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SCHOOL DISTRICTS, LOCAL — PROTESTS AGAINST PROPOSED PLAN OF TERRITORIAL ORGANIZATION — FILED PURSUANT TO SECTION 4831-3 G. C.—MAY BE WITHDRAWN AT ANY TIME BEFORE SUPERINTENDENT OF PUBLIC INSTRUCTION ACTS ON PLAN — SECTION 4831-6 G .C.

SYLLABUS:

Protests against a proposed plan of territorial organization of local school districts filed pursuant to Section 4831-3 General Code, may be withdrawn at any time before the superintendent of public instruction acts on such plan as provided by Section 4831-6 of the General Code.

Columbus, Ohio, January 6, 1947

Honorable Clyde Hissong, Superintendent of Public Instruction
Department of Education, Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"I am writing to request your formal opinion in answer to a question that has arisen in connection with the sections of the statutes that govern the transfer of territory between school districts.

Where, pursuant to the provisions of Section 4831-3 of the General Code, there is filed with a county board of education a protest against proposed changes (such proposed changes being those prescribed by a new plan of territorial organization of school districts adopted pursuant to law by the county board of education) in the boundary lines of a local school district, and such protest is signed by more than 51% of the electors of such local school district, what is the time limit within which signers to such protest may ask to have their names withdrawn therefrom? In other words, where an elector has signed such a protest does his right to request the withdrawal of his name therefrom expire as of the second Monday in March or may he exercise such right up to the time the Superintendent of Public Instruction has acted, in accordance with the provisions of Section 4831-6 of the General Code, on the plan of territorial organization for that county?"

The sections of the General Code to which you refer are part of the new school code passed by the 95th General Assembly. These sections which are codified as Sections 4831 to 4831-14, General Code, are carried as a part of Chapter 2, Title XIV-A. The chapter relates to county planning and transfer of territory between districts. Briefly analyzed, they contemplate the adoption by each county board of education on or before the first Monday in February in each even numbered year of a tentative plan of territorial organization of the school district under its supervision. This plan is to provide such transfers of territory, elimination of local districts and creation of new school districts as in the opinion of the board will provide a more economical or efficient county school system. Section 4831-3 provides as follows:

> "Any group of electors, qualified to vote in territory within the territorial boundary lines of the county school district, may, at any time prior to the second Monday in March following the adoption of the plan of organization by the county board of education, file with the county board of education a protest relating to proposed change in the boundary lines of any local school district within the county school system, wherein said electors reside.
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> Such protest shall be in writing, signed by the electors making such protest, specifically setting forth the nature of the protest together with the reasons therefor and shall be in duplicate.
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> If such protest so filed be signed by 51% or more of the electors of the local school district or districts so affected, then the county board of education and the superintendent of public instruction shall not have the authority to adopt the plan of reorganization proposed so far as the said local school district or districts protesting are concerned."

It will be noted here that the plan is referred to as the "plan of reorganization proposed." I consider it important to keep this in mind since it is plain that the county board of education no longer has the power which it had under former sections to which I will shortly refer, to create new school districts or to alter existing districts. As will be seen, the power to create such new districts or to alter existing districts is vested by the new law in the superintendent of public instruction.

Section 4831-4 requires the county board on or before the first Monday in April following its adoption of the proposed plan, to file with the superintendent of public instruction a map and description of such plan

"together with a copy of any and all protests to such plan of organization which may have been filed with the county board of education." The county board must also furnish to the superintendent such other information as he may require.

Section 4831-6, General Code, reads as follows:

> "On or before the second Monday in August in each even numbered year the superintendent of public instruction shall approve, with such modification as he deems proper, each plan of territorial organization of school districts submitted to him by county boards of education, and shall, not later than the first Monday in September, in each even numbered year, notify, in writing, the various county boards of education of his action on such plans of organization.
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> In the event the superintendent of public instruction modifies a plan of organization submitted to him by a county board of education, he shall state, in writing, his reasons for such modification and send a copy of such reasons to such board of education at the time he notifies such board of his action on the plan of organization submitted to him by such board."

