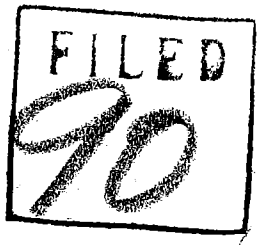
NON-PARTISAN BOARDS: POLITICAL PARTIES OR PARTY MEMBERSHIP: REMOVAL FROM NON-PARTISAN BOARDS:

An individual's political affiliations are determined by his actual manifestations or professions of loyalty to a political party, not merely his professed loyalty to one party. Where a non-partisan board contains an excess of members from any one party, its acts are not invalid, third parties and the general public are protected. Where there is an excess of members from any one party on a non-partisan board contrary to law, the defectively appointed member may be removed in a direct proceeding challenging the title to his office.

July 22,1959

James G. Trimble, Member
Missouri House of Representatives
Route # 1
Kearney, Missouri



Dear Sir:

On June 4th, 1959, you requested that we submit answers to three questions relating to the membership of non-partisan boards. Your inquiry reads as follows:

> "I would appreciate your office rendering an opinion on certain statutes requiring that members of boards and commissions be appointed on a non-partisan basis.
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> "I would like to know:
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> "1. How do you determine to what party an individual belongs;
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> "2. Are the actions of the boards invalid if there are too many of one party appointed to it; and
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> "3. If too many of one party are serving on a non-partisan board, should some be removed, if so, what is the procedure.
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> "Your attention to this matter will be greatly appreciated. If you need additional information, please let me know."

In extensively reviewing the applicable law on these questions for precedents and authority, it appears that questions of membership in political parties by its individual members or disloyalty thereto after attaining appointment to office have not been extensively passed upon.

Accordingly, we shall answer your questions categorically as these authorities seem to indicate the law. FIRST: How do you determine to what party an individual belongs?

In attempting to answer what the criteria of party membership really is, there are no clear measuring factors to pinion party loyalty in terms of rigid standards. Each individual's make-up determines what his loyalty is to be and others who sit in judgment have only his outside manifestations in making their decision as to his party loyalty.

New York, by statute, has made provision against infiltration of a political party by members of other political parties posing as members of the party infiltrated. This provision in Section 137 of the New York election laws, as found in 17 McKinley's Consolidated Laws of New York Annotated, places a limitation on the right to designate or nominate party candidates. Two cases construing this provision and which seem pertinent to the question at hand, i.e., party membership, are Werbel vs. Gernstein, 78 N.Y.Supp. 2nd 440; 191 Misc. 275, affirmed 78 N.Y.Supp. 2nd 926; 273 App.Div. 917; and In re Mendelsohn, 99 N.Y. Supp. 2nd 438; 197 Misc. 993, affirmed Mendelsohn vs. Walpin, 98 N.Y.Supp.2nd 1022; 277 App. Div. 947; appeal transferred 98 N.Y.Supp. 2nd 660; 277 App. Div. 946; affirmed 94 Northeastern 2nd 254; 302 N.Y. 670.

In Werbel vs. Gernstein, 78 N.Y.Supp.2nd l.c. 441 and 443:

> "[1] A condition of membership in a political party is the sympathy with its principles and the purpose of fostering and effectuating them.
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> "Examination may not be made into the hearts and minds of people to ascertain their thoughts and sympathies. Deceit often indicates that words do not truly disclose true thoughts and sentiments. But actions often belie words. In this case, it is more the actions of the respondents rather than their words which indicate their true political sympathies."

This philosophy was also followed in In re Mendelsohn, 99 N.Y. Supp. 2nd, l. c. 445, wherein the New York courts said:

> "[8] In so holding I do not mean that a voter may not change his party as he sees fit; that he may not enter a party for the sole purpose of seeking nomination and election; that he may not disagree with the party in its choice of candidates; that he may not criticise the party leadership and try to change it; or that he may not even oppose candidates of the party in an election. He may do any or all of these things and still remain a member of the party provided he is in reality in sympathy with its principles. But where, as I think it has been conclusively shown here, a man is not in reality in sympathy with the principles of a party he is not entitled to enroll in order to further his ulterior motives."

