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PLEASE REPLY TO:

February 14, 1995

Iva J. Boardman
Executive Director
Delaware Board of Nursing
Cannon Building
Suite 203
P.O. Box 1401
Dover, DE 19903

Re: Holdover Nursing Board Members
After Expiration of Term

Dear Ms. Boardman:

The Delaware Board of Nursing ("Board") has asked whether a member of the Board whose term has expired may continue service on the Board until a replacement has been selected, or whether a member is obligated to quit the Board at the expiration date of the term. For the reasons set out below, we conclude that under the Delaware Constitution, a member may continue to serve on the Board after expiration of his or her term until a successor is appointed and duly qualified.

The Nurse Practice Act, 24 Del. C. ch. 19, describes the process by which Board members are appointed and their term of

office. Board members are appointed by the Governor. Delaware Constitution, art. III, sec. 9; 24 Del. C. sec. 1903(c). Because a Board member's salary, fees, and emoluments of office do not exceed \$500.00 annually, the appointment is not subject to confirmation by the Delaware Senate. Delaware Const., art. III, sec. 9. "The term of office of every member appointed to the Board, except those appointed to fill vacancies occurring during any term of office, is 3 years." 24 Del. C. sec. 1903(a). See, also, 24 Del. C. sec. 1903(f) ("Each member shall serve for a term of three years..."). A person may serve no more than two consecutive terms on the Board. 24 Del. C. sec. 1903(g). The Nurse Practice Act also provides that "[s]ixty days prior to the expiration of the term of any member of the Board, a successor shall be appointed by the Governor." 24 Del. C. sec. 1903(d). Vacancies arising from the expiration of a term are not always timely filled in the manner envisioned by section 1903(d). As a result, a Board member's term may expire without a successor having been appointed by the Governor.

The Nurse Practice Act is silent as to whether a Board member may continue in office after his or her term expires, or if a vacancy exists.¹ If members are prohibited from continuing to

¹We note the variety of statutorily prescribed terms of office for members of Boards within the Division of Professional Regulation. For example, as with the Board of Nursing, members of the Board of Medical Practice (see 24 Del. C. sec. 1710(h)), Board of Cosmetology and Barbering (see 24 Del. C. sec. 5104(b)), and Board of Pharmacy (see 24 Del. C. sec. 2504(b)) serve a three-year term with no mention of the status of members whose terms expire before a successor is appointed and qualified. Members of the

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serve when their terms expire and until a successor is appointed, the potential attrition of Board members in such a circumstance could render the Board unable to establish a quorum (see 24 Del. C. sec. 1904(b)) in order to discharge its duties under the Nurse Practice Act and protect the public health, safety, and welfare. The Delaware Constitution addresses this issue and makes clear that upon expiration of the statutory term set by the Nurse Practice Act, a member of the Board may lawfully hold office until his or her successor is appointed and duly qualified.

Under article XV, sec. 5 of the Delaware Constitution, "All public officers shall hold their respective offices until their successors shall be duly qualified, except in cases herein otherwise provided." The Delaware Supreme Court has continuously construed this constitutional provision to mean that "there is no vacancy on the mere expiration of a term" and that a Board member whose term expires may continue to serve until a successor is appointed and duly qualified. State ex rel. Gebelein v. Killen, Del. Supr., 454 A.2d 737, 751 (1982). It is of no consequence that

Board of Dental Examiners serve a term of "3 years or until their successors are appointed and qualified." 24 Del. C. sec. 1102(a). Members of the Board of Funeral Service Practitioners serve a three-year term which "expire[s] on the date specified in the appointment; however the member shall be permitted to serve on the Board until a successor has been appointed." 24 Del. C. sec. 3103(b). On the other hand, the three-year term of office for members of the Board of Chiropractic and Board of Social Work Examiners "shall expire on the date specified in the appointment, and the member shall no longer be eligible to participate in Board proceedings unless lawfully appointed." 24 Del. C. secs. 702(b) (Chiropractors), 3904(b) (Social Work Examiners).

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the Nurse Practice Act is silent as to whether the Board member may continue to serve after the statutory three-year term expires and until a successor is appointed and duly qualified. It is axiomatic that a conflicting statute must yield to the constitutional mandates of art. XV, sec. 5: "A constitutional power, if not self-limiting, may be limited only by other provisions in [the Constitution]", so that "the preeminence of the constitutional authority nullifies" contrary statutory provisions in the Nurse Practice Act. State ex rel. Gebelein v. Killen, 454 A. 2d at 752.

