

1891.

BOARD OF EDUCATION—AUTHORIZED TO FILL VACANCIES IN BOARD—SUCCESSOR—TIME FIXED BY SECTION 4748, GENERAL CODE, IS DIRECTORY—ELIGIBILITY OF OTHER MEMBER OF BOARD DISCUSSED.

SYLLABUS:

1. *A board of education is authorized, by virtue of Section 4748, General Code, to fill vacancies created in said board by the resignation of one or more of its members, at any time after said resignation is tendered, even though the resignation by its terms is not to become effective until some future date.*
2. *A member of a board of education, who has tendered his resignation from such board, may continue to serve as a member of said board until his successor is elected and qualified, but may not participate in the vote for the election of his successor.*
3. *The time fixed by Section 4748, General Code, for the filling of vacancies which occur in the membership of a board of education is directory.*
4. *A member of a board of education whose term is about to expire is eligible to election to fill a vacancy in said board. He may not qualify to fill the vacancy to which he has been elected until his present connection with the board as member is severed by expiration of term, or otherwise.*

COLUMBUS, OHIO, March 24, 1928.

HON. HERMAN F. KRICKENBERGER, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion, which after substituting A, B, C, D, E, F, and G for the names of the several persons involved, is as follows:

“A rather complicated situation has arisen in this county with regard to the members of a certain board of education, and in view of the feeling existing in this particular district it is the desire of the court and of the parties concerned that I secure your opinion on the matter before taking any steps. In order to explain clearly the facts about the case, I will refer to the various persons involved by their names.

For the past two years this particular board of education has been composed of the following members: Messrs. A, B, C, D and E. Mr. D and Mr. B, their terms expiring December 31st, 1927, were up for re-election last November and were defeated, Mr. F and Mr. G being elected in their stead. After the election, viz.—at a regular meeting of the board, on December 13th, 1927, Mr. A (who was contemplating moving and has since moved to California) and Mr. E (who has served on the board for a number of years and desired to be relieved) tendered their resignations as board members, in writing. Mr. A's resignation does not state when it is to be effective, but Mr. E's resignation states that it is to take effect January 1st, 1928. The minutes of this board meeting on December 13th, 1927, show that these resignations were tendered, but do not say anything as to the effective date of either. These minutes do show, however, that a special meeting of the board was to be had on December 30th, 1927, for the purpose of appointing someone to fill the unexpired terms of these two resigning members.

The situation then existing was such that Mr. C would have been the only old member of the board after January 1st, 1928, and, according to his own statement to me, it was his desire to have some of the old members continue, if it could be legally possible. Therefore, this special meeting was had on December 30th, 1927, and, according to the minutes of said meeting, the following took place:

Mr. A (the resigning member, whose resignation did not state the effective date) moved to appoint Mr. D (who, as you will note, was a member until December 31st, 1927) to fill the unexpired term of the resigning member, Mr. E, until January 1st, 1930. This motion was seconded by Mr. C, and unanimously carried by the votes of Mr. C, Mr. E and Mr. A; then Mr. E moved to appoint Mr. B (who, you will also note, was a member until December 31st, 1927) for the unexpired term of the resigning Mr. A until January 1st, 1930. This motion was seconded by Mr. C and unanimously carried by the votes of Mr. E, Mr. A and Mr. C.

The minutes for this meeting do not show when the resignations of either Mr. E or Mr. A are to be effective nor when the two newly appointed members are to begin their terms under said appointments.

In view of this state of facts, the following questions are presented to me, and on these questions I desire the opinion of your department.

(1) Mr. A's resignation being silent as to the effective date and the minutes of the board being silent likewise, is this resignation to be conclusively presumed to take effect immediately upon the filing of the same, to-wit: December 13th, 1927?

(2) If either or both of these resignations according to the facts as explained above can be considered as not taking effect until January 1st, 1928, could the old board, as it existed prior to January 1st, 1928, appoint new members to fill out these terms?

(3) If you answer question No. 1 in the affirmative, that is that the resignation of Mr. A must be considered as taking effect on December 13th, 1927, then I assume that Mr. B, who was already a member of the board could not possibly have been appointed to fill out Mr. A's unexpired term, but, even so, could it in any way have been legally possible for Mr. A to thereafter have voted on the appointment of Mr. D to fill out the term of Mr. E?

