

DECISION

18650 *Suritz*
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-202734

DATE: June 30, 1981

MATTER OF: Members of Merit Systems Protection
Board--Service Beyond End of Term

- DIGEST:
1. On January 1, 1979, the Civil Service Commission was redesignated the Merit Systems Protection Board, and the Commissioners became Board members, pursuant to the Civil Service Reform Act of 1978. Under transitional legislation, those Board members serve out the terms of office they would have had as Commissioners and may hold over in office thereafter until new 7-year full-term appointments to the Board are made under newly enacted law (5 U.S.C. 1202). If a former Commissioner resigns, his replacement serves the remainder of his term under the same conditions and with the same eligibility to hold over in office. Subsec. 202(b), Public Law 95-454.
 2. New full-term appointments to the Merit Systems Protection Board are governed by 5 U.S.C. 1202, as added by the Civil Service Reform Act of 1978. Under that statute, Board members appointed to a full 7-year term are ineligible for reappointment but may hold over in office for up to 1 year after the end of their terms; however, Board members appointed to fill a vacancy in office and serve out the remainder of a 7-year term may be reappointed to another term but are not specifically authorized to hold over in office. These individuals should not hold over unless the law is changed to authorize specifically.

This action is in response to a letter dated March 30, 1981, from the Merit Systems Protection Board, questioning whether a Board member may continue to serve beyond the expiration of his term of office until such time as a new appointment to the office is made. We understand that the question relates specifically to Board member Ronald P. Wertheim. We have concluded that he may properly continue to serve beyond the expiration of his term of office.

[Propriety of Merit Systems Protection Board Member Serving Beyond End of Term]

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The Merit Systems Protection Board was established on January 1, 1979, as a successor agency to the United States Civil Service Commission. Jule M. Sugarman became an original member of the Board on January 1, 1979, with a term of office to last until March 1, 1981, by virtue of his prior membership on the Civil Service Commission. Mr. Sugarman thereafter resigned from the Board, and in 1980 Ronald P. Wertheim assumed office as a Board member as his replacement to serve out the remainder of that term.

Uncertainty has arisen with respect to the matter of whether or for how long Mr. Wertheim may continue to serve as a Board member after March 1, 1981, i.e., the date of expiration of the term of office he assumed in 1980. The Board notes that under prior law (former 5 U.S.C. 1102), every Civil Service Commissioner could continue to serve indefinitely after his term of office expired, until such time as his successor was appointed. However, it is also noted that under newly enacted law (5 U.S.C. 1202, as added by the Civil Service Reform Act of 1978), certain restrictions are imposed on the eligibility of Board members to hold over in office beyond the expiration of a term. Questions are therefore raised as to what law applies in Mr. Wertheim's situation, and how long he may legally continue to serve as a Board member beyond March 1, 1981, the date his term of office expired.

The Board requests a decision regarding the proper application of the restrictions imposed on holding over in office contained in the newly enacted provisions of 5 U.S.C. 1202. In that connection, it is indicated that uncertainty has arisen as to whether a distinction must be made under 5 U.S.C. 1202 between members who are appointed to a full 7-year term under the new law, and members who are only appointed to fill a vacancy in office and serve out the remainder of a predecessor's 7-year term. While it is our view that those provisions do not apply to Mr. Wertheim's present situation, we will also provide our interpretation of those provisions for future reference.

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I. Eligibility for Ronald P. Wertheim to Hold Over in Office

On January 1, 1979, the Civil Service Commission was redesignated the Merit Systems Protection Board, and the Commissioners were redesignated as Board members, pursuant to the Civil Service Reform Act of 1978, Public Law 95-454, October 13, 1978, 92 Stat. 1111-1227, section 201 of Reorganization Plan No. 2 of 1978, 92 Stat. 3784; and Executive Order No. 12107 of December 28, 1978.

With respect to the terms of office of the Civil Service Commissioners who were redesignated as members of the Merit Systems Protection Board, subsection 202(b) of the Civil Service Reform Act, 92 Stat. 1131, provides that:

"(b) Any term of office of any member of the Merit Systems Protection Board serving on the effective date of this Act shall continue in effect until the term would expire under section 1102 of title 5, United States Code, as in effect immediately before the effective date of this Act, and upon expiration of the term, appointments to such office shall be made under sections 1201 and 1202 of title 5, United States Code (as added by this section)."

It is to be observed that this transitional legislation directs that the term of office of a former Commissioner shall continue in effect under former section 1102 of title 5, United States Code, in its entirety rather than under any particular subsection thereof. It is further to be observed that an appointment is to be made under newly added sections 1201 and 1202 of title 5, United States Code, only after the former Commissioner's term has expired. Hence, in our view the conditions of the term of office held by former Commissioner Jule M. Sugarman and his replacement Ronald P. Wertheim are governed by the provisions of former 5 U.S.C. 1102, rather than the newly enacted provisions of 5 U.S.C. 1201 and 1202.

