

1770.

BOARD OF EDUCATION—ELECTION OF SUCCESSORS TO MEMBERS
WHO ARE HOLDING OVER BEYOND STATUTORY PERIOD.

SYLLABUS:

1. *When members of a board of education hold over, after the expiration of the statutory period fixed by law as their term of office, their successors should be elected at the first regular time for the election of township officers which occurs during said hold-over period.*

2. *When the entire personnel of a board of education consists of persons who are holding over, after the expiration of the regular statutory period fixed by law as the terms of office for members of the board of education, an entire new board consisting of five members should be elected at the regular time for electing township officers. Each member so elected shall be elected for a period of four years.*

COLUMBUS, OHIO, February 27, 1928.

HON. W. P. TUCKER, *Prosecuting Attorney, West Union, Ohio.*

DEAR SIR:—This will acknowledge receipt of your communication as follows:

“In re: School Election, in Sandy Springs, Rural School District, Adams County, Ohio.

There has been no school election in this district held to elect new board members since the year 1921.

They have been taking care of this matter by appointment to fill vacancies happening in the board, and by holding over.

All terms have expired long since, but there is a board filled up as above stated.

In the fall of 1927, there were five candidates, regularly nominated, and four others received votes; the ballot stated: ‘*Vote for not more than five.*’

The old board contends that there was no election because there could not be more than three to be elected at this time, and as a consequence, they hold over.

The other side hold that all the members being out that the five highest constitute the Board of Education.

One side contends that three are to be elected at one election and in two years two are to be elected and so on; they contend, although that particular section of the statute has been repealed, yet there was no more use of that section after the machinery had been started in motion, hence the reason for the repeal.

The other side holds that since there has been no election since 1921, all are out, and that it is legal and the right thing to elect a full board at the fall election last year.

Would like to have your opinion on this matter.”

Sections 4712, 4745 and 4831, General Code, provide as follows:

Sec. 4712. “In rural school districts, the board of education shall consist of five members elected at large at the same time township officers are elected and in the manner provided by law, for a term of four years.”

Sec. 4745. "The terms of office 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."

Sec. 4831. "Township officers and justices of the peace shall be chosen by the electors of each township on the first Tuesday after the first Monday in November in the odd numbered years."

Former Section 4713, General Code, which was repealed in 1914 (104 v. 145), read as follows:

"At the first election in a township district a board of education shall be elected as herein provided, two members to serve for two years and three to serve for four years. At the township election held every second year thereafter their successors shall be elected for a term of four years."

Said Section 4713, General Code, was, before the codification of 1910, a part of Section 3915, Revised Statutes, which had been enacted as a part of an act of the General Assembly passed April 25, 1904, entitled:

"An Act—To provide for the organization of the common schools of the State of Ohio and to amend, repeal and supplement certain sections of the Revised Statutes and laws of Ohio named herein." (97 v. 334.)

The entire Section 3915, Revised Statutes, as enacted at that time (97 v. 342), read as follows:

"The board of education of township school districts shall consist of five members elected at large at the same time and in the same manner as the township officers are elected, for the term of four years from the first Monday in January after their election (or) until their successors are elected and qualified. At the first township election held after the passage of this act, there shall be a board of education elected in all township districts as provided for herein, two to serve for two years, and three to serve for four years, and at the township election held every second year thereafter, their successors shall be elected for the term of four years. Upon the organization of said boards, upon the succeeding first Monday in January after their election, the previously existing township boards of education shall be thereby abolished and the newly elected and organized boards shall be their successors in all respects."

It will be observed that the aforesaid Section 3915 of the Revised Statutes was divided and somewhat changed at the time of the codification in 1910. The original section provided that:

"At the first township election held after the passage of this act there shall be a board of education elected in all township districts as provided for herein."

whereas, the codified section simply provided:

"At the first election in a township district a board of education shall be elected as herein provided."

At the time of the enactment of said Section 3915, Revised Statutes, school districts were classified as city school districts, village school districts, township school districts and special school districts. Section 3885, Revised Statutes, (97 O. L. 335).