By the provisions of sections following, provision is made for the filing of objections by the county board to any modifications of its plan which have been made by the superintendent of public instruction, for a hearing on such objections and for final action by the superintendent of public instruction. It will be noted that under the provisions of Section 4831-3 supra, protests against the plan are to be filed with the county board of education at any time prior to the second Monday in March following the adoption of the plan by the county board. There is however no provision for any examination by the county board of these protests or any adjudication by them as to their validity and sufficiency. They are simply to be passed on together with the plan and other information to the superintendent of public instruction for his action which, as heretofore pointed out, is to take place on or before the second Monday in August. In an opinion rendered on the 29th day of November, 1945, (1945 O. A. G. page 749) I held as disclosed by the fourth branch of the syllabus:

> "The county board of education with whom protests of electors have been filed pursuant to Section 4831-3, General Code, is not required to determine the validity or sufficiency of such protests but is required by Section 4831-4 of the General

> Code, to file copies of all such protests with the superintendent of public instruction, and it is the duty of such superintendent to determine the validity and sufficiency of such protests."

While as stated in that opinion, the statute is not entirely clear as to the procedure in dealing with these protests, yet it appears to me that the conclusion is irresistible that no implied duty is thrown upon anyone except the superintendent of public instruction to examine into their sufficiency and validity, and he is not required to take any action whatsoever on the protests or the plan until the second Monday in August. When he does come to consider the whole matter on or before that time, he would evidently have to take up first the question of the number, validity and sufficiency of the protests. This would be a jurisdictional question which he would have to determine before he is able to make the order approving the proposed plan either with or without modifications, because the statute provides that if the protestants amount to 51% of the electors of the local district or districts affected, he "shall not have the authority to adopt the plan proposed."

The one essential question therefore that seems to me to arise from your inquiry is whether electors who have signed a protest may withdraw their protest while the matter is thus pending before the superintendent and at any time before he has determined the sufficiency of the protests as confirming or defeating his jurisdiction in the matter. In other words if these protests may be withdrawn, must they be withdrawn within the time when they were required under the law to be filed, to wit, the second Monday in March? There are a number of decisions by the Supreme Court of this State to the effect that where there is given to electors or property owners the right of petition or protest, upon which the power and jurisdiction of public authorities to act is conditioned, the petitioners or protestants have the right to withdraw their petitions or protests *up to the time when final action is to be taken.* Hays v. Jones, 27 O. S. 218; Dutton v. Hanover, 42 O. S. 215; State, ex rel., v. Ruppert, 99 O. S. 17; Board of Education v. Board, 112 O. S. 108; Neiswander v. Brickner, 116 O. S. 249; State, ex rel., v. Board of Education, 129 O. S. 262.

In the case of Hays v. Jones, supra, the jurisdiction of the county commissioners to construct roads was to be based on a petition of the majority of the resident land owners abutting and it was held:

"The jurisdiction of the board of county commissioners to make the final order for the improvement, under these statutes, is special, and conditioned upon the consent, at the time the final order is to be made, of a majority of the resident land-holders, who are to be charged with the costs of the improvement.

Resident land-holders, who have subscribed a petition praying for such road improvement, may, at any time before such improvement is finally ordered to be made by the board of county commissioners, withdraw their assent by remonstrance, or having their names stricken from the petition, and after withdrawal of consent, such persons can no longer be counted as petitioning for the improvement."

The court on page 231 of the opinion uses the following language:

"As held on the first proposition, the jurisdictional majority must be found in the attitude of asking for the improvement at the *time the proposed final order is to be made;* and one who has subscribed the petition *may, at any time before the board makes the final order, by* remonstrance or other unmistakable sign, *signify his change of purpose.* His assent is within his own control up to the time the commissioners move to make the final order."

(Emphasis supplied.)

Several of the other cases which I have cited arose under a construction of former Section 4736, General Code, by which, as I have herein above indicated, the power to make changes in the boundaries of the local districts in the county was committed not to the superintendent of instruction but to the county board of education. That section prior to its repeal by the enactment of the new school code read as follows:

"The county board of education may create a school district from one or more school districts or parts thereof, and in so doing shall make an equitable division of the funds or indebtedness between the newly created district and any districts from which any portion of such newly created district is taken. Such action of the county board of education shall not take effect if a majority of the qualified electors residing in the territory affected by such order shall within thirty days from the time such action is taken file with the county board of education a written remonstrance against it.

