



COMMONWEALTH OF PENNSYLVANIA
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February 6, 1998

Honorable Mark S. Schweiker
Lieutenant Governor
200 Main Capitol Building
Harrisburg, Pennsylvania

Dear Lieutenant Governor Schweiker:

You have requested my opinion with respect to the following two questions relevant to the changes in the composition of the Board of Pardons brought about by the amendment of Article IV, Section 9(b) of the Pennsylvania Constitution approved by the voters at the recent November election:

- (1) Does the amendment repeal the provision of Section 403 of the Administrative Code that staggers the six-year terms of the three Board members appointed by the Governor?
- (2) Does the amendment disqualify the penologist member of the Board, whose six-year term expires on November 30, 1999, from serving the balance of his term?

The amendment of Section 9(b) to change the composition of the Board of Pardons was part of a broader amendment of Article IV, Section 9, which, in addition, amended Section 9(a) to require a unanimous recommendation of the Board before the Governor can pardon or commute the sentence of an individual sentenced to death or life imprisonment, and which further amended Section 9(b) to require only a majority vote of the Senate to approve the Governor's appointments to the Board.

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I. Staggered Terms

Article IV, Section 9(b) provides that the Board of Pardons shall consist of the Lieutenant Governor, who shall serve as chairman, the Attorney General, and three members appointed by the Governor, with Senate consent, for terms of six years. Before the recent amendment, Section 9(b) provided that the three members appointed by the Governor shall be respectively a member of the bar, a penologist, and a doctor of medicine, psychiatrist, or psychologist. Following the amendment, Section 9(b) provides that the three members appointed by the Governor shall be respectively a crime victim, a corrections expert, and a doctor of medicine, psychiatrist, or psychologist.

Section 403 of The Administrative Code of 1929, 71 P.S. §113, prescribes the composition of the Board of Pardons in language that parallels the language of Article IV, Section 9(b). Section 403 provides additionally that the six-year terms served by members of the Board appointed by the Governor are to be staggered, with appointments made one every two years.

Section 403 was amended by the Act of June 1, 1995, P.L. 1017, No. 15 (Spec. Sess. No. 1) ("Act 15"), to conform its provisions to those of Joint Resolution No. 1995-1 (Spec. Sess. No.1) passed on April 25, 1995, which first proposed the amendment of Article IV, Section 9(b) that the voters approved in November. Act 15 preserved the staggered terms provision of Section 403.

"It is an established principle that existing statutes not expressly or impliedly repealed by the Constitution remain in full force and effect." Township of East Rockhill v. Borough of Perkasio, 3 Pa. Cmwlth. 36, 47 (1971) (citations omitted). Furthermore, "the Constitution is not to be construed as an abrogation of existing laws, unless the intent is too clear to be mistaken...." In re Georges Township School Directors, 286 Pa. 129, 135 (1926), quoting, White on the Constitution, 21.

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The recent amendment of Article IV, Section 9(b) does not, by its terms, repeal Section 403; nor, in my judgment, does it do so by implication. There is no inherent conflict between the language of the Constitution and the language of the statute; the former provides for six-year terms while the latter provides that such terms shall be staggered. That Act 15 preserved the staggered terms provision strongly suggests that the General Assembly was not proposing to the voters that the Constitution should require that Board members appointed by the Governor serve coincident terms. At a minimum, such history belies a finding of clear constitutional intent to abrogate the provision for staggered terms.

Accordingly, it is my opinion, and you are so advised, that the recent amendment of Article IV, Section 9(b) of the Pennsylvania Constitution does not repeal the provision of Section 403 of the Administrative Code that staggers the six-year terms of members of the Board of Pardons appointed by the Governor.

II. The Penologist

The amended Article IV, Section 9(b) requires that the Governor appoint a crime victim and a corrections expert to the Board, rather than an attorney and a penologist. The term of the incumbent attorney member expired on November 30, 1997. The term of the incumbent penologist member does not expire until November 30, 1999. While the penologist may be qualified also as a corrections expert, I conclude that he is entitled to complete his term of office regardless.

In Suermann v. Hadley, 327 Pa. 190, 198 (1937), the Court observed that "[t]he Legislature may change an 'appointive power' but in doing so, generally speaking, it acts prospectively...." Although the Court's statement was concerned with statutory rather than constitutional interpretation, "[t]he established rules of construction applicable to statutes apply also in the construction of a Constitution," Booth & Flinn v. Miller,

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237 Pa. 297 (1912), and the applicable rule of constitutional interpretation, in any event, presumes that "[c]onstitutional provisions operate prospectively...unless the language used or the purpose of the provision indicates that [retrospective] operation was intended." Township of East Rockhill, supra, 3 Pa. Cmwlth. at 49, citing, Perkins v. Slack, 86 Pa. 270 (1878).

The Suermann case is instructive since it invalidated a statutory provision that purported to remove from office the incumbent members of a municipal board, as part of a statutory reorganization of the board that changed its functions and duties and prescribed new qualifications for board members. In the Court's analysis, the validity of the removal provision turned on whether the reorganization of the board was "of sufficient moment to sustain a finding of legislative intent to abolish the offices affected and to oust the incumbents as an incident thereof..." Suermann, supra, 327 Pa. at 194. For a reorganization to require the abolition of prevailing offices, the Court observed, "the intent to wipe out the old structure must be clearly apparent." Id. at 197.

Curiously, the Court declined even to consider the character of the changes to the affected board, emphasizing instead that "[n]owhere does the [act reorganizing the board] in terms abolish the office of members of the Board..." Id. at 197. The Court proceeded to hold that:

As the act did not, in terms, abolish the offices of the old members, the provisions for appointment of new members must be construed to be prospective. The old members will therefore, continue in their offices until the expiration of the terms for which they were appointed....

Id.

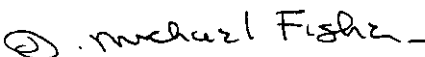
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Clearly, the amendment of Article IV, Section 9(b) did not "in terms" abolish the office of members of the Board of Pardons. On the contrary, it merely changed the qualifications for office of two of the three members appointed by the Governor. Nor, moreover, can it be said that the totality of changes in the Board's operation and the appointment and qualifications of its members brought about by the amendment of Article IV, Section 9, are "of sufficient moment" to evidence an intent to "wipe out the old structure" of the Board or otherwise to abolish the office of any of its members.

Accordingly, it is my opinion, and you are so advised, that the recent amendment of Article IV, Section 9(b) of the Pennsylvania Constitution does not disqualify the incumbent member appointed as a penologist from serving the balance of his six-year term.

Finally, you are advised that, in accordance with Section 204(a)(1) of the Commonwealth Attorneys Act, 71 P.S. §732-204(a)(1), you are required to follow the advice set forth in this Opinion and shall not in any way be liable for doing so.

Sincerely yours,



D. Michael Fisher
Attorney General

DMF/LJR