The act of which said Section 3915, Revised Statutes, was a part was passed April 25, 1904. I am advised that at that time, what is now Sandy Springs Rural School District was within the classification known as township school districts and that it became a rural school district upon the passage of the school code of 1914 by virtue of Section 4735, General Code, which reads as follows:

“The present existing township and special school districts shall constitute rural school districts until changed by the county board of education, and all officers and members of boards of education of such existing districts shall continue to hold and exercise their respective offices and powers until their terms expire and until their successors are elected and qualified.”

In 1904 the law provided that:

“The township officers and justices of the peace shall be elected on the first Tuesday after the first Monday of November annually in the manner prescribed by law.” Section 1442, Revised Statutes, (97 v. 62).

The first election for township officers after April 25, 1904, the date of the enactment of Section 3915, Revised Statutes, *supra*, was the first Tuesday after the first Monday of November, 1904. At that time there should have been elected in Sandy Springs Rural School District, two members of the board of education for two years and three members for four years. Nothing appearing to the contrary, I will assume for the purposes of this opinion, that at that time the electors of Sandy Springs Rural School District followed the law in the election of their school board and continued to do so after the district became a rural school district in 1914, and until 1921.

The terms of the members of this board who had been elected for two years expired on the first Monday of January, 1907; of those who had been elected for four years, on the first Monday in January, 1909. In the natural course of events, successors to these members would have been elected in November, 1906, and November, 1908. However, on November 7, 1905, while these members were in office, an amendment to the Constitution was adopted providing in Sec. 1 of Article XVII that:

“The election for state and county officers shall be held on the first Tuesday after the first Monday in November in the even numbered years; and elections for all other elective officers shall be held on the first Tuesday after the first Monday in November in the odd numbered years.”

The effect of this constitutional provision was to extend the term of the members of boards of education then in office and to put over the election of their successors to November, 1907, and November, 1909, respectively.

Assuming that successors to the members of this board were regularly elected as their terms expired, the board in 1921 consisted of three members whose terms were to expire on the first Monday of January, 1922, and two members whose terms were to expire on the first Monday in January, 1924.

As you state there has been no school election to elect new members since 1921, I take it that there was an election at that time and that successors were elected to the three members whose terms would expire in January, 1922. The terms of the persons elected in November, 1921, would begin in January, 1922, and extend for four years, and until their successors were elected and qualified, that is to say their terms would

expire on the first Monday in January of 1926 had there been any one elected in the fall of 1925 to succeed them.

The regular time for the election of successors to the two members of Sandy Springs Rural School District whose terms expired in January, 1924, was at the November election in 1923. Inasmuch as there was no election for members of the board of education in 1923, the incumbents of these two positions held over until their successors should be elected and qualified, that is to say, no vacancies existed in the sense that there was no one to fill the positions, because the statute, Section 4745, General Code, expressly provides that the term of a member of the board of education is for four years except as may be specifically provided in Chapter 2 of Title XIII of the General Code, and *until his successor is elected and qualified*. The said Chapter 2 of Title XIII has to do with city boards of education and need not be considered for the purposes of this opinion.

This would be true whether the persons who had originally been elected to the office were the incumbents on the first Monday of January, 1924, or whether they had in the meantime resigned or vacancies had otherwise occurred, and had then been filled by election by the remaining members of the board as authorized by Section 4748, General Code, because an appointee to fill a vacancy in an office succeeds to all the rights of the original holder, including the right to hold over, if such right had existed in the original incumbent.

The right to fill vacancies in boards of education by election by a majority vote of the remaining members of the board, as provided by Section 4748, General Code, exists even if that vacancy should occur after the expiration of the four year period which the statute fixes as the regular term of members of boards of education and such person so elected holds the office until his successor is duly elected and qualified according to law, as the period between the expiration of the term of a public officer and the qualifications of his successor is as much a part of the officer's term of office as the fixed statutory period, where the law provides that he shall hold over until his successor qualifies. Using the language of Judge Williams in *State ex rel. Wright*, 56 O. S. 540, speaking of the office of mayor :

“His right to serve after the expiration of the designated period, until the qualification of his successor, being conferred by statute at the time of his election, is no less a part of his statutory term of office, than is the fixed period itself ; and while he is so serving, there can be no vacancy in the office, in any proper sense of the term, for there is an actual incumbent of the office legally entitled to hold the same.”

