

465.

APPROVAL—BONDS OF ALBANY CONSOLIDATED RURAL SCHOOL DISTRICT, ATHENS COUNTY, OHIO, \$8,064.60. (Limited).

COLUMBUS, OHIO, April 15, 1937.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.
GENTLEMEN:

RE: Bonds of Albany Consolidated Rural School
Dist., Athens County, Ohio, \$8,064.60 (Limited).

I have examined the transcript of proceedings relative to the above bonds purchased by you. These bonds comprise all of an issue of bonds issued under House Bill No. 11, dated November 1, 1936, bearing interest at the rate of 4% per annum.

From this examination, in the light of the law under authority of which these bonds have been authorized, I am of the opinion that bonds issued under these proceedings constitute a valid and legal obligation of said school district.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

466.

RURAL BOARD OF EDUCATION MEETING — MOTIONS —
MANNER OF VOTING.

SYLLABUS:

1. *A motion made at a meeting of a rural board of education by a member requires a second.*
2. *The president as a member of a rural board of education is permitted to second a motion.*
3. *When a vote is called for upon a motion for the payment of a legal claim against a rural board of education and two members voted in favor of the same, but the remaining three members present answered*

"not voting" when each of their names were called, it was not a compliance with Section 4752, General Code, and such motion did not carry.

COLUMBUS, OHIO, April 15, 1937.

HON. JOHN W. HOWELL, *Prosecuting Attorney, Gallipolis, Ohio.*

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

"At a recent meeting of the Board of Education of Green Township, in this county, a certain motion was made for the payment of a legal claim against such Board by the Vice President. This motion was not seconded and the President of such Board gave the chair to the Vice President and seconded the motion himself. When a vote was called for upon such motion, the President and Vice President voted in favor of the same, but the remaining three (3) members present, when each of their names were called to vote on such motion, answered, 'Not Voting.'

Will you, therefore, kindly advise me as to the status of a motion under such circumstances?"

Any deliberative body, in order that the will of a majority of its members may be ascertained and registered in an orderly way, must be governed by rules of procedure to which each member thereof must conform.

Section 4750, General Code, provides in part:

"The board of education shall make such rules and regulations as it deems necessary for its government. * *."

This section gives the board of education authority to adopt rules of order for its parliamentary governance. The board in adopting such rules of procedure is limited only to the extent that said rules cannot be inconsistent with existing laws. The board of education is bound by the rules and regulations it makes for its government unless suspended in a legal manner, or revoked or modified at its pleasure.

It is a well established principle that if any deliberative body does not adopt special rules of procedure its procedure is governed by general parliamentary law.

There is nothing mentioned in the above set forth communication from which it can be ascertained whether the Board of Education of

Green Township adopted special rules of procedure for its meetings or the procedure at its meetings was governed by general parliamentary law. However, the fact that a second was made to the motion in question, to the extent that the president "gave the chair to the vice president and seconded the motion himself," is indicative that said Board of Education of Green Township had adopted a rule requiring that a motion such as is in question, be seconded.

In "Parliamentary Practice," by Robert, "Introduction," page XIV, it is said:

"Among the established rules and customs which constitute parliamentary law are the following elementary ones that everyone should know:

(1) Only one question can be considered at a time. It must be put in the form of a proposition or motion, to be proposed or moved by one member and seconded by another, and must then be stated by the presiding officer, after which it is open to debate and amendment."

This same rule is repeated at page 8, and on page 170, the author sets forth a list of various motions that do not require a second. The list does not include a motion of the type in question.

In "Cushing's Manual of Parliamentary Practice, New Revised Edition," by Lowe, page 71, it is stated:

*"A motion must be seconded, that is, approved by some one member, at least expressing his approval by rising and saying that he seconds the motion; and if a motion be not seconded, no notice whatever is to be taken of it by the presiding officer; * * **" (Italics, the writer's).

In "Hughes' American Parliamentary Guide—Revised New Edition," 1926-1927, page 89, Section 209, the following rule is set forth:

"In our American parliamentary practice, we many years ago dropped the useless requirement of seconds to motions, but they are still used in our popular practice, and our American parliamentary writers continue to teach their use, because they do not go beyond Jefferson for their parliamentary information, and perhaps they do not know, that notwithstanding the fact that Jefferson's Manual forms the foundation of the practice of Congress, yet at least 75 per cent of the principles Mr. Jeffer-

son set forth a century ago, are now obsolete in the practice of our National House, also Parliament. Upon Jefferson's foundation the National House has builded an efficient American system. The rules of the National House and very few of our state legislative bodies require by rule or practice seconds to motions. This requirement is almost as ancient as the House of Common, where it originated, and even that body is gradually by its practice forcing the death of the practice requiring seconds. Mr. Luce says: 'Not more than six American legislative bodies recognize seconds to motions.' "

At pages 91 and 92, it is stated:

"Sec. 216. While seconds to motions are unnecessary and not required in American practice, yet a meeting may use seconds. Neither would it be out of order to second a motion, but such second would have no effect further than to disclose that the seconder is favorable to the proposition. It would not set aside the right to demand the question of consideration. The chair in our American practice is without authority to refuse to put a question because a motion is not seconded. Unless a body by rule recognizes seconds they are to be ignored."

