



Lynn Fitch
ATTORNEY GENERAL
OPINIONS AND POLICY

August 29, 2025

The Honorable Brian Rhodes
Senator, District 36
Post Office Box 220
Jackson, Mississippi 39205

Re: Appointments to State Board of Cosmetology and Barbering

Dear Senator Rhodes:

The Office of the Attorney General has received your request for an official opinion.

Background

According to your request, the State Board of Cosmetology and Barbering (“Board”) is a new board. The first Board members were appointed in 2024, and the nominations of those requiring Senate confirmation were submitted to the State Senate to be considered during the 2025 legislative session. The Senate adjourned without confirming the nominees and returned the nominations to the Governor. Because this is a new board, the nominees had no predecessors.

Questions Presented

1. May the Governor reappoint one or more of the same nominees while the Senate is in vacation, subject to the advice and consent of the Senate during the 2026 legislative session?
2. May the Governor appoint different individuals to the Board while the Senate is in vacation, subject to the advice and consent of the Senate during the 2026 legislative session?

Brief Response

1. The Governor may not reappoint one or more of the same nominees while the Senate is in vacation. The Senate’s failure to confirm results in the annulment of those appointments.
2. Pursuant to Mississippi Code Annotated Section 7-1-35, “the vacancy shall not be filled if caused by the Senate’s refusal to confirm any appointment or nomination.” However, if the Governor were to appoint different individuals to the Board while the Senate is in vacation,

subject to the advice and consent of the Senate during the 2026 legislative session, such nominees would be considered de facto officers until confirmed by the Senate.

Applicable Law and Discussion

You first ask if the Governor may reappoint one or more of the same nominees while the Senate is in vacation, subject to the advice and consent of the Senate during the 2026 legislative session. “This office has consistently held that the failure of the Senate to confirm an appointment properly before it constitutes a refusal to consent to the appointment. Under the provisions of Section 7-1-35 the appointment is therefore annulled from that date.” MS AG Op., *Gordon* at *1 (Mar. 27, 1996); *see also* MS AG Op., *McArthur* at *1 (Apr. 26, 2002) (providing same).

Section 7-1-35 provides in part,

(1) The Governor shall fill by appointment, with the advice and consent of the Senate, all offices subject to such appointment when the term of the incumbent will expire within nine (9) months after the meeting of the Legislature, and also vacancies in such offices occurring from any cause during the session of the Senate or during the vacation of that body. All such appointments to offices made in vacation shall be reported to the Senate within ten (10) days after the commencement of the session of that body for its advice and consent to the appointment, and the vacancy shall not be filled if caused by the Senate’s refusal to confirm any appointment or nomination, or if it does not occur during the last five (5) days of the session, by the appointment of the Governor in the vacation of the Senate, without its concurrence. Any appointment in vacation to which the Senate shall refuse to consent shall be thereby annulled from that date, but the acts of the appointee prior thereto shall not be affected thereby.

Consequently, because “[s]uch a course of action would run afoul of Section 7-1-35,” the Governor may not reappoint one or more of the same nominees while the Senate is in vacation, subject to the advice and consent of the Senate during the 2026 legislative session. MS AG Op., *Gordon* at *1. “Any interpretation of 7-1-35 allowing this course of action would, in fact, render the statute meaningless. The Governor may convene the Senate in vacation to consider further appointments pursuant to Section 7-1-37.” *Id.*¹

You next ask if the Governor may appoint different individuals to the board while the Senate is in vacation, subject to the advice and consent of the Senate during the 2026 legislative session. As stated by the Mississippi Supreme Court, “[c]learly the governor cannot appoint to a vacancy which happens during the session of the senate, without its concurrence . . . ; nor can he fill a vacancy caused by the refusal of the senate ‘to confirm any appointment or nomination.’” *Brady v. Howe*, 50 Miss. 607, 617 (1874); *see also O’Leary v. Adler*, 51 Miss. 28, 33 (1875) (“Appointments by the governor in vacation are limited to vacancies which then happen (and as

¹ Section 7-1-37 provides, “[t]he [G]overnor may convene the [S]enate in the vacation of the legislature for concurrence in appointments by giving ten days’ notice thereof by proclamation by mail to each of the [S]enators.”

could not be anticipated and were casual), ‘and vacancies which occur during the last five days of the session. . . .’”).

This said, if the Governor were to make appointments of new individuals during vacation, as stated by our office in MS AG Op., *Johnson* at *2 (Nov. 15, 1989), once the Governor has made such appointments “and the oath of office is properly administered and filed with the Secretary of State, the nominees become members of the board *subject to confirmation at the next session of the Legislature.*” (emphasis added). Until confirmed, the nominees would be considered “de facto officers.” MS AG Op., *Burnett* at *2 (June 12, 2000) (citing *Brady*, 50 Miss. at 614). While the acts of de facto officers are “valid and binding” under Section 25-1-37, de facto officers are not entitled “to receive salary or per diem for their service.” *Id.* (citing *Miss. Bd. of Levee Com’rs v. Montgomery*, 110 So. 845 (Miss. 1927)); *see also* Miss. Code Ann. § 7-1-35(1) (“Any appointment in vacation to which the Senate shall refuse to consent shall be thereby annulled from that date, *but the acts of the appointee prior thereto shall not be affected thereby.*”) (emphasis added).

In conclusion, in the event the Governor appointed new members to the Board during vacation (none of whom had been nominated previously), the Senate still must be notified within ten days after the commencement of the session for the Senate’s advice and consent.

If this office may be of any further assistance to you, please do not hesitate to contact us.

Sincerely,

LYNN FITCH, ATTORNEY GENERAL

By: /s/ Maggie Kate Bobo

Maggie Kate Bobo
Special Assistant Attorney General