Naturally, in this regard, each situation must be judged in itself as to whether there has in fact been a change in actual political loyalty in contrast to the professed loyalty affiliations. It is well known that there are conservative and liberal elements in every major political party. At times, these elements seem to be more closely allied with other factions or the general spirit of opposing parties, but yet these people can be truly said to be members of the party with which they profess to belong. Their interpretation of a party's basic philosophy may differ.

Certain standards do emerge -- active participation in the party's affairs, contributions to its cause, registering and voting as an active partisan, etc., none of which are determinate in themselves. The individual's overall actions must be examined. On one other occasion has this office had the opportunity to discuss a similar though not synonymous question of party affiliation. Feeling this opinion may also be of help to you, we are enclosing for your information our opinion of October 29th, 1954, to the Honorable Michael J. Doherty which discusses the question of what constitutes "political activity."

See also Section 36.150, RSMo, which sets out certain criteria which can be used to some extent as standards of political affiliations and activity.

SECOND: Are the actions of the boards invalid if there

are too many of one party appointed to it?

Where an appointee has received an apparently valid appointment and enters into the duties of the office, he falls within the doctrine of de facto officers. This rule is applicably stated in 43 American Jurisprudence, Public Officers, Section 470, which we quote in part:

> "The de facto doctrine was ingrafted upon the law as a matter of policy and necessity, to protect the interests of the public and individuals involved in the official acts of persons exercising the duty of an officer without actually being one in strict point of law. It was seen that if would be unreasonable to require the public to inquire on all occasions into the title of an officer, or compel him to show title, especially since the public has neither the time nor opportunity to investigate the title of the incumbent. The doctrine rests on the principle of protection to the interests of the public and third parties, not to protect or vindicate the acts or rights of the particular de facto officer or the claims or rights of rival claimants to the particular office. The law validates the acts of de facto officers as to the public and third persons on the ground that, although not officers de jure, they are, in virtue of the particular circumstances, officers in fact whose acts public policy requires should be considered valid."

As to appointive officers in particular, 43 American Jurisprudence, Public Officers, Section 481, reads as follows:

> "One of the important classes of de facto officers consists of those who enter into possession of an office and exercise its functions by reason of an appointment which is informal or defective. As already seen, the defective appointment constitutes color of title or color of appointment. Therefore, the general rule is that when an official person or body has apparent authority

> to appoint to public office, and apparently exercises such authority, and the person so appointed enters on such office, and performs its duties, he will be an officer de facto, notwithstanding there was want of power to appoint in the body or person who professed to do so, or although the power was exercised in an irregular manner. Accordingly, it has been held that persons are officers de facto where, although their appointment was without authority, they were duly commissioned, and discharged the duties of their offices, and were generally recognized as legally constituted officers, and that so long as one assumes to act in an official capacity under a commission from the governor, although issued without authority, he is a de facto officer."

See also in this regard State ex rel. City of Republic vs. Smith, 345 Mo. 1158, 139 S.W. 2nd 929; Forwood et al. vs. City of Taylor, Civ. App., 208 S.W. 2nd 670; rehearing denied 209 S.W. 2d 434; affirmed 147 Texas 161, 214 S.W. 2nd 282.

It is clear then that an appointive officer whose appointment is either void ab initio or who forfeits his appointment while in office, but who assumes the duties of the office and actually acts in performing these duties is a de facto officer and that third parties and the public are protected from his acts. An attack on an officer's right to hold office must be a direct attack by quo warranto proceedings or a statutory removal proceeding. It cannot be attacked collaterally in another proceeding. In Hutchins vs. Pacific Mutual Life Insurance Company of California, 20 Fed. Supp. 150, affirmed C.C.A., 97 Fed.2nd 58, an Insurance Commissioner had been appointed by the Governor of California and confirmed by the California State Senate, but was not legally eligible for the appointment. His official acts were sought to be set aside on the grounds of his defective appointment. The court refuted this collateral attack as follows, at l.c.152-153:

> "[8] Second, assuming this court could review the Commissioner's power to act and his right to hold office, it could be done only in quo warranto proceedings where the

> attack was direct. Here, the main relief asked is that the court order reconveyance of transferred assets and that an equity receiver be appointed. The Commissioner's power to file the petition in the state court against the insurance company is questioned only collaterally. The rule is that suit must be brought directly, not only against the Commissioner, but also for the purpose of testing his title to office, otherwise his acts as de facto commissioner are valid.
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> "* * * There is no reason to depart from the general rule that the acts of a de facto officer are valid until such time as it is judicially determined he has no legal right to his office. * * *"

THIRDLY: If too many of one party are serving on a non-partisan board, should some be removed, if so, what is the procedure?

