

1290.

APPROVAL, FINAL RESOLUTIONS ON ROAD IMPROVEMENT IN CUYA-HOGA COUNTY.

COLUMBUS, OHIO, December 13, 1929.

HON. ROBERT N. WAID, *Director of Highways, Columbus, Ohio.*

1291.

ELECTION—DUTY OF CANVASSING BOARDS TO DETERMINE PERSONS ELECTED FROM FACE OF RETURNS—SUCH BOARDS NOT TO PASS UPON IRREGULARITIES.

SYLLABUS:

After an election has been held and the returns are certified to the proper canvassing official or board, it is the duty of such official or board to proceed to canvass the vote and determine the persons duly elected to the offices to be filled at such election, if it is possible upon the face of the returns to determine such result. It is not within the province of such canvassing official or board to pass upon questions of irregularities in connection with such election resulting from the use of improper forms of ballot, or otherwise, since the duty of such official or board is ministerial in character and confined to a consideration of the returns alone.

COLUMBUS, OHIO, December 13, 1929.

HON. CLARENCE J. BROWN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have recently received from various prosecuting attorneys four separate requests for opinion in election matters which are more or less along similar lines and which involve questions of such importance that I deem it proper to address my opinion on these questions to you and send copies to the interested prosecutors.

The Honorable C. E. Moyer, Prosecuting Attorney of Erie County, submits two questions. In the first, a village board of education in a newly created district has been serving pursuant to appointment under authority of Section 4736. There were, accordingly, five members to be elected at the late election, two for the term of two years and three for four years. Through error the ballot did not designate which were running for the two year term and which were running for the four year term, and the question submitted is as to whether there was a valid election, and, if so, for what term.

Mr. Moyer's second communication presents a somewhat different situation. In this instance there were three members of a board of education to be elected and by mistake the ballots stated that two only were to be elected. He states that the first candidate received twenty-five votes, the second twenty-two and the third and fourth twenty votes each. His question is as to the validity of this election.

The Honorable F. H. Buckingham, Prosecuting Attorney of Sandusky County, submits a similar question to the latter one submitted by Mr. Moyer. In this instance, however, there were two justices of the peace to be elected and the ballot stated "vote for not more than one." No names appeared upon the ballots and all names were written in by the electors. He inquires as to the validity of this election.

The Honorable J. D. Sears, Prosecuting Attorney of Crawford County, submits

a question concerning the election for members of a board of education in a rural school district. There were several nominees whose names appeared upon the ballot, three of whom were to be elected, but the ballot read through error "vote for not more than two." He asks what effect, if any, should be given to this election.

These various inquiries present two problems:

1. Where several members of a board are to be elected, certain of whom are to serve for one term and the remainder for another, and the ballot fails to designate the terms, is the election entirely invalidated thereby so that the old board members will continue to function?

2. Where two or more persons are to be elected to the same office, and the ballots, through error, contain the mandate to vote for not more than a lesser number than that which the electors are authorized to elect, is the election entirely invalidated, and, if not, how many persons were elected?

With respect to the first question, it should be stated that the provisions of law applicable clearly require that the office to be filled at the election shall be set forth. It has often been held, where two different terms for the same office are to be voted on, that they must be separately set forth, and accordingly the ballot which fails to so set forth the term is at least irregular in form. *State vs. Cogswell*, 8 O. S. 621; *State vs. Schafer*, 18 O. C. C. 525, 20 C. J. 146.

It does not necessarily follow, however, from the fact that the ballots fail to state the terms, that the whole election is thereby rendered void. The authorities on the subject are not extensive, although apparently there has been considerable litigation on this point in Pennsylvania. An examination of the various cases upon the subject discloses that those ballots which fail to designate the terms are void for uncertainty, but it may be that in a given election certain of the electors were sufficiently advised as to their legal rights that they indicated upon their ballots the terms for which they intended to vote. I am not prepared to say that ballots thus being made certain by the electors themselves could be held void.

