



Spring 3-1-1961

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Recommended Citation

Right To Compensation Of De Jure And De Facto Officers Of Municipalities, 18 Wash. & Lee L. Rev. 134 (1961).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol18/iss1/17>

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RIGHT TO COMPENSATION OF DE JURE AND DE FACTO
OFFICERS OF MUNICIPALITIES

When an election result is upset by a court after the apparent winner has served for several months, a troublesome situation arises. Should the de jure officer,¹ *i.e.*, the officer determined by the court to have been the winner, be allowed to recover the salary for the period during which he was excluded from office? If so, from whom should he be allowed to recover—the governmental body, which will be paying the salary twice, or the de facto officer,² *i.e.*, the apparent winner, who will then go uncompensated for the services he performed?

This problem arose in the recent Rhode Island case of *La Belle v. Hazard*.³ In that case an election dispute concerning the office of town surveyor arose between the incumbent, La Belle, and his opponent, Monahan. Although the ballots cast at the polls showed that La Belle had a slight majority, a dispute arose concerning absentee ballots. The board of canvassers notified the town council that it could not issue a certificate of election to either candidate. The town council, acting pursuant to state law, appointed Monahan town surveyor. La Belle refused to vacate the office until compelled to do so under threat of arrest. He immediately instituted quo warranto proceedings in the Rhode Island Supreme Court and was adjudged the winner.⁴ Meanwhile, La Belle had been kept out of office for approximately four months during which time Monahan had performed the duties of office and had received compensation therefor. La Belle demanded that the town pay him the salary attached to the office for this period of time and brought assumpsit upon the town's refusal. The trial court awarded La Belle his salary for the four month period.

The Supreme Court, in a case of first impression, affirmed. While recognizing that "cases in other jurisdictions appear to be in direct conflict,"⁵ the court adopted the following rule:

"Where the governmental body is responsible for the situation giving rise to the dispute to office, where it has notice that such

¹A de jure officer is one who in all respects is legally appointed and qualified to exercise the office, and consequently has full legal right and title to the office. A de facto officer has only color of right or title to exercise the office. *Brown v. Anderson*, 210 Ark. 970, 198 S.W.2d 188 (1946); *People v. Brautigan*, 310 Ill. 472, 142 N.E. 208 (1923).

²*Ibid.*

³160 A.2d 723 (R.I. 1960).

⁴*Powers ex rel. La Belle v. Monahan*, 85 R.I. 398, 132 A.2d 97 (1957).

⁵160 A.2d at 724.

dispute exists, and where the de jure officer in no way acquiesced in his removal from office, he is entitled to the salary of the office regardless of whether a de facto officer has already been paid by the governmental body."⁶

This language in effect defines the rule adopted in a minority of the states.⁷ However, the court's requirement that the governmental body be "responsible for the situation" and have "notice" that a dispute exists constitutes a variation from the minority rule.⁸

A majority of the states that have considered the problem have held that when the governmental body pays the de facto officer it is discharged from liability to the de jure officer.⁹ These courts reason that efficiency in government demands that officers be paid promptly; therefore, the disbursing officer should be able to rely upon the de facto officer's apparent title.¹⁰ Forcing the city to pay the de jure officer later would be forcing the city to make a double payment, and would therefore be unreasonable.¹¹ The position of the majority is based upon the premise that the de jure officer has no property right in the office and therefore compensation is dependent upon the performance of the duties.¹²

There is, also, a logical basis for the rule followed in a minority of the jurisdictions. These states hold that the de jure officer who is not barred by his own conduct through waiver or estoppel may recover

⁶160 A.2d at 725.

⁷State ex rel. Worrel v. Carr, 129 Ind. 44, 28 N.E. 88 (1891); Ness v. City of Fargo, 64 N.D. 231, 251 N.W. 843 (1933); Board of County Comm'rs v. Litton, 315 P.2d 239 (Okla. 1957). For a collection of cases see Annot., 64 A.L.R.2d 1375, 1390 (1959); Annot., 55 A.L.R. 997, 1004 (1928).