In State ex rel. Harvey vs. Wright, 251 Mo. 325, 158 S.W. 823, Ann. Cas. 1915A 588, the Missouri Supreme Court en banc, in quo warranto proceedings, had occasion to pass upon the question of removal of an appointee who professed to be of one political faction at the time of his appointment to a non-partisan board, though he was in reality a member of another political faction. A writ of ouster was issued on the basis of his appointment being invalid when made. The court stated the rule in relation to removal from a non-partisan board in such instance, l.c. 827 and 828:

> "[7] III. Respondent insists that the Governor in appointing him and the Senate in confirming him 'determined a political question after an inquiry imposed by law,' and that therefore such action foreclosed judicial inquiry. The authorities urged upon us as upholding this view are cases where this court refused to control by mandamus the political and ministerial discretion of the executive by compelling him to issue commissions, or to do other acts strictly pertaining to the duties of the executive as a member of a co-ordinate branch of government.

"If by this contention respondent means that, as a matter of law, we may not go behind the commission of the Governor, we answer that this point is fairly well settled by the case of State ex rel. v. Vail, 53 Mo. 97. In the above case the authorities purport to be reviewed in so far as this state is concerned, and they were said to be on this point 'conclusive on this court'. State ex rel. v. Vail, 53 Mo.loc.cit.109; State ex rel. v. Bishop, 44 Mo. 229; State ex rel. v. Hays, 44 Mo. 230; State ex rel. v. Steers, 44 Mo. 225; State ex rel. v. McAdoo, 36 Mo. 453; State v. McBride, 4 Mo. 303, 29 Am.Dec.636.

"In the case of State ex rel. v. Steers, supra, Wagner, J., said: 'A person derives his title to an office by his election, and not by his commission; and if he holds and exercises the functions of an office without having been legally elected, it is unlawful holding, and he may be ousted at the instance of the state, notwithstanding his commission. Bashford v. Barstow, 4 Wis. 567.' Changing merely the words 'election' and 'elected' to 'appointment' and 'appointed,' what is said above fairly well applies to the instant case.

"[8] If, on the other hand, respondent has reference to a question of fact when he insists that the determination of the Governor and Senate conclude us, the answer may well be that this would be true if the record were silent as to the political affiliation of respondent. The condition would then, however, arise from the entertaining of a presumption, rather than from the application of any inherent doctrine allied to that 'divinity which doth hedge a king.' We have in the record, however, the clear-cut charge that respondent is a member of the Progressive party, as well as his frank admission of the truth of this charge. Can we say in the light of this that respondent is a Republican? Would it not be

> tantamount to saying that black is white? While appointments to office have been known to change the political complexion of men, respondent stands here solemnly averring that he has not been so affected. Relator inquires with some considerable degree of pertinence whether, if the Legislature had required the appointment of a male to this office, and the Governor had appointed and the Senate had confirmed a female would 'she' have become a male, ipso facto, to the extent of precluding judicial determination of the fact? We think not, though conceding that if the record were silent on this point of party or of sex, a Progressive might be changed to a Republican and a female to a male, within the law's purview from the application of the presumption of 'right and solemn performance of a duty enjoined'." (Emphasis ours.)

CONCLUSION

1. It may be determined to what party an individual belongs by his outward manifestation of loyalty to a party and in so judging the evidence must clearly indicate that his loyalty is other than that professed, otherwise, his profession of loyalty of party affiliation should be accepted.

2. Acts of a non-partisan board where an invalidly appointed member (by reason of political affiliation) acts as a de facto board member, the board's action is not invalid by reason of a de facto member's participation as to third parties and the public. Title to his office must be challenged directly through quo warranto proceedings or by a statutory removal proceeding and it cannot be challenged indirectly in a collateral proceeding.

3. Where too many members of one political faction are on a non-partisan board contrary to statutory requirements, the defective appointment or appointments may be

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challenged in direct proceedings for their ouster.

The foregoing opinion, which I hereby approve, was prepared by my assistant, J. B. Buxton.

Yours very truly,

John M. Dalton
Attorney General

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1 enclosure