The Schafer case, *supra*, clearly reaches this result, although the election was therein held invalid because all of the ballots failed to state for which term the candidates were favored. The first branch of the headnotes of that case is as follows:

"Where several members of a board are to be elected at one election, but for different terms of office, the ballots must state to which term the candidate is elected, otherwise the ballots will be declared void, although the entire election may be invalidated thereby."

In the latter part of the opinion the court discusses authorities in other states and shows that these authorities are in each instance considering individual ballots and not necessarily the validity of the election as a whole.

Mr. Moyer's letter does not disclose whether there were any returns made to the canvassing board which showed votes for different terms. His statement deals solely with the printing which appears upon the ballots. Accordingly, I am unable to state categorically that the whole election would be invalid under the authority of the Schafer case.

It is a general principle of law applicable to elections that irregularities on the part of election officials will not defeat the will of the people if that will may be determined. Thus, in the case of *State ex rel Thompson vs. Arnold, et al.*, 213 So. W. 834, it is stated in the first branch of the syllabus:

"An election irregularity is not fatal to the validity of the whole return of the precinct unless made so by statute, or unless the irregularity is such as probably prevented a free and full expression of the popular will."

The Supreme Court of Florida, in the case of *Carn vs. Moore*, 76 So. 337, in the fifth proposition of the syllabus, held:

“An election will not be set aside on purely technical grounds where no fraud is established and where no voter was prevented from expressing his choice or where it is not shown that but for the acts complained of, the result would have been different.”

The Supreme Court of Appeals of the State of Missouri, in the case of *Horsefall vs. School District of the city of Salem*, 128 S. W. 33, said in the fourth proposition of the syllabus:

“Where a statute provides specifically that a ballot not in a prescribed form shall not be counted, the statute is mandatory and must be enforced; but where the statute merely provides that certain things shall be done, the statute is directory merely, and the test as to the legality of a ballot is whether or not the voters were given an opportunity to express, and fairly expressed their will.”

I find in *Paine on Elections*, Section 499, page 421, this statement:

“While it is well settled that the mere neglect to comply with directory requirements of the law, or the performance of duty in a mistaken manner, without bad faith, or injurious results, will not justify the rejection of an entire poll; it is equally well settled that when the proceedings are so tarnished by fraudulent, or negligent, or improper conduct on the part of the officers, that the result of the election is unreliable, the entire returns will be rejected.”

It would seem that in the case submitted by Mr. Moyer, where five members of the board of education were to be elected but there was a failure to designate the terms, the will of the people was certainly expressed, at least so far as to indicate that the five receiving the highest number of votes were preferred over the present incumbents. The difficulty exists in determining for what term these persons are elected, assuming, of course, there are none of the ballots which show the terms.

In this connection it may be stated that the *Schafer* case, *supra*, would apparently be authority for the conclusion that such an election would be entirely invalid. In the case of *State vs. Thomas*, 150 Wisc. 190, an election under similar circumstances was sustained. There the vote should have been for a certain number of candidates for one year and the remainder for two years. The ballot failed to state the terms and the court concluded that the required number were elected for the term of one year. It is true that this case is isolated and there does not seem to be any authority sustaining it, but it has at least the force of giving effect to the choice of the electors as against the incumbents who otherwise would hold over.

In Mr. Moyer's case the board of education would, by virtue of Sections 5120 and 5121, be the canvassing board required by law to receive the returns, tabulate them and declare the persons elected. Their duties are ministerial in their nature and if, upon the face of any of the returns, there appear indications of ballots cast for persons for specific terms which were authorized to be filled by the electors, these votes should be counted and the ones receiving the highest number of votes for the specific terms should be declared elected. If no returns show ballots cast for specific terms, it is my view that the board should take no action beyond a finding that it is unable to determine the successful candidates from the returns. I am not stating, however, that the election is necessarily totally invalidated. 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.

