

Opinion No. 12-886

April 27, 1912

BY: FRANK W. CLANCY, Attorney General

TO: Mr. M. W. Browne, Secretary of the Board of Regents, New Mexico Normal University, East Las Vegas, N. M.

NORMAL UNIVERSITY OF LAS VEGAS.

John D. W. Veeder held to continue as member of the Board of Regents until his successor is appointed and qualified.

OPINION

{*27} While I have not been able to take the time to make an exhaustive examination of all authorities on the subject presented by your letter of the 22nd instant, which you handed to me day before yesterday, yet I am now satisfied that the opinion which I expressed to you as my first impression is correct.

{*28} In your letter you say that Mr. F. H. Pierce was confirmed as a member of your Board by the Territorial Council on March 13, 1909, for a term expiring February 22nd, 1912, and that he died February 24, 1912; that Mr. John D. W. Veeder was appointed February 29th, 1912, to fill the vacancy caused by Mr. Pierce's death, and that Mr. Veeder's name was sent to the Senate early in the present month, and was rejected on April 8, 1912. Under these circumstances you submit three questions, as follows:

1. Was Mr. Veeder legally a member of the board between February 29 and April 8, when he was rejected by the Senate?
2. Is he legally a member since his rejection?
3. Will meetings of the Board be illegal if he sits with the board as a member and acts as such, even though there may be a quorum of members whose rights are not questioned also present?

It will be unnecessary to make any answer to the third question, as I am satisfied that the first and second should be answered in the affirmative.

At the time of Mr. Veeder's appointment on February 29th, 1912, there can be no doubt that a vacancy existed, which the Governor was authorized to fill in accordance with the power conferred upon him by Section 5 of Article XX of the Constitution, which provides for the filling of vacancies which occur while the Senate is not in session in any office the incumbent of which is appointed by the Governor, by and with the advice and consent of the Senate, and authorizes the Governor to "appoint some qualified person

to fill the same until the next session of the Senate." A vacancy undoubtedly existed, caused by the death of Mr. Pierce, and Mr. Veeder's appointment would be until the next session of the Senate. It then became the duty of the Governor, by the same section, to appoint, by and with the advice and consent of the Senate, some qualified person to fill said office for the period of the unexpired term. It might be urged that as Mr. Pierce's term of office had expired just before his death this language about the period of the unexpired term has no application, but I think this is quite immaterial. The Constitution clearly intends that no office shall remain vacant, no matter how or when the vacancy occurs, and that if it does occur when the Senate is not in session, the vacancy must be filled by the Governor.

Section 2 of the same article of the Constitution provides: "Every officer, unless removed, shall hold his office until his successor is duly qualified." I am satisfied that under this provision Mr. Pierce was lawfully in office up to the time of his death, and that Mr. Veeder continues in office, notwithstanding the action of the Senate in rejecting his name.

In the case of *People v. Tyrrell*, 87 Cal. 477, it appears that on November 17, 1884, during a recess of the legislature, a vacancy existed in the membership of the State Board of Health, and on that day Tyrrell was appointed by the Governor, and in the commission issued it was recited that he was appointed in place of a member deceased "for the term expiring January 11, 1888." He qualified on November 19, and continued to discharge the duties of the office until the case was instituted against him. On January 10, 1885, the Governor informed the Senate of the appointment of Tyrrell on November 17, 1884, for the term of four years, and the Senate consented {²⁹} to that appointment. No additional commission was issued to Tyrrell. On March 18, 1889, during a recess of the legislature, the Governor appointed another person, one Laine, who immediately qualified and was compelled to institute proceedings against Tyrrell to get possession of the office. The court below ordered judgment in favor of the relator, ousting Tyrrell from office, and the latter appealed to the supreme court.

That court held that the commission issued on Nov. 17, 1884, had the legal effect of an appointment to fill the vacancy until the adjournment of the next session of the legislature, as that was the limit of the term for which recess appointments could be made. The court says also that upon the issuance of the commission the appointment was complete and needed no action of the Senate to confirm it, and that under this commission Tyrrell was vested with the right to hold office until the appointment and qualification of a successor, saying that the limitation that a person who received a recess appointment could only hold until the adjournment of the next session of the legislature meant, when construed with another section, which like our Constitution in substance provided that every officer must continue to discharge the duties of his office until his successor has qualified, that the term of the appointed officer should expire at the adjournment of the next session of the legislature, and his successor might take his place, but if no successor were appointed then, he would continue until such successor should appear and qualify. The court also said that it was settled law that the mere expiration of the term of the incumbent of an office does not create a vacancy such as

the Governor alone is authorized to fill, and that it therefore followed that the appointment of the relator in 1889, when the legislature was not in session, was invalid, and judgment should have been rendered in favor of Tyrrell, and the case was reversed.

This would seem to be even a stronger case than that of Veeder, unless it could be held that the action of the Senate in rejecting him terminated his official existence. I am unable to find, however, any authority to support this proposition, and am compelled to believe that Mr. Veeder continues in office until his successor is regularly appointed and qualified.