Members of the board of education of the newly created district shall be appointed by the county board of education and shall hold their office until the first election for members of a board of education held in such district after such appointment,

> at which said first election two members shall be elected for two years and three members shall be elected for four years, and thereafter their successors shall be elected in the same manner and for the term as is provided by section 4712 of the General Code. The board so appointed by the county board of education shall organize on the second Monday after their appointment."

Here it will be noted the power was vested solely in the county board of education, which by appropriate action could create a new school district from one or more school districts or parts thereof. A very similar power couched in practically the same language was conferred on the county board by Section 4692, General Code, since repealed, as to the alteration of the boundaries of districts and transfer of part of one local district to another. These two sections were superseded by the provisions of Section 4831 et seq. to which I have already referred. Under Section 4736 supra it appeared that when the county board had taken action in creating a new school district from one or more districts or parts thereof, such action was not to take effect if a majority of the qualified electors filed with the board a remonstrance "within thirty days from the time such action is taken." The effect of filing this remonstrance was to completely undo the action which the board had taken. There was nothing left for the board thereafter to do. There was no further action which it could take and the whole proposition was at an end. It was therefore quite proper that the courts should hold that any withdrawal of protests by those who had signed the same must be made within the thirty day period during which protests could be filed. At the expiration of that thirty day period the situation had to be judged as it then stood and a subsequent withdrawal of a previously filed protest would of course have no meaning or effect.

Construing this provision, the supreme court in the case of County board of Education v. Board, 112 O. S. 108, held that the withdrawal of protests must be made within the thirty day period within which the protests had to be filed. The court in the course of its opinion on page 112 said:

> "The filing of a remonstrance under Section 4736, General Code, on the contrary, does not invoke the jurisdiction of the county board of education. The board of education in the first instance *has power to create* a school district from one or more school districts or parts thereof without the filing of a petition by the electors, but the remonstrance when duly filed makes ineffectual the action of the board." (Emphasis supplied.)

With the theory underlying that decision we have no quarrel. The original action of the board was its final action so far as creating the district was concerned. The subsequent filing of a protest with the requisite majority of signatures within thirty days put a complete end to the procedure. Manifestly the withdrawal of protests thereafter could not bring it to life. The later case of Neiswander v. Brickner, 116 O. S. 249, recognized the soundness of the decision last referred to as applied to the situation arising under Section 4736 supra. The court in discussing the right of withdrawal says on page 253 of the opinion:

> "It is true that the earlier Ohio cases above cited, as pointed out in County Bd. of Education of Putnam County v. Bd. of Education, 112 Ohio St., 108, 146 N. E., 812, relate to the filing of petitions instead of to the filing of remonstrances. However, so far as the right to withdraw signatures is concerned the principle they announce directly applies. It is a right generally enjoyed by one who casts a vote to change his vote, or by one who is authorized to state in writing his position of affirmance or dissent upon public questions to withdraw from or change that statement of position."

The same principle was applied in a further case arising under Section 4736 in the case of State, ex rel., v. Board of Educationn, 129 O. S. 262, the court there holding again that the remonstrants had the right to withdraw their protests within the thirty day period following *the action of the board of education in creating a new district.* Again I point out that the action of the board of education was its final action in creating the district and that the statutes saw fit to give the electors thirty days and no more within which to express their desires. There was no other tribunal which was to have any voice in the matter after protests had been filed and accordingly it was very proper that the status of the protestants and the number of the protests should be determined and the right of further protest or withdrawal concluded as of the end of the thirty day period.

The situation however, arising under the present law is completely different. As already pointed out, the superintendent of education has until the second Monday in August to determine the whole matter that has been submitted to him tentatively by the county board of education, and upon reason it would appear that when he comes to weigh the sufficiency and validity of the protests as preliminary to his action, he should

have the right to determine *the then existing status* of the desires and objections of the electors of the district. Let us suppose that within the time limit for filing protests a very large majority of the electors had filed their protest; these protests, under the law, were passed on to the superintendent for his examination and consideration along with the proposed plan; before he had made such examination and reached a conclusion thereon everyone of the protestants appeared before him in person and formally withdrew his protest and gave his assent and approval to the plan of reorganization. Can it possibly be contended that the superintendent was shorn of his power to approve the plan in accordance with the then expressed recommendation of the board of education and wish of the entire body of electors?