With respect to the first question under consideration here, I am accordingly of the opinion that, where several members of a board are to be elected at one election but for different terms of office and the ballots fail to state such different terms so that the canvassing board is unable to certify to any votes cast for specific terms, such canvassing board should refuse to declare the election of any one, leaving the determination of the validity of the election to the proper court action. While there exists no statutory authority for a contest in the case of elections for members of a board of education, yet the rule is, as stated by Judge Jones in the case of *Prentiss vs. Dittmer*, 93 O. S., p. 314, at page 322:

“It has been held, however, that if no adequate remedy is provided by law, quo warranto might be invoked in order to ascertain the legality or illegality of the election. *The State ex rel. Conrad vs. Patterson*, 84 Ohio St., 89.”

The second question here under consideration arises by reason of the failure of the board of elections to comply with the statutory mandate requiring the proper statement upon the ballot with respect to the number of persons to be elected to the same office. See Sections 5032 and 5054-2 of the General Code. In each instance the error consisted in stating that the voters were entitled to vote for a lesser number than there were officers to be chosen.

In view of what has heretofore been said, this question is not of serious difficulty so far as the duties of the local officials are concerned. Certain of these questions apply to elections for school boards. The board of education constitutes the canvassing board, and Section 5121 of the General Code with respect to the duties of the board states:

“In the canvass of the vote for members of the board of education, or assessors of real property, the person having the highest number of votes shall be declared elected, and the next highest, and so on, until the number required to be elected shall have been selected from the number having the highest number of votes. If any number of persons greater than the number to be elected at such election have the highest and an equal number of votes, the board making the canvass shall determine by lot which of the persons shall be duly elected.”

You will observe that it is the duty of the board to declare the persons receiving the highest number of votes elected until the number required to be elected shall have been selected from the number having the highest number of votes. In my opinion this does not mean that the board shall only declare the election of the number stated on the ballot, but it includes a declaration with respect to all who were to be elected, irrespective of anything appearing on the ballot. The ballot itself is not officially before the election board at all. The board deals solely with the returns except in instances where there are uncounted ballots which are, under the law, returnable to the canvassing board for determination.

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. Tanzey*, 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 should perhaps be stated that one of the specific cases before us deals with the election of two justices of the peace. By Section 5118 of the Code the township clerk is the canvassing authority in the election of a justice of the peace and his duties would be similar to those of the board of elections in the case of an election of members of that board.

One of the inquiries also presents a situation of where there existed a tie vote in the case of the three members of the school board. Section 5121 of the Code, which has heretofore been quoted, specifically permits the board to determine by lot which of the persons shall be duly elected.

It should be understood that in reaching these conclusions I am not attempting in any way to express final opinion upon the validity of these elections. I am here dealing with the duties enjoined by law upon certain boards and officers. As I view the law, the duties under the circumstances are purely ministerial and it is not within the power of any official, other than such boards as have been designated by law as having authority in election contests or a proper court in a quo warranto or other appropriate proceeding, to pass upon the validity of these elections. Under the circumstances, and in view of the fact that there is no official to whom an opinion of this office can be directed having authority in this matter, it would be inappropriate for me to express any definite conclusion.

It is not my province to anticipate the considered judgment of a court or other tribunal having before it all of the pertinent facts.

I am accordingly of the opinion that, after an election has been held and the returns are certified to the proper canvassing official or board, it is the duty of such official or board to proceed to canvass the vote and determine the persons duly elected to the offices to be filled at such election, if it is possible upon the face of the returns to determine such result. It is not within the province of such canvassing official or board to pass upon questions of irregularities in connection with such election resulting from the use of improper forms of ballot, or otherwise, since the duty of such official or board is ministerial in character and confined to a consideration of the returns alone.

Respectfully,

GILBERT BETTMAN,

Attorney General.

1292.

ELECTION—VILLAGE BOARD OF EDUCATION—DUTY TO CANVASS VOTE
WHEN RETURNS JUSTIFY—PROCEDURE WHEN SAME CANDIDATES
RECEIVE HIGHEST VOTES FOR FOUR AND TWO YEAR TERMS.

SYLLABUS:

1. *Where, in an election of members of a village board of education, the returns certified to the board of education by the precinct officials are such as to enable the board to determine which candidates are elected, it is the duty of the board of education to canvass*