look beyond the words of the statute itself to determine legislative intent.

In *Tracey v. Tracey*, 328 Md. 380, 387, 614 A.2d 590, 594 (1992), however, this Court opined:

While the language of the statute is the primary source for determining legislative intention, the plain meaning rule of construction is not absolute; rather, the statute must be construed reasonably with reference to the purpose, aim, or policy of the enacting body. The Court will look at the larger context, including the legislative purpose, within which statutory language appears. Construction of a statute which is unreasonable, illogical, unjust, or inconsistent with common sense should be avoided. [Citations omitted.]

Thus, we are not constrained by the literal or usual meaning of the terms at issue. Rather, we must interpret the meaning and effect of the language in light of the objectives and purposes of the provision enacted. Furthermore, we should

⁴*Id.*

⁵*Claude v. Wayson*, 118 Md. 477, 84 A. 562 (1912).

⁶*Baltimore v. Baltimore Gas and Electric Co.*, 232 Md. 123, 135, 192 A.2d 87, 93 (1963).

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construe the statute in a manner that results in an interpretation reasonable and consonant with logic and common sense.^[7]

The legislative history suggests that the Council intended to codify the common law rule that a commissioner continues to serve after the expiration of his term until a successor is appointed and qualified. When then-County Executive Neal Potter recommended adding the sentence “a Commission member serves until a new member is appointed” to the ethics law, he characterized the change as a “technical amendment.” In his transmittal memorandum to the Council, Mr. Potter attached a memorandum from the Chair of the Ethics Commission explaining the reasons for the amendments. That latter memorandum states, “This amendment conforms to the common law and present practice.” In enacting the new law, the Council characterized the change in the bill title as a “clarification” of commissioners’ terms.

On the other hand, the Council adopted language that alters the common law rule by providing that a commissioner serves until the County Executive appoints a successor. This is markedly different from the method of succession the Council provided for all other County boards, committees and commissions.⁸ If the Council had merely intended to clarify an ethics commissioner’s authority to hold-over until it confirms a successor, the Council would have expressly said so as it has done with respect to other County committees.

CONCLUSION

The lack of congruence between the language used in the ethics law and the law’s legislative history leads us to conclude that the status of a hold-over commissioner is in some doubt. Although we believe that the sounder conclusion, in light of the law’s legislative history, is that the Council did not intend to change the common law rule, we also believe that a court could reasonably conclude, based on the plain language of the law, that a hold-over commissioner is not holding office under color of right after the County Executive appoints a

⁷*Degren v. State*, 352 Md. 400, 417-18, 722 A.2d 887, 895 (1999) (internal citations and quotations omitted).

⁸*See, e.g.*, Committee on Hate/Violence (“Members continue in office until their successors are appointed and qualified” — § 27-63(a)(3)); Commission for Women (“The members shall continue in office until their successors are appointed and have qualified . . .” — § 27-28(b)); Commission on Human Relations (“Each member of the Commission continues to serve until his or her successor has been appointed and approved.” § 37-2(a)); Animal Matters Hearing Board (“board members and alternates continue to serve after the expiration of each term until a successor is appointed and qualified” — § 5-9(b)); Alcohol and other Drug Abuse Advisory Council (“At the end of a term, an appointed member continues to serve until a successor is appointed and qualified” — § 24-41); Commission on Aging (“Members shall continue in office until their successors are appointed and approved” — § 27-35); Solid Waste Advisory Committee (“Members shall serve until their successors have been appointed and have qualified” — § 48-38(a)); and Commission on Landlord Tenant Affairs (“Each member of the Commission shall continue to serve until his successor has been appointed and has been confirmed” — § 27-9(a)).

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successor. The latter finding would put into question the actions of the Ethics Commission in which the hold-over commissioner participated.

The Council may want to remove this cloud of doubt by acting on the Executive's appointment of a successor to the Ethics Commission; the Council may also want to consider amending the ethics law with respect to hold-over commissioners.

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cc: Douglas M. Duncan, County Executive
Deborah Goodwin, Special Assistant to the County Executive
Michael E. Faden, Senior Legislative Attorney

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