⁸The minority rule is generally stated as follows: "A de jure officer who is wrongfully excluded from his office, upon his restoration, is entitled to recover the salary incident to his office during the time that he was wrongfully excluded, although during the time of such exclusion the office was occupied by a de facto officer who performed the duties thereof and was paid the salary." Ness v. City of Fargo, 64 N.D. 231, 251 N.W. 843, 844 (1933). However, the principles of waiver and estoppel may be applied against a de jure officer when he acquiesces in his illegal removal, as in the occupancy of his office by another. 251 N.W. at 845. This exception was also applied where the de jure officer was declared legally entitled to the office, but subsequently failed to qualify, neglecting to give bond, so that the governmental body had to appoint a de facto officer. Rasmussen v. Board of Comm'rs, 8 Wyo. 277, 56 Pac. 1098 (1899).

⁹E.g., McKinley v. City of Chicago, 369 Ill. 268, 16 N.E.2d 727, 728 (1938); Board of Auditors v. Benoit, 20 Mich. 176, 4 Am. Rep. 382, 385-88 (1870); Bowlin v. Franklin County, 152 Miss. 534, 120 So. 453, 454 (1929). For a collection of cases see Annot., 64 A.L.R.2d 1375, 1378 (1959); 67 C.J.S. Officers § 99(b) n.1 (1950).

¹⁰Bowlin v. Franklin County, 152 Miss. 534, 120 So. 453, 454 (1929).

¹¹City of Peru v. State ex rel. McGuire, 210 Ind. 668, 199 N.E. 151, 153 (1936).

¹²Board of Auditors v. Benoit, 20 Mich. 176, 4 Am. Rep. 382, 385-88 (1870); Hild v. Polk County, 242 Iowa 1354, 49 N.W.2d 206, 210-11 (1951) (dissenting opinion).

his back salary from the municipality.¹³ It is reasoned that right to salary is incident to the legal title to office.¹⁴ Furthermore, public policy is opposed to the denial of salary to one entitled thereto, and payment of the salary to one who is not entitled to it should not operate to the detriment of the duly elected officer.¹⁵

The rule that denies compensation to the de jure officer is subject to several important exceptions. For example, when the municipality has not paid the de facto officer,¹⁶ or when the de facto officer was clearly a usurper,¹⁷ the de jure officer may recover from the city. Similarly, the de jure officer may recover if the city pays the de facto officer after a judicial determination that the de jure officer was wrongfully removed or is otherwise entitled to hold the office.¹⁸ It has been held that the de jure officer can recover if the de facto officer was not employed specifically to fill the vacancy, but was only one of several men employed to do the same type of work.¹⁹ And it is universally held that if the city acted in bad faith the de jure officer may recover,²⁰ but the mere fact that litigation was in progress is not enough to constitute bad faith.²¹

The *La Belle* case presented a situation in which the governmental body acted in good faith and paid the de facto officer before final judgment in the suit to contest the election. The court was in the position where it had to choose between the two rules, and it chose the minority rule. However, the court did not adopt the strict minority rule which allows the de jure officer to recover from the governmental body in every case of wrongful exclusion from office. Instead it modified the rule requiring governmental "notice" and "responsibility for

¹³See notes 1 and 8 supra.

¹⁴*Ness v. City of Fargo*, 64 N.D. 231, 251 N.W. 843 (1933).

¹⁵*Ibid.*

¹⁶*City of Tulsa v. Coker*, 181 Okla. 291, 73 P.2d 443 (1937).

¹⁷*Morten v. City of Aurora*, 96 Ind. App. 203, 182 N.E. 259 (1932); *City of Ardmore v. Sayre*, 54 Okla. 779, 154 Pac. 356 (1915); *Warden v. Bayfield County*, 87 Wis. 181, 58 N.W. 248 (1894).

¹⁸*Corbett v. City of Chicago*, 391 Ill. 96, 62 N.E.2d 693 (1945); *Markus v. City of Duluth*, 138 Minn. 225, 164 N.W. 906 (1917); *Fylpaa v. Brown County*, 6 S.D. 634, 62 N.W. 962 (1895).

