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Mayoral Succession

1913

New York, September 23, 1913.

Hon. William A. Prendergast,
Comptroller.

Sir:

I have received your communication under date of September 11, 1913, signed by Deputy and Acting Comptroller Mathewson, relative to the situation created by the recent resignation of the President of the Board of Aldermen, followed by the death of the Mayor. My opinion is requested upon various phases of this situation, and I have set out below the substance of the questions propounded in said communication from you, so far as is deemed necessary to an understanding of this opinion.

Preliminarily I may say that the statutory provision having principal bearing upon the subject is section 23 of the Greater New York Charter, which is as follows:

"Whenever there shall be a vacancy in the office of Mayor, or whenever, by reason of sickness or absence from the city, the mayor shall be prevented from attending to the duties of his office, the president of the board of aldermen shall act as mayor and possess all the rights and powers of mayor during such disability or absence. In case of a vacancy he shall so act until noon of the first day of January succeeding the election at which the mayor's successor shall be chosen. It shall not be lawful for the president of the board of aldermen, when acting as mayor in consequence of the sickness or absence from the city of the mayor, to exercise any powers of appointment to or removal from office, unless such sickness or absence of the mayor shall have continued thirty days; or to sign, approve

or disapprove any ordinance or resolution unless such sickness or absence shall have continued at least nine days. The board of aldermen shall elect a vice-chairman to preside over its meetings, who shall possess the powers and perform the duties of the president of the board of aldermen, when the president is sick, absent or under suspension, or while the president of the board of aldermen is acting as mayor, or when a vacancy occurs in said office, and who shall, during such time, be a member of every board of which the president of said board is a member by virtue of his office."

It will be noted that the last paragraph of this section expressly provides that during a vacancy or temporary absence in the office of the President of the Board of Aldermen, the Vice-Chairman of said Board shall possess all the powers and perform all the duties of that office. There is no express provision for the succession of the Vice-Chairman to the office of Mayor, but among the duties and powers of the President of the Board of Aldermen, expressly conferred upon him, are the powers and duties of the Mayor in the event of a vacancy or temporary absence in that office. The statute does not in terms distinguish between the consequences of a temporary absence and a vacancy in the office referred to, but this does not debar us from a construction of the statute which would result in such a distinction, if, upon reasonable grounds, a legislative intent favoring such a construction may be presumed.

Nor is it necessary, in the matter before us, that we should inquire further than sufficient for the proper application of the controlling provisions of law in the precise circumstances which have arisen, -

that is to say, the resignation of the incumbent of the office of President of the Board of Aldermen, creating not a temporary absence, but a vacancy in said office, followed by the death of the Mayor, creating again not a temporary absence, but a vacancy; and in further view of the pending mayoralty election to be held within the next two months, at which a mayor, a President of the Board of Aldermen and other municipal officers are to be chosen by the electorate of the whole City for the regular official terms prescribed by law.

Three theories have been suggested:

First: That in the circumstances described the Vice-Chairman of the Board of Aldermen would become Acting President and Acting Mayor, and perform, until the election and qualification of persons to fill such vacancies, the combined duties of the office of Mayor, the office of President of the Board of Aldermen and the office of Vice-Chairman of said Board.

Second: That as there is no express provision for the succession of the Vice-Chairman to the Mayoralty, there is now a vacancy in the office of Mayor to be filled by appointment of the Governor under the general provisions of the Public Officers Law (§42).

Third: That pursuant to §23 of the Charter, the Vice-Chairman of the Board of Aldermen, upon the happening of the contingencies stated, becomes the Mayor of the City, automatically vacating his office

as Vice-Chairman of the Board of Aldermen, to which is incidental the exercise of the powers, duties and functions of the President of the Board, involving, also, a vacancy in the office of Alderman in and for the district formerly represented by the Vice-Chairman of the Board.

