

1548.

## ELECTION—MEMBERS OF BOARDS OF EDUCATION—DUTY OF ELECTION OFFICERS AS TO RETURNS.

*SYLLABUS:*

1. *It is the duty of election officers of each precinct not less than five days after an election for members of boards of education to make returns to the clerk of the board of education of the district. All uncounted ballots in such elections are likewise to be returned to the clerk of the board of education of the district. All ballots other than the uncounted ballots are to be returned by the election officers to the board of deputy state supervisors of elections.*

2. *Question of canvassing returns and disposition of ballots in elections in school district on question of issuing bonds not considered.*

COLUMBUS, OHIO, January 9, 1928.

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

DEAR SIR:—This will acknowledge receipt of your recent communication requesting my opinion as follows:

“We are enclosing herewith copy of a letter from the clerk of the Board of Deputy State Supervisors of Elections of Warren County.

We request your opinion as to whether or not all ballots in election for member of boards of education should be delivered to the board of education as the canvassing board or just those ballots upon which the precinct election officers have failed to agree as to the count thereof.”

Accompanying your letter and to which you refer is one from the clerk of the board of deputy state supervisors of elections of Warren County, reading as follows:

“The board of education of Merrittstown School District, Warren County, Ohio, refuses to canvass the result of the election held on the 8th day of November, 1927. Took the matter up with our prosecuting attorney but he does not know just what to do and asked this board to write you for opinion.

They refuse to make abstract on ground that all ballots must be returned to them by the various judges but election board says only disputed ballots should be returned.

Just what should this board do no contest pending?”

It is noted that while your inquiry is confined to elections for members of boards of education, the letter from the clerk of the board of deputy state supervisors of elections of Warren County refers generally to the canvass of the result “of the election held on the 8th day of November, 1927.” Notwithstanding this fact, I am confining this opinion to the question asked in your letter, and the question of canvassing the returns and disposition of the ballots of elections held to determine whether or not bonds of a school district shall be issued, is not considered herein. In this connection your attention is invited to Section 2293-21 of the General Code (112 v. 364, 373), the first sentence of which reads as follows:

“The election shall be held at the regular places for voting in such subdivision and shall be conducted, canvassed and certified in the same manner as regular elections in such subdivision for the election of county officers.”

Section 5120, General Code, providing for the canvass of votes in school elections, is as follows :

"In school elections, the returns shall be made by the judges and clerks of each precinct to the clerk of the board of education of the district, not less than five days after the election. Such board shall canvass such returns at a meeting to be held on the second Monday after the election, and the result thereof shall be entered upon the records of the board."

Under the above section it is the duty of the election officers of each precinct to make returns of school elections to the clerk of the board of education of the district in which such precinct is situated.

Under Section 5090, General Code, provision is made for the placing of uncounted ballots in envelopes, which are to be sealed and returned to the deputy state supervisor with the returns of the election to be by them counted.

Section 5090-1, General Code, provides as follows :

"Before separating, the judges and clerks shall fold in two folds and string closely upon a single piece of flexible wire, all ballots which shall have been counted by them, unite the ends of such wire in a firm knot in such manner that it cannot be untied without breaking the seal, enclose the ballots so strung in a secure cloth of heavy paper covering and securely tie and seal such covering with official wax impression seals, to be provided by the deputy state supervisors of elections, in such manner that it cannot be opened without breaking the seals, and deliver said ballots in such sealed covering to the deputy state supervisors of elections, and such officers shall carefully preserve such ballots for thirty days, and at the expiration of that time shall destroy them by burning without previously opening the package. Such ballots shall be destroyed in the presence of the official custodians thereof and two electors of approved integrity and good reputation and members respectively of the two leading political parties. The said electors shall be designated by the board of deputy state supervisors of elections of the county in which such ballots are kept ; provided that if any contest of election shall be pending, at the expiration of said time the said ballots shall not be destroyed until such contest is finally determined. In all cases of contested elections, the parties contesting the same shall have the right, after a prima facie case of fraud, mistake or error is shown, to have said ballots opened and to have all errors made in counting corrected by the court or body trying such contest ; but such ballots shall be opened only in open court or in open session of such body and in the presence of the officers having the custody thereof."

Section 5111, General Code, is as follows :

"In November elections held in odd numbered years for township officers, justices of the peace, municipal officers and members of boards of education, the judges and clerks of elections in each precinct shall make and certify the returns to the clerk of the township or the clerk or auditor of the municipality in or for which the election is held or the clerk of the board of education of the school district, respectively, instead of to the board of deputy state supervisors of the county. This provision shall not apply to the returns of elections for assessors of real property."