Former section 1102 of title 5, United States Code, provides in pertinent part that:

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"(a) The term of office of each Civil Service Commissioner is 6 years. The term of one Commissioner ends on March 1 of each odd-numbered year.

"(b) A Commissioner appointed to fill a vacancy occurring before the end of the term of office of his predecessor serves for the remainder of that term. * * *

"(c) When the term of office of a Commissioner ends, he may continue to serve until his successor is appointed and has qualified."

It is our view that under the above-quoted transitional provisions of the Civil Service Reform Act and the provisions of former subsections 1102(a) and (c) of title 5, United States Code, on January 1, 1979, Civil Service Commissioner Jule M. Sugarman took office as a member of the Merit Systems Protection Board for a term to end on March 1, 1981, but with an eligibility to serve beyond that date until the appointment of a successor to a new full term of office. It is also our view that when Ronald P. Wertheim assumed the office in 1980 after Mr. Sugarman's resignation, he did so under former 5 U.S.C. 1102(b) and (c) for the remainder of that same term and with the same eligibility to hold over in office beyond the expiration of the term. When Mr. Wertheim's successor is eventually appointed to a new full term of office, that appointment will then be made under and be governed by the newly enacted provisions of 5 U.S.C. 1201 and 1202, and only then will there be attached to the office the restrictions contained in 5 U.S.C. 1202 on holding over in office beyond the end of a term.

Accordingly, Robert P. Wertheim may properly continue to serve as a member of the Merit Systems Protection Board until such time as his successor is appointed to a new full term of office.

II. Holding Over in Office by Board Members Subject to 5 U.S.C. 1202

With respect to the further question raised regarding the proper application of the restrictions imposed on

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holding over in office contained in the newly enacted provisions of 5 U.S.C. 1202, that statute provides in pertinent part:

"(a) The term of office of each member of the Merit Systems Protection Board is 7 years.

"(b) A member appointed to fill a vacancy occurring before the end of a term of office of his predecessor serves for the remainder of that term. Any appointment to fill a vacancy is subject to the requirements of section 1201 of this title.

"(c) Any member appointed for a 7-year term may not be reappointed to any following term but may continue to serve beyond the expiration of the term until a successor is appointed and has qualified, except that such member may not continue to serve for more than one year after the date on which the term of the member would otherwise expire under this section."

Senate Report No. 95-969, July 10, 1978, at page 28 provides the following explanation concerning the intended purpose and application of that statute:

"Section 1202. Term of office; filling vacancies; removal

"Subsection (a) provides for a seven year term for members of the Merit Systems Protection Board.

"Subsection (b) provides that in the event of any vacancy on the Board, a member appointed to fill the vacancy serves only until the expiration of the term remaining. Any appointment to fill a vacancy is subject to the provisions of section 1201.

"Subsection (c) provides that Board members may not be reappointed if they have

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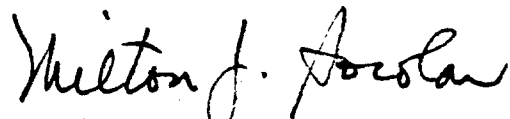
been appointed to a full term, but may serve for up to one year beyond the expiration of the term if a successor has not been appointed and qualified." (Emphasis added.)

In our view, the above-quoted language of the statute, together with the explanatory statements of intent appearing in its legislative history, demonstrate that a significant distinction is to be made between Board members who are appointed to a full 7-year term and those who are appointed to fill a vacancy in office. Board members appointed to a full 7-year term are ineligible for reappointment but may hold over in office for up to 1 additional year beyond the expiration of their terms. On the other hand, members appointed to fill a vacancy in office may serve "only until the expiration of the term remaining," although they may then be reappointed to new full terms of office.

As a general rule, the eligibility of a public official to serve beyond the expiration of his term of office is a matter for determination under the specific provisions of statute which pertain to that particular office. See 57 Comp. Gen. 213 (1978); 63 Am. Jur. 2d, Public Officers and Employees, sec. 155, 157. If a public officer continues to serve beyond the expiration of his term in contravention of statute, the validity of his official acts and his entitlement to salary become questionable. See, generally, 56 Comp. Gen. 761, 766 (1977); and compare Williams v. Phillips, 360 F. Supp. 1363 (D. D.C. 1973), motion for stay denied 482 F.2d 669 (D.C. App. 1973). Although we recognize the difficulties which could arise under a rule permitting no hold over past the expiration of a member's term, the consequence of a member continuing to act as a member without holdover authority would also be very disruptive. Accordingly, we believe that the Merit Systems Protection Board should not assume that a Board member appointed to fill a vacancy of less than a full-term may serve beyond the expiration of the term of office to which appointed. If the Board feels that this limitation is too restrictive, an amendment to the statute could be proposed to permit persons appointed to fill such vacancies to hold over in office for a period of time or until a successor is appointed.

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The questions presented are answered accordingly.

A handwritten signature in cursive script, reading "Milton J. Aroslan".

Acting Comptroller General
of the United States