In the case of State, ex rel., v. Rupert, 99 O. S. 17, it appears that a municipal ordinance had been passed, to which the requisite number of electors had, within the thirty day period prescribed by Section 4227-2, filed a petition for referendum. This section provided in part:

> "When a petition signed by ten per cent of the electors of any municipal corporation shall have been filed with the city auditor or village clerk in such municipal corporation, *within thirty days* after any ordinance, or other measure shall have been filed with the mayor, or passed by the council of a village, ordering that such ordinance or measure be submitted to the electors of such municipal corporation for their approval or rejection, such city auditor or village clerk shall, *after ten days,* certify the petition to the board of deputy supervisors of elections of the county * * *." (Emphasis supplied.)

In a per curiam the court said:

> "In the absence of statutory provisions to the contrary an elector signing a petition authorized by the statutes of this state, invoking either official or judicial action, has a right to withdraw his name from such petition, or, if he be the sole petitioner, to dismiss the same at any time before judgment has been pronounced, or before official action has been taken thereon. Dutten v. Village of Hanover, 42 Ohio St., 215; Hays et al. v. Jones et al., 27 Ohio St., 218, and McGonnigle et al. v. Arthur et al., 27 Ohio St., 251, 256.
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> The general assembly of Ohio, in the enactment of Section 4227-2, General Code, evidently recognized this right, and afforded the signers of a referendum petition an opportunity for its exercise by providing in this section that the clerk or city

> auditor shall not certify such petition to the board of deputy supervisors of elections until after the expiration of ten days from the date of filing the same."

The court proceeded to say that the clerk must within a reasonable time after the expiration of the ten day period certify the petition to the board of elections, and after saying that the clerk cannot arbitrarily withhold such certification for the purpose of permitting the withdrawal of further signatures, the court concluded:

> "* * * but until official action is taken by him, or an action in mandamus is brought, any person signing a petition has the right to withdraw his name therefrom. * * * In such proceeding the question of the sufficiency of the referendum petition will be determined as of the date of the commencement of the action."

The case just referred to seems to me to be decisive of the precise situation we have here. While the statute relative to referendum distinctly requires the petition for referendum to be filed by the requisite percentage of electors *within thirty days after passage of the ordinance,* yet the right of withdrawal was recognized by the court as existing up until the time final action has been taken thereon, which in this case was the certification to the board of elections.

Before the decision in the last above case, one of my predecessors had reached the same conclusion, in an opinion found in 1913 O. A. G., page 1632, holding:

> "When a petition for the referendum on a municipal ordinance, therefore, has been filed with the clerk of the village, the names may be withdrawn therefrom at any time prior to the certification of such petition to the board of elections by said clerk."

Another holding to like effect is found in 1932 O. A. G., page 688, as shown by the first paragraph of the syllabus where it was held:

> "Names may be witdrawn from a village referendum petition at any time until it has been certified by the clerk to the board of elections, even though such certification is made after the expiration of the ten day period during which the clerk must keep the petition open for public inspection."

It might be contended that under the language of Section 4831-3 supra, the filing of a protest by the second Monday in March, representing

a number of electors afterwards determined by the superintendent to equal the required per centum, automatically ends the superintendent's authority in the whole matter as of the second Monday in March. I do not consider that the statute has or was intended to have that effect. As already pointed out, Section 4831-4 requires the protests, along with the plan to be passed on to the superintendent on or before the first Monday in April for his action not later than the second Monday in August, and it would be absurd to hold that his authority entirely ceased five months before he was to exercise it. If I am correct in holding that it is a part of the duty of the superintendent to determine the question of his jurisdiction, it must follow, in my opinion, that the only effect of the filing of the protests is to raise a question as to the superintendent's authority, to be determined by him later, up to the time when he is required to act. The general assembly had a very apparent motive in requiring the protests to be filed within a limited time, but I can see no possible purpose in cutting off summarily and irrevocably the power of the superintendent to act on the whole proposition, and I find no provision in the law evidencing any such intention.

Accordingly, in specific answer to your question it is my opinion that protests against a proposed plan of territorial organization of local school districts filed pursuant to Section 4831-3 General Code, may be withdrawn at any time before the superintendent of public instruction acts on such plan as provided by Section 4831-6 of the General Code.

Respectfully,

HUGH S. JENKINS
Attorney General