

1461.

ELECTION—ABSENT VOTERS' BALLOT RECEIVED BY COUNTY ELECTION BOARD BUT NOT DELIVERED TO PRECINCTS BEFORE CLOSE OF POLLS—HOW DEFEATED CANDIDATE MAY OBTAIN RELIEF.

SYLLABUS:

In the event a board of deputy state supervisors of elections failed to deliver to a precinct before the close of the polls the absent voters' ballots as provided in Section 5078-5, General Code, as in force and effect prior to January 1, 1930, and such absent voters' ballots, which were accordingly not counted, appear to have been such as to change the result of the election of one of the members of a board of education of a rural school district, any relief to one who feels himself entitled to the office should be secured through a court action in mandamus, quo warranto, or otherwise, there being no provision for a reconsideration by a board of education after such board has canvassed the vote.

COLUMBUS, OHIO, January 28, 1930.

HON. FRANK L. MYERS, *Prosecuting Attorney, Mt. Gilead, Ohio.*

DEAR SIR:—Your letter of recent date is as follows:

"The following statement of facts and question involved were presented to me and I am asking your opinion for the benefit of those concerned.

During the November election two (2) ballots were cast by absent voters for a member of a certain township school board, and were placed with the county board of election. These ballots were mislaid and not delivered to their respective precinct, but were opened about 11 o'clock p. m. on the night of election by the county board of election. Mr. A was elected by the votes cast in his precinct, having a majority of one; if the absent voters' ballots had been received and counted Mr. B would have been elected by a majority of one vote.

Query: Do the absent voters' ballots count that were properly received by the county board of election, but were mislaid and not delivered during the hours that the polls were opened for voters at the different precincts, but were opened by the county board of election in the evening after the polls were closed?"

Your inquiry being predicated upon the November, 1929, election, references herein are to sections of the law as in force and effect prior to January 1, 1930, the effective date of the amended Substitute Senate Bill No. 2, enacted by the 88th General Assembly, known as the Election Laws of the State of Ohio.

Section 5078-4, General Code, provided that the board of deputy state supervisors of elections shall notify the presiding judge of the precinct of which any absent voter claims to be an elector of the fact that such voter has obtained an absent voter's ballot, which notification should be made before election day. Section 5078-5 provided that absent voters' ballots in precincts of the state outside of registration cities should be delivered to the presiding judge of the home precinct of each absent voter along with other election supplies, and that such ballots should be deposited in the proper ballot box as soon as the polls are opened on the morning of election day. The section further provides that any absent voters' ballots received by any board of deputy state supervisors of elections before the hour

for closing the polls on election day shall be opened by the board in its office before such close of the polls and tabulated according to the home precinct of the voters whose votes have been so received, each ballot being accredited to the proper precinct and counted with the votes therein cast.

Upon the statement of facts submitted, it is evident that the provisions of Sections 5078-4 and 5078-5, General Code, were not complied with. If the absent voters' ballots in question were valid and such as should have been counted, there is probably no doubt but that upon consideration of all the facts, a court of competent jurisdiction might hold that Mr. B was elected a member of the board of education.

You are referred to Opinion No. 1291 rendered under date of December 12, 1929, to Hon. Clarence J. Brown, Secretary of State, copy of which is enclosed. In this opinion, after quoting Section 5121, General Code, relating to the canvass of the vote for members of the board of education, the following language is used:

"It is well settled in this state, as well as elsewhere, that the powers of a canvassing board are limited and do not comprehend the determination of questions of election irregularities. Attention need only be directed to the cases of *State ex rel. vs. Tansey*, 49 O. S. 656; *State vs. Patterson*, 73 O. S. 305; *State ex rel. vs. Graves*, 91 O. S. 113. These authorities make it clear that the canvassing board has no jurisdiction to go beyond the returns and consider other possible irregularities in the election.

In view of this rule, it must be concluded that, in cases of the character which are here under consideration, the canvassing board should declare the election of the three candidates receiving the highest number of votes, irrespective of any doubts which may exist in the minds of the board as to the legal effect of the election itself. This is not a matter which is within their jurisdiction."

It is also stated in this opinion as follows:

"No provision for a recount or an election contest is found with respect to members of boards of education. It would follow that any relief to those who feel themselves entitled to the office would necessarily be secured through court procedure, either through mandamus, quo warranto or otherwise. What the result of any litigation under these circumstances would be I am not prepared to say. I do not feel that an administrative officer should express an opinion thereon, in view of the fact that the determination of what the real intent and will of the electorate was must necessarily be reached only upon consideration of every circumstance, and this inquiry should, in my opinion, be before a proper tribunal in an adverse proceeding and upon evidence, and not before the attorney general, or any other administrative official, in the absence of specific statutory authority."

I assume that the board of education has already canvassed the vote and declared Mr. A elected in accordance with Sections 5120 and 5121, General Code. There are no provisions in the General Code whereby a board of education is authorized to reconsider this matter.

In view of the foregoing, and in answer to your inquiry, I am of the opinion that in the event a board of deputy state supervisors of elections failed to deliver to a precinct before the close of the polls the absent voters' ballots as pro-

vided in Section 5078-5 as in force and effect prior to January 1, 1930, and such absent voters' ballots, which were accordingly not counted, appear to have been such as to change the result of the election of one of the members of a board of education of a rural school district, any relief to one who feels himself entitled to the office should be secured through a court action in mandamus, quo warranto, or otherwise, there being no provision for a reconsideration by a board of education after such board has canvassed the vote.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1462.

APPROVAL, BONDS OF SYRACUSE VILLAGE SCHOOL DISTRICT,
MEIGS COUNTY—\$24,000.00.

COLUMBUS, OHIO, January 28, 1930.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

1463.

APPROVAL, ONE GAME REFUGE LEASE.

COLUMBUS, OHIO, January 28, 1930.

HON. JOHN W. THOMPSON, *Commissioner, Division of Conservation, Columbus, Ohio.*

DEAR SIR:—You have submitted lease No. 2039, wherein William D. Miller grants sixty-four acres of land, situated in the township of Meigs and county of Muskingum to the State, for state game refuge purposes. Said lease is for the term of five years.

Finding said lease executed in proper legal form, I have accordingly endorsed my approval thereon, and return the same herewith.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1464.

APPROVAL, BONDS OF RACCOON TOWNSHIP RURAL SCHOOL DISTRICT,
GALLIA COUNTY—\$27,000.00.

COLUMBUS, OHIO, January 28, 1930.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.