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LOCAL SCHOOL DISTRICT — APPOINTMENT OF EXECUTIVE HEAD—OUTGOING SUPERINTENDENT OF COUNTY SCHOOLS CANNOT NOMINATE HIMSELF FOR EXECUTIVE HEAD—SECTION 3319.02.

SYLLABUS:

1. The provision of Section 3319.02, Revised Code, as to the recommendation by the superintendent for the position of executive head of a local school district, is a condition precedent to the right to make such appointment.

2. It would be contrary to public policy for a county superintendent of schools to recommend his own appointment to the position of executive head of a local district presently under his supervision, even though such appointment is to become effective after his tenure in the office of county superintendent has ended.

Columbus, Ohio, May 18, 1959

Hon. Donovan Lowe, Prosecuting Attorney
Morgan County, McConnelsville, Ohio

Dear Sir:

I have before me your request for my opinion, reading in part as follows:

“I have been requested by the Morgan County Board of Education to ask for a ruling from your Office on the following matter:

“As a result of School Consolidation, there will be in Morgan County, only one local school district after July 1, 1959. There will be in existence, the Morgan County Board of Education and the Morgan Local School District Board of Education.

“The Morgan County Board of Education, McConnelsville, Ohio, met at a regular meeting on March 5, 1959. At that time, they notified the present County Superintendent that his present contract which expires July 31, 1959, would not be renewed.

“The Morgan Local School District Board of Education, at a meeting on March 9, 1959, hired the present County Superintendent as Executive Head of the Local School District for three years, without considering any recommendations or nominations for such position being made by the School Superintendent, himself.

“* * *

“With this back-ground, the following questions are posed:

“1. Is it a mandatory requirement or prerequisite under Sec. 3319.02 R.C. that, prior to the employment of an Executive Head of a Local School District, that at least one nomination or recommendation be submitted by the County Superintendent of Schools for consideration by the Local School District Board of Education?

“2. If it may be implied that the presence of the County Superintendent of Schools at a local district board meeting where the County Supt. of Schools is employed as Executive Head of the Local District constitutes nomination of himself as a candidate. May he so recommend or nominate himself to fill the top executive position in the school system under him, full well knowing that his present contract as County Supt. of Schools is not to be renewed by the County Board of Education?

“3. Did Morgan Local School District legally hire the present County Supt. of Schools as Executive Head of the Local School District where no recommendations or nominations for this position were presented before the Local School District Board of Education by the County Supt. of Schools?”
Section 3319.02, Revised Code, provides in part:

“* * * *Upon recommendation of the county superintendent*, a local board may employ a person of proper certification or a person holding or qualified to hold the position of executive head of a local school district on the effective date of this act, as executive head for a period not to exceed five years beginning with the first day of August and ending on the thirty-first day of July. A board of education by a three-fourths vote of its full membership may, after considering two nominations for the position of executive head made by the county superintendent of schools, employ or re-employ a person not so nominated for such position.” (Emphasis added)

It is clear from the language of that section that the recommendation of the county superintendent is a pre-requisite to the action of the board. In effect, the statute makes the county superintendent an essential part of the appointing power.

The power and duties of a superintendent, including a county superintendent, are clearly set forth in Section 3319.01, Revised Code, as follows:

“Such superintendent shall be the executive officer for the board, direct and assign teachers *and other employees* of the schools under his supervision, * * *” (Emphasis added)

The county superintendent has supervision over all local districts in his county, since such local districts constitute the county district. Section 3311.05, Revised Code.

The real question, therefore, becomes this: may the superintendent of a county school district take part in the appointment or employment of himself to a position under the control of one of the local districts which are under his supervision?

It is well settled that offices are incompatible, where one is in any way subordinate to the other. This principle is carried further in 42 American Jurisprudence, page 937. There we find this statement:

“One of the most important tests as to whether offices are incompatible is found in the principle that the incompatibility is recognized whenever one is subordinate to the other in some of its important and principal duties, and subject in some degree to its revisory power. Thus, two offices are *incompatible where the incumbent of the one has the power of appointment to the other office* or the power to remove its incumbent, even though the contingency on which the power may be exercised is remote.”
(Emphasis added)

Citing *Ehlinger*, 117 Tex., 547, 8 S.W. (2d), 6662.

The same proposition is stated in 67 Corpus Juris Secundum, page 133, where it is said:

“It is contrary to the policy of the law for an officer to use his official appointing power to place himself in office, so that even in the absence of a statutory inhibition, all officers who have the appointing power are disqualified for appointment to the offices to which they may appoint * * * and notwithstanding his office was about to expire; nor can the result be accomplished indirectly by his resignation with the intention that his successor shall cast his vote for him.”

Citing *Sprinkle v. Carr County*, 254 Ill., 337; *Commonwealth v. Major*, 343 Pa., 365, *Montgomery v. Weissinger*, 140 Ky., 353.

I am in entire agreement with the above statement as to the policy of the law in relating to an attempt by an officer to place himself in another office, particularly one over which he has presently the right and duty of supervision.

If the superintendent in the case you present had attempted to nominate himself to the position in question, he would have been attempting

to project his appointing power into a term which would begin after his authority ceased. This, according to the holding in *State, ex rel. Morris v. Sullivan*, 81 Ohio St., 79, he could not do. It was there held:

“The well settled rule of the common law forbids that an officer clothed with power of appointment to a public office, shall forestall the rights and prerogative of his successor, by making a prospective appointment to fill an anticipated vacancy in an office the term of which cannot begin until after his own term and power to appoint have expired.”

In Opinion No. 1935, Opinions of the Attorney General for 1933, p. 1831, it was held:

“A county board of education is without power to anticipate the expiration of the term of an assistant county superintendent of schools which will take place after the time when the life of the board of education has ended, and appoint or employ a successor to the said assistant county superintendent of schools.”

Your statement that the board employed the superintendent in question “without considering any recommendations or nominations being made by the superintendent,” shows clearly that the action of the board was in total disregard of the law, and therefore of no effect.

Accordingly, it is my opinion and you are advised:

1. The provision of Section 3319.02, Revised Code, as to the recommendation by the superintendent for the position of executive head of a local school district, is a condition precedent to the right to make such appointment.

2. It would be contrary to public policy for a county superintendent of schools to recommend his own appointment to the position of executive head of a local district presently under his supervision, even though such appointment is to become effective after his tenure in the office of county superintendent has ended.

Respectfully,

MARK McELROY

Attorney General