"Sec. 217. Under our modern American practice it is the highly protected right of any one member to make a motion and it need not be seconded or supported by another. 'When a motion is made it shall be stated by the Speaker.' "

A reading of the above rules from the three outstanding authorities on parliamentary practice would indicate that there is some conflict in regard to the rule of the requirement of a second to a motion, Cushing and Robert holding that a "second" is necessary and Hughes that a second is not required. However, Hughes does not state that this is an all inclusive rule. He says it is the popular practice to require a second to a motion, and, in effect, Section 216, supra, excludes from the operation of his rule a "body" that "recognizes seconds." Therefore, so far as the instant question is concerned, it can be said that these three authorities are in accord that a second was required to the motion made at the meeting of the Board of Education of Green Township. As stated hereinabove, there is no doubt but that the Board of Education had adopted a rule requiring a motion to be seconded. This can be clearly surmised from the manner in which the motion in question was seconded.

It is therefore my opinion that a second was required to the motion

made by the vice president of the Board of Education of Green Township.

The question now is—did the president have authority to give “the chair to the vice president, and second the motion himself?”

I am unable to find any rule of parliamentary practice that permits the president to withdraw from the chair for any purpose other than participating in the debate or proceedings. In Robert, *supra*, at page 114, it is stated:

“If the chairman thinks it necessary for him to take part in the debate he must call someone else to the chair, as chairman pro tem (a vice chairman if one is present) and take the floor as a member, not as presiding officer. By doing this in a case where there is strong feeling he destroys the confidence of the opposite side in his impartiality, and therefore he should not resume the chair until that question is disposed of.”

In Cushing’s Manual, *supra*, at page 44, it is stated:

“If the assembly is organized by the choice of a president and vice-presidents, it is the duty of one of the latter to take the chair, in case of the absence of the president from the assembly, or of his withdrawing from the chair for the purpose of participating in the proceedings.”

However, whether or not it was permissible for the president to call someone else to his chair and take his place at the meeting as a member, and not as a presiding officer, in my opinion, is immaterial. The basic question is, did the President of the Board of Education of Green Township have any authority to second the motion made by the vice-president.

The president of a township board of education is a constituent member of the board. He attains membership of this board the same as any other member, by virtue of Section 4712, General Code, which provides:

“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.”

He becomes the presiding officer of the township board of education by the provisions of Section 4747, General Code, which provides that “one member of the board shall be elected president.” His election as

president of the board does not deprive him of the privilege of casting a vote the same as any other member of the board. Being a voting member, he is entitled to second a motion. It therefore is my opinion that the second, by the president, to the motion made by the vice president, was valid.

The entire membership of the Board of Education of Green Township was present at the meeting in question. "The motion was made for the payment of a legal claim against said Board." The procedure for a motion to authorize the board of education to pay any claim is set forth in Section 4752, General Code, which, in part, provides:

"A majority of the members of a board of education shall constitute a quorum for the transaction of business. Upon a motion to adopt a resolution authorizing the purchase or sale of real or personal property or to employ a superintendent or teacher, janitor or other employe or to elect or appoint an officer or to pay any debt or claim or to adopt any text book, the clerk of the board shall publicly call the roll of the members composing the board and enter on the records the names of those voting 'aye' and the names of those voting 'no.' If a majority of all of the members of the board vote aye, the president shall declare the motion carried. * * *"

The facts stated in your communication show: that, when a vote was called for, upon such motion, the president and vice-president voted in favor of the same, but the remaining three (3) members present when each of their names were called to vote on such motion, answered "not voting."

The general rule of parliamentary practice is: that every member who is present at a meeting at the time a vote is called for, has not only the right to vote but is bound to vote, and that a refusal to vote is held as being acquiescent in the decision of the majority. Hughes' American Parliamentary Guide, supra, page 531, Section 1156, states:

"While the right of a member to refuse to vote is now pretty generally recognized by legislative bodies, yet members so refusing, cannot escape all responsibility in discharging what is their plain duty. It is the right of every deliberative body to obtain a final decision upon every question brought before it, according to the general and justly formed opinion of the meeting. It has been held by all the large parliamentary bodies in the world and several of our state supreme courts, as well as the

federal Supreme Court of the United States, that members who are present and abstain from voting are held, by their presence during the vote to be acquiescent in the decision of the majority and to impart validity to the proceedings, if their votes, had they been given, were essential thereto."

