



Lynn Fitch
ATTORNEY GENERAL
OPINIONS AND POLICY

October 7, 2025

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Re: Appointments to State Board of Cosmetology and Barbering

Dear Mr. Sclafani:

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

Background

According to your request, you seek clarification of our August 29, 2025, opinion (“Opinion”) in which we stated that if the Governor were to appoint individuals to the newly created State Board of Cosmetology and Barbering Board (“Board”), different from those not confirmed in the 2025 regular session, while the Senate is in vacation, subject to the advice and consent of the Senate during the 2026 legislative session, that such nominees would be considered de facto officers until confirmed by the Senate.

The Board was created by Laws 2024, Ch. 437 (H.B. No. 313), § 1, eff. from and after passage (approved April 25, 2024). Pursuant to Mississippi Code Annotated Section 73-7-1, six of the seven board members are “to be appointed by the Governor, with the advice and consent of the Senate. . . .” Section 73-7-1 continues, stating that “[t]he initial appointments must be made before August 1, 2024. If appointments are not made by August 1, 2024, the State Board of Cosmetology and the Board of Barber Examiners shall continue to operate in their separate capacities until such time as the Board of Cosmetology and Barbering is appointed.” Thus, the Governor’s initial appointments to this new combined board triggered the dissolution of the two independent boards and the repeal of the statutes governing the two independent boards, effective January 1, 2025, one week prior to the start of the 2025 legislative session. “All property and assets owned by the Mississippi State Board of Cosmetology and the State Board of Barber Examiners shall be vested in and transferred to the Mississippi State Board of Cosmetology and Barbering by January 1, 2025.” Laws 2024, Ch. 437 (H.B. No. 313), § 52.

As noted in the Opinion, the Governor appointed members to serve on the newly created Board. In January 2025, these appointments were submitted to the Mississippi Senate for advice and

consent. However, the Senate adjourned the 2025 Regular Legislative session without confirming these appointments, and said appointments were returned to the Governor. The appointments were not included in the call for the First Extraordinary Session; however, the Legislature passed H.B. 18, making appropriations for the Board, which the Governor signed on June 4, 2025. Lacking six of its seven members, there is currently no Board in place to assume the statutory responsibilities set forth in Mississippi Code Annotated Sections 73-7-1 *et seq.*

Questions Presented

1. If the Governor appoints different individuals to the Board, would such appointees lawfully hold office between the date of appointment and the date they receive Senate confirmation [and thus have no liability during this time period under Mississippi Code Annotated Section 25-1-37 stating that persons that do not lawfully hold office “shall be liable [for] all the penalties imposed by law for usurping or unlawfully holding office, or for exercising the functions thereof without lawful right. . . .]?
2. If the answer to Question one is “yes” [such appointees would lawfully hold office between the date of appointment and the date they receive Senate confirmation], are such appointees entitled to public official immunity during this time period?

Brief Response

1. “An officer de facto is one who exercises the powers and discharges the functions of an office, being then in possession of the same under color of authority, [even] without actual right thereto.” *Adams v. Mississippi State Bank*, 23 So. 395, 398 (Miss. 1897). “[A]ppointment by the Governor [is] certainly color of title and of authority.” *Upchurch v. City of Oxford*, 17 So. 2d 204, 205 (Miss. 1944). The Governor’s appointments to the Board under these circumstances are valid de facto officers and have the lawful right to serve until the Senate confirms, and during that time, their acts are valid and binding.
2. We are unable to opine upon matters of liability, which involve mixed issues of law and fact.

Applicable Law and Discussion

In the Opinion of which you seek clarification, this office was asked specifically about executive appointments to the Board made in vacation after the Senate’s failure to confirm. In response, we opined that vacation appointments under the circumstances described would result in de facto officer status until such time as the Senate, in the 2026 legislative session, confirmed the appointments. At present, not only have the two previously independent boards been abolished by statute, but the newly created Board is currently non-existent, and instead of a functioning arm of government with its attendant obligations, responsibilities, and duties, the result is a vacuum for the more than 50,000 professionals who depend on the Board for their livelihood.

“An officer de facto is one who exercises the powers and discharges the functions of an office, being then in possession of the same under color of authority, [even] without actual right thereto.” *Adams v. Mississippi State Bank*, 23 So. 395, 398 (Miss. 1897). “[A]ppointment by the Governor

[is] certainly color of title and of authority.” *Upchurch v. City of Oxford*, 17 So. 2d 204, 205 (Miss. 1944); see also *Barton v. Barton*, 726 So. 2d 163, 166 (Miss. 1998) (“A de facto [officer] can retain his color of authority as long as he has some claim to his position. One such claim of right comes through appointment.”). De facto officers have valid authority to act in an official capacity. *Mississippi Real Estate Appraiser Licensing and Certification Board v. Schroeder*, 980 So. 2d 275, 289 (Miss. Ct. App. 2007). The acts of de facto officers are valid and binding. Miss. Code Ann. § 25-1-37. Further, “[a]ny challenge regarding the validity of actor’s appointment must be brought against the actor in proceedings contesting the right to office.” *Nelson v. State*, 626 So. 2d 121, 125 (Miss. 1993).

Clearly the law has recognized the viability of the actions taken by individuals serving in an official capacity even though, as here, the Senate has not yet confirmed those appointments.¹ The existence of de facto officers who act in an official capacity and whose acts are valid and binding is evidence of the public policy purposes that underlie Section 25-1-37. See 43 Am. Jur. *Public Officers* § 495, at 242 (1942) (stating that “[t]he principle is placed on the high ground of public policy, and for the protection of those having official business to transact, and to prevent a failure of public justice.”).

Any appointments by the Governor in this instance would not involve the usurpation of another’s right to hold office, nor does it reflect any other unlawful claim to office. In this unique and limited circumstance where two previously existing boards have been eliminated, and there is no current board to perform the statutory responsibilities, the Governor’s appointments have the lawful right to serve until the Senate confirms, and during that time, their acts are valid and binding. Moreover, in this circumstance, we have not found any legal authority holding that these appointments are not lawful.

In response to your second question, we are unable to opine upon matters of liability, which involve mixed issues of law and fact. Section 7-5-25 authorizes our office to opine upon prospective matters of state law only. MS AG Op., *Head* at *1 (Nov. 25, 1998).

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/ Misty Monroe

Misty Monroe
Assistant Attorney General

¹ The Governor also has the authority to “convene the senate in the vacation of the legislature for concurrence in appointments by giving ten days’ notice thereof by proclamation by mail to each of the senators.” Miss. Code Ann. § 7-1-37.