(4) Finally, can either Mr. D or Mr. B possibly be legally constituted members of this board of education since January 1st, 1928?

(5) If you answer question No. 4, in the negative, then must the board, as it now exists, consisting of Mr. C, Mr. G and Mr. F, appoint the new members?

In view of this controversy, we have practically no board in this District, and proceedings have been suspended pending my securing your opinion as above stated. In view of this fact, I will appreciate your advising, just as soon as possible, what your opinion is on these questions."

Sections 4745, 4746 and 4748, General Code, read as follows:

Section 4745. "The terms of office of members of each board of education shall begin on the first Monday in January after their election and each such officer shall hold his office for four years except as may be specifically provided in chapter 2 of this title, and until his successor is elected and qualified."

Section 4746. "Before entering upon the duties of his office, each person elected or appointed a member of a board of education or elected or appointed to any other office under this title shall take an oath to support the constitution of the United States and the constitution of this state and that he will perform faithfully the duties of his office. Such oath may be administered by the clerk or any member of the board."

Section 4748. "A vacancy in any board of education may be caused by death, non-residence, resignation, removal from office, failure of a person elected or appointed to qualify within ten days after the organization of the board or of his appointment, removal from the district or absence from meetings of the board for a period of ninety days, if such absence is caused by reasons declared insufficient by a two-thirds vote of the remaining members of the Board, which vote must be taken and entered upon the records of the board not less than thirty days after such absence. Any such vacancy shall be filled by the board at its next regular or special meeting, or as soon thereafter as possible, by election for the unexpired term. A majority vote of all the remaining members of the board may fill any such vacancy."

Inasmuch as prosecuting attorneys are not legal advisors for city boards of education, I assume that the school district, wherein this controversy has arisen, is not a city school district. The "chapter 2" referred to in Section 4745, supra, relates to city school districts, and therefore will not be considered.

It appears from the facts set forth in your letter that the membership of the board of education of the school district prior to December 13, 1927, consisted of A, B, C, D and E. The terms of B and D expired on the first Monday in January, 1928, and F and G were elected at the November, 1927, election to succeed these two members.

At a regular meeting of the board on December 13, 1927, A and E tendered their resignations, one, Mr. E's, to become effective January 1, 1928, the other, Mr. A's resignation fixing no time when it should become effective. No action on the resignations was taken at that time other than to fix a date for a special meeting to be held December 30, 1927, to take such action as might be desired with reference to these resignations. At the meeting held on December 30, 1927, E, whose resignation had been tendered to become effective January 1, 1928, moved to appoint B, who was then a member of the board but who would retire on the first Monday of January 1928, by reason of the expiration of his term, to fill the vacancy caused by the resignation of A. This motion having been properly seconded was carried by the votes of A, C and E.

A who had tendered his unconditional resignation on December 13, 1927, moved to appoint D, who was still a member of the board and whose term would expire on the first Monday of January, 1928, to fill the vacancy caused by the resignation of E. After a second to this motion it was carried by the votes of C, E and A. No formal acceptance was made of the resignations of A and E at any time.

It was held by the Supreme Court of Ohio in the case of *Reiter vs. State*, 51 O. S. 74, that:

"By the rules of the common law, a resignation of an office does not take effect, so as to create a vacancy, until such resignation is accepted by the proper authority; but the common law in this regard is not in force in this state, to its full extent, and here a resignation without acceptance

creates a vacancy, to the extent at least, of giving jurisdiction to appoint or elect a successor, unless otherwise provided by statute."

In the course of the opinion in the Reiter case, *supra*, the court cites with approval the case of *Leech vs. State*, 78 Ind. 570, and with respect thereto, says:

"In this last case, *Leech vs. State*, a school trustee on March 1, 1880, presented his resignation of that date to take effect from and after March 5 of the same year. On the same first day of March a successor was appointed to fill out the unexpired term of the resigning trustee. In a contest over the office it was claimed that the appointment was void, because it was made on March 1, when the vacancy did not occur by the terms of the resignation until from and after March 5. The court held, that the resignation made the office so far vacant on March 1, as to give jurisdiction to appoint a successor to fill out the unexpired term, the appointee's term to begin from and after March 5."