¹⁹*Talmadge v. Seymour*, 167 Ga. 601, 146 S.E. 473 (1929); *Talmadge v. Cordell*, 167 Ga. 594, 146 S.E. 467 (1928); *Olsen v. City of Superior*, 240 Wis. 108, 2 N.W.2d 718 (1942); *Seifen v. City of Racine*, 129 Wis. 343, 109 N.W. 72 (1906).

²⁰*Irwin v. Jefferson County*, 228 Ala. 609, 154 So. 589, 590 (1934); *Talmadge v. Cordell*, 167 Ga. 594, 146 S.E. 467, 471 (1928); *Mattox v. Board of Education*, 148 Ga. 577, 97 S.E. 532, 533 (1918); *Glenn v. Chambers*, 242 Iowa 760, 48 N.W.2d 275, 280 (1951); *Hefter v. Bradway*, 115 N.J.L. 81, 178 Atl. 199, 200 (Sup. Ct. 1935); *Seaman v. Monmouth County*, 15 N.J. Misc. 249, 191 Atl. 103, 105, (Sup. Ct. 1935).

²¹*Smith v. Board of Education*, 111 F.2d 573, 575 (6th Cir. 1940).

the situation giving rise to the dispute to office" in order for the de jure officer to recover. Although these two requirements are nearly always present in cases where the minority rule has been applied,²² it might be argued that the court intended to limit the minority rule, contemplating a situation in which the de jure officer would be barred from recovery. The affirmative argument for this proposition is that the court did not simply recite the minority rule, but created its own rule. The negative argument is that since the court recited the reasons for the minority rule, it impliedly accepted its conclusion. In any case the Rhode Island Supreme Court did allow itself some leeway for future decisions in this area.

There is the alternative under either the majority rule or minority rule that the de jure officer can recover from the de facto officer even though the latter acted in good faith and under color of title.²³ The reason for the rule is the same as that given for the minority rule—the right to salary is incident to the legal title to the office.²⁴ Courts have admitted that the rule is harsh, but have said that it is so firmly entrenched in the law that only the legislature can change it.²⁵

The rule is made more harsh by the fact that an uncompensated de facto officer cannot compel payment from the governmental body.²⁶ Thus the de facto officer who has discharged the duties of public office becomes an orphan of the law. Under the majority rule, the de jure officer fails in his action against the municipality, because it has previously paid the de facto officer.²⁷ He is then permitted to recover from the de facto officer, who has received the salary, even though he (the de jure officer) has not performed these duties.²⁸ Since the de facto officer, who has performed the duties, may not recover from the municipality,²⁹ the court finds itself faced with the dilemma of either forcing the municipality to pay twice, or denying compensation to one who has worked for it.

²²See note 7 supra.

²³Walker v. Hughes, 42 Del. 447, 36 A.2d 47, 49 (1944); Fleming v. Anderson, 187 Va. 788, 48 S.E.2d 269, 273 (1948) (dictum). For a collection of cases see Annot., 151 A.L.R. 952, 960 (1944); 67 C.J.S. Officers § 100 n.31 (1950). Contra, Stuhr v. Curran, 44 N.J.L. 181, 43 Am. Rep. 353 (1882).

²⁴Walker v. Hughes, 42 Del. 447, 36 A.2d 47, 49 (1944).

²⁵Coughlin v. McElroy, 74 Conn. 397, 50 Atl. 1025, 1028 (1902).

²⁶Gerson v. City of Philadelphia, 342 Pa. 552, 20 A.2d 283, 284-85 (1941). For a collection of cases see Annot., 151 A.L.R. 952, 954 (1944); Annot., 93 A.L.R. 258, 260 (1934). Although a de facto officer cannot require the governmental body to compensate him, he can retain, as against the government body, compensation paid to him. McKenna v. Nichols, 295 Ky. 778, 175 S.W.2d 121, 122-23 (1943).

²⁷See note 9 supra.

²⁸See note 23 supra.

²⁹See note 26 supra.