Under the provisions of Section 5090, *supra*, it is required that, if any ballots are placed in the envelope for uncounted ballots, such envelopes shall be sealed and returned to the deputy state supervisors "with the returns of the election, to be by them counted," and it is therein specifically provided that such ballots shall be counted, tallied and "preserved for such judicial or other investigation as may be necessary."

Under this section little difficulty, if any, will be met in those elections, the returns of which are required to be made to the deputy state supervisors of elections. The difficulty arises, however, from the application of the provisions of Sections 5111 and 5120, General Code. The provisions of these sections are apparently inconsistent, as under the provisions of Section 5090, *supra*, the envelopes shall be "returned to the deputy state supervisors," with the further requirement that they shall be returned "with the returns of the election." Under the provisions of Section 5120, *supra*, the returns of the election about which you inquire are not made to the deputy state supervisors of elections but to the clerk of the board of education of the district. It is clearly apparent that these envelopes can not be returned to the deputy state supervisors "with the returns of the election" at one and the same time, unless it be that the returns of the election be divided and one set of poll books be sent to the deputy state supervisors of elections and the other set of poll books and tally sheets sent to the board of education. In school elections we do not find this provision.

In an opinion reported in Opinions, Attorney General, 1915, Vol. III, page 2197, this subject was under consideration by this department. The syllabus of that opinion is :

"Ballots for members of township rural district boards of education upon which the judges of elections are unable to agree as to how they should be counted should be sealed in an envelope for that purpose and returned with the returns of the election to the clerk of the board of education of the district for which such election is held.

The board of education of the district in canvassing the returns and determining the result of such election should open and count such ballots if the choice of the voter can be determined therefrom, and preserve the same for further judicial or other investigation. If it is impossible for the board of education to determine the choice of the voter from the ballot the result of the election should then be determined exclusive of such ballots and the same preserved in like manner."

On page 2198 this language is used :

"The question as to whom the return of such envelope shall be made, under a similar state of facts, was considered in Opinion No. 577 of this department, rendered to Hon. Irving Carpenter, prosecuting attorney, under date of July 2, 1915, a copy of which is herewith enclosed, in which opinion it was held that as to those elections, returns of which are not made to the deputy state supervisors, the provision for the return of such envelopes '*with the returns of the elections*' will control to the exclusion of the provision that the same shall be returned '*to the deputy state supervisors.*'"

On the reasoning of that opinion I therefore hold that the envelopes containing uncounted ballots for members of township boards of education should be returned with the returns of the election to the clerk of the board of education of the township rural school district in which such elections are held.

Coming to a consideration of the second question stated, it seems manifest from the provisions of Section 5090, G. C., 103 O. L., 266, that it was the

legislative intent that these ballots should be counted, in officially determining the result of the election and canvassing the returns thereof, in every election without awaiting a contest or other investigation.

The board of education is charged with the duty of canvassing the returns of the election about which you inquire, under the provisions of Section 5120, G. C., supra. Since such ballots are required to be counted and the board of education must canvass the returns and determine the results of the election, it of necessity becomes the duty of the board of education to open the envelopes referred to, count the ballots and tally the same in so determining the result of such election."

It is therefore my opinion that envelopes containing uncounted ballots for members of township boards of education should be returned to the clerk of the board of education of the school district in which such election is held; and that such board of education when canvassing the returns of such election should open such ballots and, if from the same they are able to determine the voters' choice, such ballots should be counted and tallied in accordance with such determination and all such ballots should be preserved for the prescribed time for the purposes of such judicial or other investigation as may be necessary. All ballots other than the uncounted ballots should be returned to the board of deputy state supervisors of elections in accordance with law.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

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1549.

DAYTON STATE HOSPITAL—SUPERINTENDENT WITHOUT AUTHORITY TO BIND STATE BY CONTRACT FOR MOTION PICTURE FILMS.

*SYLLABUS:*

*The superintendent of the Dayton state hospital is without authority to bind the state or said institution by a contract for supplying moving picture films to be exhibited at said institution.*

COLUMBUS, OHIO, January 9, 1928.

HON. JOHN E. HARPER, *Director of Public Welfare, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication which reads:

"Inclosed find copies of correspondence and contract with the Skirboll Gold Seal Productions, Inc., concerning the contract made by Dr. McClellan, as superintendent of the Dayton State Hospital under date of June 28th, seventeen days previous to his relinquishing the superintendency of that institution.

Dr. Hooper, who succeeded Dr. McClellan as superintendent of the Dayton State Hospital, contends that this contract is void inasmuch as the showing of the pictures, according to the terms of the contract, did not begin until November, four months after the expiration of Dr. McClellan's incumbency, thereby usurping the powers of the incoming superintendent and con-