The Delaware Supreme Court has had several opportunities to consider the meaning of art. XV, sec. 5 and has consistently held that constitutional provision

was apparently enacted for the very purpose of preventing a possible vacancy or interregnum in an office where there [is] not a properly qualified successor at the expiration of the usual statutory term of such office. Opinion of the Justices, Del. Supr., 189 A.2d 777, 778 (1963), quoting State ex rel. Southerland v. Caulk, Del. Super., 138 A.2d 354, 357 (1927).

The Supreme Court reaffirmed these principles in State ex rel. Gebelein v. Killen and left no doubt that art. XV, sec. 5 is intended to avoid the disruption of governmental affairs which would occur if a public office were left vacant by the expiration of a term: "The plain purpose of both Article III, sec. 9 and Article XV, sec. 5 is to prevent public offices from becoming unoccupied and being without an incumbent to perform the public duties." State ex rel. Gebelein v. Killen, 454 A.2d at 748,

citations omitted. Art. XV, sec. V of the Delaware Constitution "gives an incumbent the legal right to remain in office at expiration of term when no successor is qualified. The incumbent continues as a constitutionally sanctioned de jure officer." State ex rel. Gebelein v. Killen, 454 A.2d at 748. As the Court further explained:

where there is an express constitutional provision that all public officers shall hold their respective offices until their successors shall be duly qualified, as in section 5 of article 15, the mere expiration of the usual statutory term does not create a vacancy if there is a person who has the lawful right to perform the duties of such office.

State ex rel. Gebelein v. Killen, 454 A.2d at 751, quoting State ex rel. Southerland v. Caulk, Del. Supr., 138 A.2d 354, 357 (1927).

The Delaware Supreme Court has recently concluded that art. XV, sec. 5 of the Delaware Constitution entitled a Justice of the Peace to continue to hold office and exercise her duties after the expiration of her fixed term "in the absence of a qualified successor." Barron v. Kleinman, Del. Supr., 550 A.2d 324 (1988). The Court reasoned that "where an incumbent holds office after the expiration of a term under a general power of appointment he is viewed as a de jure officer subject to the holdover provisions of Article XV, Section 5." Id. 325, citations omitted. Because the purpose of art. XV, sec. 5 is "preventing a vacancy following the expiration of a term of office" Id. at 325, public officers "may continue in office at the expiration of their term of office." Id. at 326. Indeed, "[i]n the absence of death, resignation, or

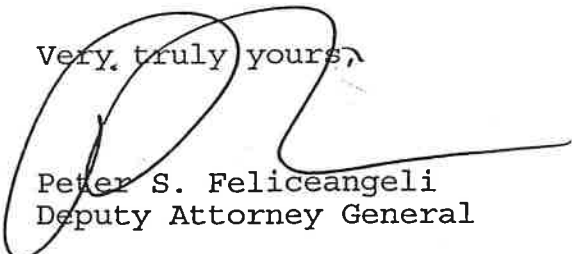
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removal", the holdover official continues to hold office "until her successor is duly qualified." Id. at 327.

Art. XV, sec. 5 of the Delaware Constitution controls over any inconsistent statutory provision in the Nurse Practice Act. Based on the foregoing, we conclude that a member whose term of office on the Delaware Board of Nursing has expired without a successor having been appointed may continue to serve on the Board and exercise all powers and duties of a Board member until his or her successor is appointed and duly qualified. This result is dictated by the Delaware Constitution to assure that Board memberships do not go unoccupied by mere reason of the expiration of a term, and so that important Board affairs may continue to be executed for the protection of the public health, safety, and welfare.

Please feel free to contact us should you have any further questions.

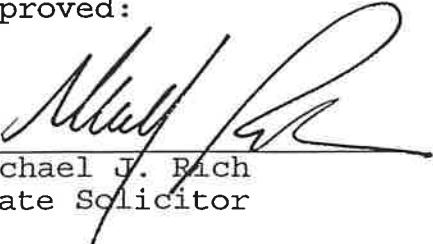
Very truly yours,



Peter S. Feliceangeli
Deputy Attorney General

PSF/td

Approved:



Michael J. Rich
State Solicitor