By virtue of the foregoing case of *Reiter vs. State*, there is evolved in this state the rule that as against the officer himself an unaccepted resignation is conclusive and not subject to recall, though it is stated in R. C. L., Vol. 19, page 937, that:

"The appointment of a successor to an officer who has resigned is sufficient acceptance of his resignation. In those states having a statute which provides that a person elected to office shall serve therein until his successor is elected or appointed and qualified, an officer although his resignation is tendered and accepted by the proper authority, continues in office and is not relieved from his duties or responsibilities as such officer until his successor has qualified. During the interim between the acceptance of his resignation and the qualification and induction of his successor into office the resigning officer may be compelled by mandamus to perform any of the duties which pertain to the office from which he has resigned."

See also R. C. L., Vol. 22, 537; *State of W. Va. vs. Blair*, 87 W. Va. 564; 19 A. L. R. 35, note page 484.

Again in R. C. L. Vol. 22, 438, it is said:

"A vacancy may occur so as to permit the appointing or electing power to appoint or elect some person to the office although the incumbent continues physically to occupy it, (*Haymaker vs. State* (N. M.) 163 Pac. 248; L. R. A. 1917 D 219) and has the right to do so until the qualification of his successor. *State vs. Boucher*, 3 N. D. 389; 21 L. R. A. 539."

In 35 Cyc. page 890, it is said:

"Where a school trustee resigns, to take effect at a certain date the proper board may before that date elect a successor for the unexpired term." (Citing *Leech vs. State*, 78 Ind. 570.)

In American and English Encyclopedia of Law, Second Edition, Vol. 23, page 423, it is said:

"Where the resignation is worded to take effect at a future day it does not take effect until such day, no matter when it is accepted, but it

has been held that this does not prevent the election of a successor before the day fixed for the taking effect of the resignation." (Citing *Leech vs. State*, supra, and *Reiter vs. State*, supra.)

From the authorities, it seems clear that the case of *Reiter vs. State*, supra, is considered as being conclusive, so far as the State of Ohio is concerned, of the proposition that the mere tendering of a resignation by a public official, even though by the terms of the resignation it is not to take effect until some future date, creates a vacancy in the office to the extent of vesting in the proper authorities the power to fill the vacancy.

This power was recognized, although not directly involved in the issues, in the case of *State of Ohio, ex rel. Charles Orr, vs. Board of Education of the City of Cleveland, et al.*, 23 O. C. C. (N. S.) 98. In that case, Charles Orr, Director of Schools of the City of Cleveland, tendered his resignation on January 16, 1912, to become effective June 15, 1912. On May 12, 1912, and again on June 3, 1912, he attempted to withdraw this resignation in writing. Prior to the attempted withdrawal on June 3, 1912, the board of education passed a resolution adopting a report of its committee on business management, which recommended that the board proceed to elect a director of schools for the unexpired term and which expressed an opinion that a vacancy would exist in the office of the Director of Schools from and after the fifteenth day of June, 1912. The board on the seventh day of June, 1912, elected Frank G. Hogan as Director of Schools to fill the vacancy theretofore declared by it to exist.

An action in mandamus was brought, in which Charles Orr was relator and the members of the board of education were respondents, and it was sought by means of this action to restore Charles Orr to the position of Director of Schools. Although the question of the right of Frank Hogan to act as Director of Schools under his election of June 7th, was not directly involved, it was held in substance that this election of Frank Hogan amounted to an acceptance of the resignation of Charles Orr and that the attempted withdrawal by Charles Orr of his resignation was of no avail: The right of Frank Hogan to act as Director of Schools under his election of June 7th, was not questioned. This case was affirmed without opinion by the Supreme Court in 87 O. S. 529.

Inasmuch as our statute, Section 4745, supra, provides that members of boards of education shall hold office until their successors are elected and qualified, and Section 4748, supra, provides that vacancies shall be filled for the unexpired term by election by the remaining members of the board, it seems clear that the board had the right to fill the unexpired terms of A and E, the resigning members, on January 30, 1927, and that both of these members had the right to continue as members of the board after tendering their resignations until their successors were so elected and qualified and thus to participate in the filling of these vacancies, at least in all respects other than participating in the election of their own successors.