Permit me to say that in my opinion the last proposition announces the preferable view, for the reasons which follow:

(a) From the conclusion that the Vice-Chairman of the Board of Aldermen only becomes Acting Mayor in the circumstances described, retaining also the functions and powers of the President of the Board of Aldermen, with membership in the various boards of which the President of the Board of Aldermen is a member by virtue of his office, it would follow that there would be vested in the same individual two distinct positions, to each of which a salary is attached by law, in conflict with §1549 of the Charter, which prohibits just these things.

Though it has been suggested that the offices of Mayor and President of the Board of Aldermen are not incompatible, such incompatibility, in a legal sense, clearly appears when the same person attempts to exercise permanently the functions of both officers. That is to say, the combination of the functions of the offices of Mayor and President of the Board of Aldermen in one individual would give him six votes in the Board of Estimate, or a majority of a quorum of

that Board (§225 of the Charter), and two votes in the Board of Commissioners of the Sinking Fund, or one-half of a quorum of that Board (§204 of the Charter), a consequence the mere statement of which described a result so preposterous as that its contemplation as a matter of legislative intention may be instantly dismissed from the mind.

(b) If we conclude that there is now a vacancy in the office of Mayor, it would follow that some of the most important and necessary functions of our City Government must be suspended for more than three months. It is familiar knowledge that for issuance of special revenue bonds under paragraph 8 of §188 of the Charter, the "concurrent vote of all the members of the Board of Estimate" is required, and that for other and equally important municipal functions the "unanimous vote" of the Board of Commissioners of the Sinking Fund, of which the Mayor is also a member, must be had (§§204, 205 et seq.). For other Charter sections requiring the unanimous vote of the Board of Commissioners of the Sinking Fund or Board of Estimate see §§221a and 246. These considerations serve to give added emphasis to the legal maxim that the law abhors a vacancy in office. Certainly no interpretation of a legislative act will be unnecessarily indulged which does violence to this maxim, or would result in the complete breaking down or serious interruption of the proper administration of the business of the City.

The notion that the Governor or Acting Governor might fill such a vacancy under the general provisions of §42 of the Public Officers Law, and that thus a vacancy might be avoided, does not commend itself to my judgment. Such a construction would be contrary, if not to the letter, at least to the spirit, of that provision of our Constitution designed to secure local self-government, as applied to the choice of local officers (See N.Y. Const. Art. X, §2; Lincoln's Const. Hist. of N.Y., Vol. 4 pp. 733 et seq.).

(c) By the foregoing process of elimination there remains as the only practical and satisfactory solution of the present problem the view that under §23 of the Charter the former Vice-President of the Board of Aldermen, upon the happening of the contingencies stated, became the Mayor of the City for the remainder of the present year, automatically vacating his office of Vice-Chairman, to which is incidental the exercise of the powers, duties and functions of the President of the Board. This involves, also, a vacancy in the office of alderman in and for the district formerly represented by the Vice-Chairman of the Board. It is not necessary now to consider what would happen if the mayoralty term exceeded the aldermanic term for which the Vice-Chairman of the Board had been elected as Alderman. That question is academic here.

This view will permit the Aldermen now to elect a new Vice-Chairman, who will exercise the powers and duties of the President of the Board of Aldermen. There

will then be no vacancy in the Board of Estimate, no vacancy in the Board of Sinking Fund Commissioners, and each may proceed to the performance of the functions devolved upon it by law, the membership in such boards being made complete by the election of a local officer by the proper local Board.

I may say in conclusion that the foregoing views are the same as those expressed by one of my predecessors in office, E. Delafield Smith, upon the construction of a statute in terms substantially identical with those employed in section 23 of the present Charter. The question arose as to the status of Samuel D. H. Vance, President of the Board of Aldermen, by reason of the death of Mayor Havemeyer. The opinion was dated December 3, 1874, addressed to the Honorable Board of Aldermen. It is short, to the point, and so pertinent here that I may be permitted to quote the same in full.

LAW DEPARTMENT
OFFICE OF THE COUNSEL TO THE CORPORATION,
New York, September 3, 1874.

To the Honorable the Board of Aldermen:

Gentlemen-- My opinion is requested whether the death of the late Mayor, and the imposition of the duties of his office upon the late President of the Board of Aldermen, create a vacancy in the seat in your Body, lately held by the Hon. Samuel B. H. Vance.