Judge Spear in *State vs. Metcalfe*, 80 O. S. 244-264, speaking of the resignation of Judge Burrows of the Circuit Court bench during the six year period for which he had been elected, said :

“What did Judge Burrows resign? There was no qualification to his resignation, if indeed there could have been. We are of opinion that he resigned the entire authority which as a judge he possessed. That embraced as well the authority to hold over until a successor should be elected and qualified as the remaining portion of the six years, the extent of his term as originally conferred. (Citing cases). See also Mechem on Public Offices, here and there.”

Hence, if the Board of Education of Sandy Springs Rural School District during the time since 1921 has kept its personnel filled by elections, filling vacancies as they may have occurred, the board has been at all times a legally constituted board qual-

ified to do business, and will so continue until successors to each of its members are duly elected and qualified.

Had elections been held as they should have been since 1921, the board on the first Tuesday after the first Monday of November, 1927, would have consisted of two members whose terms would expire on the first Monday of January, 1928, and three members whose terms would expire on the first Monday of January, 1930, hence there would have been two to elect at that time.

The question arises, where a member of a board of education holds over, for the reason that no successor had been elected at the regular and proper time for electing such successor, how long does he hold over for? When should a successor be elected, if it is not done at the proper time? Should it be done at the next regular election for members of boards of education after the one when it should have been done, irrespective of the fact that at that time the terms of the remaining members of the board expire and in the regular course of events their successors should also be elected? Or should successors be elected at that time to the ones whose terms at that time expire, and the hold-overs continue to hold over until the next regular time for election of township officers? Or should an election be had for successors to the hold-overs and the ones whose terms expire at that time hold over until the next election?

For example, reverting to the situation as it existed in this district on the first Tuesday after the first Monday in November, 1925. At that time the board consisted of three members whose terms would expire on the first Monday in January, 1926, and two members whose successors should have been elected in November, 1923, and who were holding over because no successors had been elected in November, 1923, as provided by law. How many should have been elected in November, 1925? Should three members have been elected and the two hold-overs continue to hold over, or should two members have been elected and three members hold over, or should five members have been elected, and who should decide how many were to be elected?

There apparently is no statutory provision covering this subject. One thing is assured, no matter how many ought to have been elected, those elected would have been so elected for a four year term. Former Section 4713, General Code, had been repealed and Sections 4712 and 4745, *supra*, had been enacted since the original enactment of said Section 4713, General Code, and whether it had been repealed or not, there was no authority at that time and is not now for the election of a member of a board of education for a lesser period than four years, except when a new school district is created by a county board of education and a school board appointed to hold until the first regular election for members of a board of education at which time three members shall be elected for four years and two members for two years as provided by Section 4736, General Code; or when a board of education is appointed by the county commissioners as provided by Section 4736-1, General Code; or where new villages are created and a board of education selected as provided by Sections 4709 and 4710, General Code. None of these statutes has any application to the instant case.

I have no doubt that the Legislature intended, in the first instance, to so arrange the election of members of boards of education that the board would be a continuing body, and that only a part of the board would retire at one time, but it has failed to provide for the maintenance of the original sequence of terms under circumstances such as we have in Sandy Springs Rural School District, but on the other hand has provided that all members of boards of education shall hold over until their successors are elected and qualified and, when elected, they shall be elected for a term of four years.

You state that the old board contends that there was no election in 1927 for the reason that three members should have been elected in November, 1927, and in two years two members should be elected, although as pointed out above, if elections had

been regularly held as they should have been since 1921, there would have been only two to elect in 1927. The regular statutory term of the other three members of the board would not expire until January, 1930.

