

Opinion No. 19-2268

May 17, 1919

BY: HARRY S. BOWMAN, Assistant Attorney General

TO: The Honorable O. A. Larrazolo, Governor of the State of New Mexico, Santa Fe, New Mexico.

Appointment Members State Board of Pharmacy Need Not Be Confirmed By Senate.

OPINION

Referring to the oral request from your office, accompanied by letter from W. H. Duckworth, Secretary of the New Mexico Board of Pharmacy, and copy of the written appointment of J. H. McCain of Roswell to that board by former Governor W. E. Lindsey for the term ending June, 1923, and the written appointment of four members to the board made by yourself under date of the 15th of March, 1919, as to the legality of the appointment of Mr. McCain, we will advise you as follows:

The question involved is as to the holding of the office by McCain under appointment of Governor Lindsey, in view of the appointment made by you of H. O. Wicks of Grant County to serve for the same period, that is, for the term ending March, 1923.

The appointment of the members to the New Mexico State Board of Pharmacy made by you were submitted to the senate for confirmation, and were confirmed by that body. The appointment of McCain by Governor Lindsey, as I am informed, was not confirmed by the senate. The question is, was such confirmation necessary?

Section 5 of Article V of the Constitution provides that,

"The governor shall nominate, and, by and with the consent of the senate, appoint all officers whose appointment or election is not otherwise provided for, and may remove any officer appointed by him for incompetency, neglect of duty or malfeasance in office. Should a vacancy occur in any state office, except lieutenant-governor and member of the legislature, the governor shall fill such by appointment, and such appointee shall hold office until the next general election, when his successor shall be chosen for the unexpired term."

That a member of a Board, such as the New Mexico State Board of Pharmacy, is an officer within the contemplation of the constitution must be admitted and unless some other provision for the appointment of the members of that board is contained within the statute law of the State, then it would be necessary for the appointee to receive the confirmation of the senate prior to his being qualified to assume office.

The authority for the appointment of the members of the Board of Pharmacy is contained in section 4054, Code of 1915, wherein it is provided that the governor shall appoint five persons, all of whom shall have been residents of the State, and actively engaged in the drug business, for three or more years, and of at least eight years practical experience as druggists and pharmacists, who shall be known and styled, "the Board of Pharmacy for the State of New Mexico," etc.

There is nothing in this section or any other part of the Codification wherein it is provided that appointments to the Board of Pharmacy shall be confirmed by the Senate.

There are other boards whose appointments are authorized by the governor which are in a similar condition, for instance, the Board of Examiners in Optometry, the provisions for the appointment of whom are contained in section 3992, Code of 1915; the Board of Dental Examiners, whose appointment is provided for in section 1826, Code 1915; and the Board of Embalmers, the authority for the appointment of whom is contained in section 2081, Code 1915; and possibly some others. The State Board of Health, as it formerly existed, was composed of seven reputable physicians, whose appointment shall be made the same as appointees for other state boards.

The members of the State Board of Osteopathy, however, which is also appointed by the governor, must be confirmed by the senate, section 4003, Code 1915. The law providing for a State Board of Osteopathy was passed at the same session as that providing for a Board of Examiners of Optometry, to-wit, the session held in the year 1905, and the two different methods of appointment of the members of the two such boards is provided for.

It is therefore quite clear that it was the intention of the legislature that the members of one board should be confirmed by the senate upon nomination by the governor, while the other should be appointed by the governor without any such confirmation.

Construing these sections together and comparing their provisions, it is apparent that it was not the intention of the legislature that the members of the Board of Pharmacy should be subject to confirmation by the senate, after appointment by the governor, and the fact that it has been the custom to submit such nominations to the senate for confirmation does not alter the situation.

In the case of *People ex rel. Kresser et al. vs. Fitzsimmons et al.*, 68 N. Y., 514, the mayor of the City of Albany appointed as excise commissioners three persons, and, under an erroneous impression that it was necessary that such appointments should be confirmed by the common council, sent the nominations to that body for such confirmation. One of the members refused to accept the office, and another person was appointed by the mayor to fill the vacancy. The mayor subsequently appointed three other persons to fill the office of excise commissioners, upon the theory that the first named appointees had not been properly appointed. The question involved was as to whether or not the first or second set of appointees was entitled to the office, and the Court of Appeals of the State of New York held that the fact that the mayor had sent to

the common council the names of the appointees for confirmation in no way affected their appointments, as such appointments dated from the time of the making thereof by the mayor, the confirmation of excise commissioners not being required by the statute.

We are satisfied, therefore, that the appointment of McCain by Governor Lindsey was a valid appointment without the confirmation thereof by the state senate, and he therefore holds his office as a member of the Board of Pharmacy, unless he has been removed.

I understand that there has been no attempt to remove him except such as might be considered to be implied by virtue of the appointment of Wicks to membership on the Board for the same term.

The power to fill an office does not imply the power to declare the office vacant.

Throop on Public Officers, p. 422, sec. 437.

Mechem on Public Officers, p. 46, sec. 113.

Unless, therefore, Mr. McCain has been removed for incompetency, neglect of duty or malfeasance in office, he still retains his commission as a member of the Board of Pharmacy, and under the holdings of the two text writers last above named, the appointment of Wicks to the same office is void.

I am returning to you herewith the papers handed me, and mentioned in the first paragraph of this letter.