The question might arise whether or not the authorities herein relied on are applicable to the present question, because of the wording of the statute involved (Section 4748, General Code), which reads:

"Any such vacancy shall be filled by the board at its next regular or special meeting or as soon thereafter as possible, by election for the unexpired term. A majority vote of all the remaining members may fill any such vacancy."

Out of this grow two questions:

First, whether the provision that the vacancy must be filled at the next regular or special meeting precludes the filling of the vacancy at any other time.

Second, whether the provision that the vacancy may be filled by a majority vote of all the remaining members of the board permitted A and E to participate in the filling of these vacancies.

As to the first question, it has been held that the provisions of the statute as to time are directory merely and that a vacancy in a board of education may be filled at the same meeting at which a member resigns. See *State ex rel. Mittendorf vs. Hensing*, 10 O. A. 205. In deciding this case the court quotes from Judge Cooley without giving the reference, which is the source of the quotation, as follows:

"If the act is performed, but not in the time or in the precise mode indicated it may still be sufficient if that which is done accomplishes the substantial purposes of the statute."

Moreover, in connection with this question, it will be noted that the section under consideration provides that any "such vacancy shall be filled by the board at its next regular or special meeting or as soon thereafter as possible." It would seem that the word "thereafter" refers to the word "vacancy" rather than to the words "regular or special meeting." Such a construction is consistent with the policy of the law to prevent, whenever possible, a vacancy in public office.

So far as the time of filling the vacancies is concerned, there can be no question but that the vacancies created by the unconditional resignation of A might lawfully have been filled at the meeting of December 30, 1927, as was done. With respect to the filling of the vacancy caused by the resignation of E, which was not to become effective until January 1, 1928, it is not so clear. In my opinion, however, in view of the general law with respect to the filling of vacancies caused by the resignation of public officers, as established by the authorities hereinbefore cited, the directory provisions of the statute as to time, the fact of the vacancy being filled without objection of the resigning member and in fact with his open and active participation, and the further fact that the substantial purpose of the statute was thereby accomplished, the filling of the vacancy caused by the resignation of E on January 30, 1927, was lawful and proper.

Coming now to the question of the lawfulness of A's and E's open participation in the filling of these vacancies, it will be noted that the statute provides that vacancies may be filled by a "majority vote of all the remaining members of the board." This provision it seems to me precludes either A or E from voting on the election of his own successor. Inasmuch, however, as each had a right to participate in the proceedings of the board until his successor is elected and qualified, each of them had a right to participate and vote in the election of a successor to the other. It does not appear from your communication whether B and D were present at the meeting of December 30, 1927. As nothing appears to the contrary, I assume that this meeting was legally called and that, therefore, B and D had a right to be present and participate in the proceedings. Being a special meeting, if it were not properly called, none of its proceedings was lawful.

Disregarding the vote of A, on the motion to appoint B his successor, and the vote of E, on the motion to appoint D the successor of E, there remain two votes in favor of the motions. As no votes were cast against the motions these two votes constitute a majority of the votes cast for the motions, but they were not representative of a majority of all the remaining members of the board or of the full remaining membership of the board.

It is a general rule in political elections that a majority of the votes cast at an election on any question means the majority of those who voted on that question

Taylor vs. Taylor, 10 Minn. 107; *Holcomb vs. Davis*, 56 Ill. 414; *Gillespie vs. Palmer*, 20 Wis. 544. In *Cass County vs. Johnston*, 95 U. S. 369, it is said:

"All qualified voters who absent themselves from an election duly called are presumed to assent to the express will of the majority of those voting unless the law providing for the election otherwise declares. Any other rule would be productive of the greatest inconvenience and ought not to be adopted unless the legislative will to that effect is clearly expressed."