It will be observed that the statutes provide that members of boards of education shall hold their office until their successors are elected and qualified, not until the expiration of another statutory four year period after the expiration of the four year period for which they had been elected. They are subject to have their successors elected at the first opportunity the electors of the district have to elect such successors and if this is done they must retire in favor of the persons so elected.

One of the cardinal principles of the American form of government is that officeholders who are called upon to administer the laws enacted by the people, among the people, shall be chosen by the people through the ballot box. This principle is expressed in Article XVII, Section 2 of the Constitution of Ohio, wherein it is provided:

“ * * * Any vacancy which shall occur in any elective state office other than that of a member of the General Assembly or of governor, shall be filled by appointment by the governor until the disability is removed or a successor elected and qualified. Every such vacancy shall be filled by election at the first general election for the office which is vacant, that occurs more than thirty (30) days after the vacancy shall have occurred. The person elected shall fill the office for the unexpired term. All vacancies in other elective offices shall be filled for the unexpired term in such manner as may be prescribed by law. * * * ”

And in Section 10, General Code, wherein it is provided as follows:

“When an elective office becomes vacant, and is filled by appointment, such appointee shall hold the office until his successor is elected and qualified. Unless otherwise provided by law, such successor shall be elected for the unexpired term at the first general election for the office which is vacant that occurs more than thirty days after the vacancy shall have occurred. This section shall not be construed to postpone the time for such election beyond that at which it would have been held had no such vacancy occurred, nor to affect the official term, or the time for the commencement thereof, of any person elected to such office before the occurrence of such vacancy.”

Neither the constitutional provision above quoted nor Section 10, *supra*, are applicable here, because members of boards of education are not state officers and it is *otherwise provided by law* than in Section 10, *supra*, that where a vacancy occurs in the membership of a board of education the vacancy shall be filled by election by the board for the unexpired term and until his successor shall be duly elected and qualified, but it seems to me the spirit of these enactments should be preserved. Although the statute does not provide that a successor to a member of a board of education shall be elected at the first general election for the office after the expiration of the statutory period which constitutes the regular term of the office, where the unexpired term has been filled by election by the board, such election should nevertheless be held at that time.

If, however, in this case, three members or two members or any lesser number than five members had been elected in November, 1927, the election in my opinion would have been void for the reason that it would have been impossible to determine whose places the persons elected would take, and therefore who of the old board should retire. Any one of the then acting members of the board had as good a right

to continue as such as any other. None of those elected could be designated as the successor of a particular former member.

The electors in Sandy Springs Rural School District have by their action in nominating and electing five members of their school board elected successors to the present acting members of the board who are authorized to act as such only until their successors are elected and qualified, and if the election has been in all respects regular, which I assume it has, the acting members should retire when the five persons who receive the highest number of votes at the November election for members of the board of education properly qualify for the position.

A somewhat similar situation was before the Supreme Court in the case of *State ex rel. vs. Houpt*, 98 O. S. 451. The facts in that case are not clearly and definitely set out in the opinion. An examination of the files discloses that on September 15, 1915, the county board of education of Wyandot County created the McCutchenville Rural School District and appointed therefor a board of education by virtue of Section 4736, General Code. The county commissioners of Wyandot County, under the mistaken belief that it was their duty to appoint a board of education for this district, appointed the same persons as members of the board that had been appointed by the county board of education, acting under Section 4736-1, General Code. Said Section 4736-1, General Code, provided that when a board of education was appointed by the county commissioners:

“The successors of the members so appointed shall be elected at the first election for members of the board of education held in such district after such appointment, two members to serve for two years and three members for four years. And thereafter their successors shall be elected in the manner and for the term as provided by Section 4712 of the General Code.”

At that time, Section 4736, General Code, (106 O. L. 397) provided in part as follows:

“The county board of education is hereby authorized to create a school district from one or more school districts or parts thereof. The county board of education is authorized to appoint a board of education for such newly created school district and direct an equitable division of the funds or indebtedness belonging to the newly created district. Members of the board of education of the newly created district shall thereafter be elected at the same time and in the same manner as the boards of education of the village and rural districts.”

