

STATE OF MISSISSIPPI



JIM HOOD
ATTORNEY GENERAL

OPINIONS
DIVISION

July 26, 2019

John H. McWilliams, Esquire
Attorney, Sunflower County Board of Supervisors
Post Office Box 288
Drew, Mississippi 38737-0288

Re: Authority of Community College Trustee to Holdover

Dear Mr. McWilliams:

Attorney General Jim Hood is in receipt of your opinion request and has assigned it to me for research and reply. In your letter, you explain that Sunflower County appoints Trustees to the Mississippi Delta Community College (hereinafter "MDCC") under Section 37-29-65 of the Mississippi Code Annotated. You state that the term of the trustee from District 3 expired on June 30, 2019. The Supervisor from District 3 has advised that he is not yet prepared to nominate a successor trustee.

Questions Presented

1. Is this Trustee position now vacant, or would the previous Trustee hold over and continue to serve until a successor is appointed?
2. Is the Board of Supervisors authorized to declare the position vacant and specify that the previous trustee would not hold over and would not be authorized to attend meetings or otherwise undertake the duties of that position?

Response

1. We find no authority for a member of a community college board of trustees to "hold over" after his or her term has expired. The position in question becomes vacant upon the expiration of the term of the trustee and will remain vacant until a successor is appointed.

2. Since the member's term expired on June 30, 2019, the Board of Supervisors has the authority to declare the office vacant and make an appointment to fill the vacancy.

Applicable Law and Discussion

Section 25-1-7 of the Mississippi Code Annotated provides:

If any person elected or appointed to any state, state district, levee board, county, county district, or municipal office shall fail to qualify as required by law on or before the day of the commencement of his term of office, or for any cause any such officer shall hold over after his regular term of office expires **under the authority given him to hold over until his successor is appointed or elected and qualified**, a vacancy in such office shall occur thereby and it shall be filled in the manner prescribed by law, as provided by Section 103 of the Constitution for filling vacancies in such offices, unless the failure to qualify arises from there being no officer to approve the bond of such officer-elect, and except the Governor-elect when the Legislature fixes by resolution the time of his installation. This section shall not be applicable to any coroner who fails to qualify as provided in Section 19-21-105.

(Emphasis added).

Section 25-1-37 of the Mississippi Code Annotated provides:

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The official acts of any person in possession of a public office and exercising the functions thereof shall be valid and binding as official acts in regard to all persons interested or affected thereby, whether such person be lawfully entitled to hold the office or not and whether such person be lawfully qualified or not; but such person shall be liable to all the penalties imposed by law for usurping or unlawfully holding office, or for exercising the functions thereof without lawful right or without being qualified according to law.

In response to your first question, our opinion to H. Donald Brock, Jr., dated January 19, 2010, stated:

Section 25-1-7 requires that in order for a particular officer to be entitled to remain in office after the expiration of his or her term, there must be statutory authority specific to the office in question authorizing same. MS AG Op., Litchliter (April 14, 2006); MS AG Op., Burnett (June 12, 2000); MS AG Op., Hardwick (June 16, 2000).

We further opined that the position becomes vacant upon the expiration of the statutory term of office and remains vacant until a qualified person is appointed by the governing authority. We find no language in Section 37-29-65 or related statutes indicating said trustee may act in a holdover capacity until his successor is appointed and qualified.

In response to your second question, Section 37-29-65 of the Mississippi Code Annotated provides:

(6) The board of supervisors shall elect the requisite number of discreet persons of good moral character, sufficient education and experience, and of proven interest in public education, who are qualified electors of the county, as trustees of the junior college; **and annually thereafter the board of supervisors in like manner shall fill vacancies.** All trustees so appointed shall be listed in the minutes of the board of supervisors and their appointment shall be certified by the chancery clerk to the president of the junior college.

(*Emphasis added*). The Mississippi Supreme Court has held:

Whether there is in fact a vacancy in office is not settled by the declaration of the authority vested with the power of filling it. It is a question always open to judicial interpretation. **State v. Harrison**, 113 Ind. 434, 16 N. E. 384, 3 Am. St. Rep. 666; **Commonwealth v. Meeser**, 44 Pa. 341; **Dullam v. Willson**, 53 Mich. 392, 19 N. W. 112, 51 Am. Rep. 120. In the case of **State v. Harrison**, 113 Ind. 434, 16 N. E. 384, 3 Am. St. Rep. 666, it is said: "The word 'vacancy,' as applied to an office, has no technical meaning. An office is not vacant so long as it is supplied in the manner provided by the Constitution or law with an incumbent who is legally qualified to exercise the powers and perform the duties which pertain to it, and, conversely, it is vacant in the eye of the law whenever it is unoccupied by a legally qualified incumbent, who has a lawful right to continue therein until the happening of some future event."

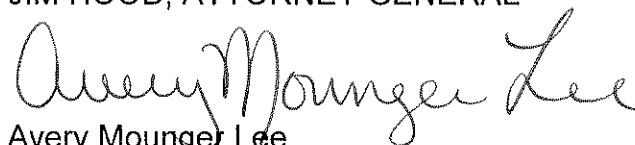
State v. Hays, 45 So. 728, 729 (Miss. 1908). In your factual scenario, the office of the trustee became vacant by operation of law upon the expiration of the statutory term of office as there is no holdover provision authorizing the trustee to remain in office. The Board of Supervisors is statutorily-authorized to make an appointment to fill the vacancy. In fact, the Board of Supervisors is legally required to make that appointment within a reasonable time and will be derelict in its duties if it refuses to do so. Once the Board of Supervisors makes the appointment, it should notify the MDCC Board of Trustees of its appointment.

If this office may be of any further assistance to you, please let us know.

Sincerely,

JIM HOOD, ATTORNEY GENERAL

By:


Avery Mounger Lee
Special Assistant Attorney General