The act of April 30, 1873, known as the Amended Charter of that year provides that 'Whenever there shall be a vacancy in the office of Mayor,' 'the President of the Board of Aldermen shall act as Mayor, and possess all the rights and powers of Mayor.' (Laws of 1873, Chapter 335, section 21). It will be observed, that under the language of the law, the President of the Board is

not only to 'act as Mayor', but is to absolutely 'possess all the rights and powers of Mayor.' These words are as strong as any that could have been used. They clearly make the President of the Board of Aldermen the actual Mayor of the City when a vacancy has been created in the office. Mr. Vance is therefore, at this moment, under the laws of the State of New York, as truly the Mayor of the City as was Mr. Havemeyer during the last twenty-three months of his life, and as will be Mr. Wickham if alive on the first day of the ensuing year. The law operates to absolutely divest him of the office of Alderman, and to invest him with the office of Mayor, during the time which Mr. Havemeyer would have served if his life had been prolonged to the first day of January. He holds but one office, and that the Mayoralty of the City. He performs the duties of one office, and one only. By operation of existing statutes he is, for the time being, as perfectly transferred from the Board of Aldermen to the Chamber of the Mayoralty as though he had resigned the former position and been elected to the latter.

Upon the death of President Harrison in April, 1841, a question similar to this was considered by the eminent members of the cabinet which his successor, Mr. Tyler, appointed upon the accession of the latter. The inquiry arose whether the official designation of Mr. Tyler should be President or Acting President. The Constitution of the United States provides that -- 'In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President.' (Subdivision 6, section 1 of Article 2.) This clause does not, in express terms, declare that the Vice-President shall be President. It simply says that the 'powers and duties of the office shall devolve.' So here, the article of the charter which we are considering does not expressly declare that the President of the Board of Aldermen shall be Mayor. It simply says that he 'shall possess all the rights and powers of Mayor.' This language is at least equally strong and comprehensive with that employed in the Constitution. Mr. Webster suggested that Mr. Tyler was not simply acting President but President. This view was acquiesced in and acted upon by his colleagues in the Cabinet and by both houses of Congress, nor was it ever questioned in any branch of the judiciary.

Again: When President Taylor died, Mr. Fillmore was declared and recognized, not as Acting President, but as President of the United States. The opinion of such jurists as Webster, Crittenden, Reverdy Johnson, and others, with the precedent established in the case of Tyler were cited and acquiesced in by every branch of the Government of the United States. On the death of President Lincoln and the accession of Mr. Johnson, the precedent was again discussed and deliberately followed. In the impeachment a question was raised whether Andrew Johnson was to be proceeded against as Vice-President or President; and a committee, comprising jurists of eminence, reported that he must be cited as President. So the House of Representatives and the Senate determined.

A separate act of the Legislature of the State passed thirteen days after the adoption of the Charter, provided that any vacancy occurring in the Board of Aldermen by reason of death, resignation, or any other cause, should be filled by election by the Board in which such vacancy should arise by a vote of a majority of all the members elected to said Board. (Laws of 1873, chapter 857, section 1.)

In my judgment, there can be no question that Mr. Vance is the Mayor of the City, and not now a member of your Board; that his seat therein has become and is at present vacant; and that the Board clearly possesses the power and duty of filling such vacancy by vote of a majority of all the members elected.

I am, gentlemen,

Very respectfully,
Your obedient servant,
E. DELAFIELD SMITH,
Counsel to the Corporation."

From the foregoing it follows that Hon. Ardolph L. Kline, former Vice-Chairman of the Board of Aldermen, became, upon the happening of the contingencies stated, Mayor of the City of New York, and entitled to receive the salary of said office as fixed by law.

Hon. William A. Prendergast

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Furthermore, I am of opinion, as is presumed to be the proper course by your Department in the premises, that a new designation by the present Mayor of clerks to sign warrants and bonds should be made.

Respectfully,

ARCHIBALD R. WATSON,

Corporation Counsel.