Said Section 4736, General Code, has since been amended (108 O. L. Part 1, page 707) to read as it now does. The above section, as amended, provides that:

“* * * 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. * * *”

For some reason no election was held for members of the board of education in this McCutchenville District in November, 1915, as there should have been, and at the November, 1917, election the ballots provided:

"For members of board of education. Vote for not more than five."

The five persons who received the highest number of votes in the 1917 election instituted action in quo warranto making the acting board, who had refused to retire, defendants therein. It was contended by the defendants that three members should have been elected for four years and two for two years, and for that reason the election as held was void. It was argued in the briefs filed by the Attorney General on behalf of respondents that although Section 4736, General Code, did not provide for such action, Section 4736-1, General Code, did so provide as did also Section 4710, General Code, relating to elections for boards of education in newly created village districts, and these sections together with repealed Section 4713, General Code, heretofore referred to, indicated a legislative intent that the terms of members of boards of education should rotate in such a manner that the board would be a continuing body and only a part of its membership retire at the same time.

To preserve the spirit of this intendment, elections under circumstances such as existed in the McCutchenville District in November, 1917, should be so conducted as to provide a school board the terms of whose members would be such that only a part of the membership would retire at one time. The court held:

"That the County Board of Education of Wyandot County, Ohio, was duly and legally authorized by the provisions of Section 4736, General Code, to appoint the members of the board of education of the newly created McCutchenville Rural School District, and that the appointment so made by them was valid and legal; and the pretended appointment by the commissioners of Wyandot County on the 9th day of October, 1915, was without authority of law, and void. * * *

The court further finds that the provisions of Section 4736-1 in relation to the successors of members of a board of education of a rural school district appointed by the commissioners of a county under authority of that section, have no application whatever to the election of successors of members of the board of education of a rural school district appointed by the county board of education under authority of Section 4736, General Code. * * *

The court further finds that the relators were each duly, legally, and properly elected members of the board of education on the 6th day of November, 1917, at the time fixed for the election of township officers within the State of Ohio as members of the Board of Education of the McCutchenville Rural School District. * * *

That the defendants unlawfully usurp the office of members of the Board of Education of the McCutchenville Rural School District. * * *

It is therefore ordered and adjudged, that the defendants and each of them be ousted from the office of member of the Board of Education of the McCutchenville Rural School District, and that the relators be inducted therein."

It is therefore my opinion that so far as appears from your communication, the election for members of the Board of Education in Sandy Springs Rural School District held in November, 1927, was regular and that the five persons who received the greatest number of votes as candidates for members of the Board of Education of Sandy Springs Rural School District were duly elected as members of said board, and that when they qualify for the position and duly organize according to law, they

will constitute the duly elected and qualified board of education for such district, and that the old board should retire and turn over the books and other properties belonging to the district to the newly elected board of education.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1771.

APPROVAL, BONDS OF HARRISON TOWNSHIP RURAL SCHOOL DISTRICT, PREBLE COUNTY—\$51,500.00.

COLUMBUS, OHIO, February 27, 1928.

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

1772.

APPROVAL, BONDS OF LEWISBURG VILLAGE SCHOOL DISTRICT, PREBLE COUNTY, OHIO—\$38,600.00.

COLUMBUS, OHIO, February 27, 1928.

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

1773.

COUNTY COMMISSIONERS—WHEN THEY MAY EMPLOY ATTORNEY TO FILE SUIT ON BOND OF DEFAULTING TREASURER—SECTION 2695, GENERAL CODE, AS TO PENALTY DISCUSSED—DUTY OF STATE AUDITOR.

SYLLABUS:

1. *The board of county commissioners of the county is not authorized to employ attorneys other than the prosecuting attorney of the county for the purpose of filing suit on the bond of the defaulting county treasurer, unless the employment of such attorneys is authorized by the common pleas court upon application for such authority made by the board of county commissioners and the prosecuting attorney in the manner provided by Section 2412, General Code.*