It seems to me the language of Judge Cooley, above quoted, may well be applied to this situation and that it may be determined that the substantial purpose of the statute was accomplished. If B and D had voted on these motions, it can scarcely be doubted but that they would have voted in the affirmative, and as the apparent purpose of the action of the board was to fill the vacancies created in the board during its existence as such, while the board as thus constituted still functioned, which it no doubt had a right to do, it should be held to have done so, by the action taken on January 30, 1927, and that the said action was a substantial compliance with the statute and was lawful and had the effect of accomplishing the manifest purpose of the board.

Another question arises, that is, whether or not B and D, having been on December 30, 1927, members of this board of education, were qualified to election to membership on the same board of which they were already members. Obviously, they are not qualified to hold two positions as members of the board, and inasmuch as their terms as members did not expire until the first Monday in January, 1928, they could not qualify to fill the unexpired terms of A and E on December 30, 1927, unless they resign from their former positions, or unless the election and qualification for the new positions would be tantamount to a resignation of the former position. We need not consider this matter, however, because election to the position and qualifying for it by taking the oath of office and assuming its duties are entirely different, and the eligibility of B and D on December 30, 1927, to be elected to fill the unexpired terms of A and E, is not dependent on their resigning the positions they already had, although that might have been done. In R. C. L. Vol. 22, page 402, it is said:

"The courts do not agree as to the time at which the eligibility or qualification of a person for public office must be determined. The question has arisen most frequently under statutory or constitutional provisions using the word eligible in connection with certain qualifications or disqualifications for public office. One line of authorities holds that the time of election is the proper time to test whether a person is qualified or eligible, and that it is immaterial that a person then qualified removes the disqualification before actually entering on the duties of the office. * * * But the weight of authority appears to be that where the word 'eligibility' is used in connection with an office and there are no explanatory words indicating that such word is used with reference to the time of election, it has reference to the qualification to hold the office rather than the qualification to be elected to the office."

It is my opinion that B and D were on the thirtieth day of December, 1927, eligible to be elected to fill the unexpired terms of A and E and upon being so elected they could qualify for the office on the first Monday of January, 1928.

Specifically answering your questions, in the order asked:

First, the resignation of A having been tendered on December 13, 1927, without

any qualification as to when it would become effective, would, so far as A himself is concerned, be construed as being effective at once if the remaining members of the board saw fit then to elect his successor. This, however, did not prevent A from continuing as a member of the board and participating in its deliberations until such time as his successor was elected and qualified.

Second, the circumstances surrounding the resignations of A and E were such as to vest in the board as it existed prior to January 1, 1928, the power and authority to elect members to fill the unexpired terms of A and E.

Third, the fact that the separate resignations of A and E were tendered on December 13, 1927, and no action was at that time taken with reference thereto, permitted A and E each to continue physically to occupy his position as a member of the board and to participate in the election of a person to fill the vacancy caused by the resignation of the other. The vote of A on December 30, 1927, on the motion to appoint D to fill out the unexpired term of E was legal and the vote of E on the motion to appoint B to fill out the unexpired term of A was legal.

Fourth, upon the qualification of D and B by taking the oath of office and assuming their duties as members of the board of education for this school district on the first Monday of January, 1928, or thereafter, they became legal members of such board.

Fifth, in view of the answers given to the four previous questions, your fifth question need not be answered.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1892.

APPROVAL, ABSTRACT OF TITLE TO LAND OF SOLOMON KLINE, IN
LAUREL AND PERRY TOWNSHIPS, HOCKING COUNTY, OHIO.

COLUMBUS, OHIO, March 24, 1928.

HON. CARL E. STEEB, *Secretary, Ohio Agricultural Experiment Station, Columbus Ohio.*

DEAR SIR:—My opinion has been requested on a corrected abstract of title on certain lands situated in Laurel and Perry Townships, Hocking County, Ohio, and more particularly described as follows:

“First tract, being the east half of the southwest quarter of section number thirty (30) township number twelve (12) range eighteen (18) and the northwest quarter of the southwest quarter of said section thirty (30) and a part of the southwest quarter of the southeast quarter of said section thirty (30) same township and range, beginning at the southeast corner of the southwest quarter of said section; thence east to the county road; thence north along said road to the north and south line of said land; thence west to the northwest corner of said lot; thence with the line of said land to the place of beginning, containing one-half acre more or less, containing in all one hundred and twenty-one (121) acres more or less.