The Supreme Court of Ohio has given expression to this rule in the case of *Ex rel. William M. Shinnich, Jr. vs. John A. Green*, 37 O. S. 227, wherein it was held:

"2. All the members being present and engaged in holding the election, members by refusing to vote when their names are called cannot defeat the election, or divest the body of the power to elect.

3. In such case the legal effect of refusing to vote is an acquiescence in the choice of those who do vote, and this is so, although those refusing to vote object to the mode of voting, and on the ground that no quorum voted."

Applying this rule, the legal effect of the three members "not voting" would be an acquiescence in the decision of the two who did vote, and the motion would have carried. However, I am of the opinion that this general principle of law, as counting in effect the vote of those members who did not vote as an acquiescence in the decision of those members who did vote, is not applicable. A reading of Section 4752, *supra*, shows that the recording of the names of those voting "aye" and those voting "not voting" is contrary to the specific provisions that the clerk shall publicly call the roll and *enter on the records the names of those voting "aye" and the names of those voting "no"*.

The clause in Section 4752, *supra*, requiring the entering of the names of those voting "aye" and the names of those voting "no" has been interpreted and construed in numerous Ohio decisions, and held to be a mandatory provision which must be strictly pursued. In the outstanding authority on this question, *Board of Education vs. Best*, 52 O. S., 138 it was held:

"1. The clause in Section 3982, of the Revised Statutes, to wit: 'Upon a motion * * to employ a * * teacher, * * the clerk of the board shall call, publicly, the roll of all the members composing the board, and enter on the record required to be kept, the names of those voting aye, and the names of those voting no,' is a mandatory provision and must be strictly pursued.

2. Where the minute book, containing a record of the proceedings of a board of education, shows that all the members of the board were present; that a motion to proceed to the election of teachers was carried by a unanimous vote; and that an applicant for the position of teacher was declared elected by a unanimous vote, but that the clerk did not call the roll of the members, and the names of those voting aye were not entered on the record, the requirement of the statute was not sufficiently complied with, and the election was invalid."

The reason for the necessity of strict compliance with this clause is clearly set forth on pages 154 and 155, of the opinion, wherein it was stated:

"To avoid uncertainty, therefore, in determining the conduct of boards of education in transacting such important official business as concerns the purchase or sale of property, the payment of debts or claims, and the selection of teachers who are to stand somewhat in loco parentis in training the minds, and shaping the moral character of their pupils, the general assembly has carefully guarded against ambiguity by prescribing a method of voting which should not be departed from, and in that regard, the rule *expressio unius*, should, we think, be strictly applied. * * *

It was said by Cooley, J., in pronouncing the opinion of the court: 'We have found ourselves unable to take the same view of this record that is taken by the counsel for defendants. There can be no doubt that the provision of the statute which requires these votes to be entered at large on the minutes, was designed to accomplish an important public purpose, and that it cannot be regarded as immaterial, nor its observance be dispensed with. The purpose, among other things, is to make the members of the common council feel the responsibility of their action when these important measures are upon their passage, and to compel each member to bear his share in the responsibility, by a record of his action which should not afterwards be open to dispute.'

It therefore is my opinion: that, when at a regular meeting of a rural board of education a vote is 'called for upon a motion and the president and vice-president vote in favor of the same, but the remaining three (3) members present answer, "not voting" when each of their names are called, is not a compliance with Section 4752, *supra*; and that

such motion for the payment of a legal claim against the board was not carried.

Specifically answering your question, it is my opinion: that, a second was required to the motion made by the vice-president of the Board of Education of Green Township, at its meeting; that, the president, as a member of the board, was permitted to second the motion; that, when a vote was called for upon the motion and the president and vice-president voted in favor of the same, but the remaining three members present answered "not voting" when each of their names were called, it was not a compliance with Section 4752, *supra*; and that, such motion for the payment of a legal claim against the board, was not carried.

Respectfully,

HERBERT S. DUFFY,

Attorney General.

467.

CORPORATIONS—PERSONAL PROPERTY TAX RETURN —
SALE OF ASSETS—TAX RATE—ASSESSMENT.

SYLLABUS:

A corporation which filed its personal property tax return as of January 1, 1930, and subsequently sold its entire assets on March 15, 1930, is liable for the full amount of tax assessed against it for that year on a rate established by the proper taxing officials subsequent to such tax listing date.

COLUMBUS, OHIO, April 15, 1937.

HON. PAUL D. MICHEL, *Prosecuting Attorney, Marion, Ohio.*

DEAR SIR: This will acknowledge receipt of your inquiry of recent date, written by your assistant, in which you state as follows:

"Will you provide this office with a written opinion on the following?"

We have a case in this County, the facts of which are as follows: A corporation doing business in Marion County filed its personal property tax return January 1st, 1930, and subsequently, on March 15, 1930, sold its entire assets. The question now arises as to how much personal property tax for the year 1930 the corporation must pay.