

OPINION NO. 72-026

Syllabus:

1. Where a member of a board of township trustees resigns while his term has almost three years remaining, the board is prohibited by public policy from appointing to the vacancy one of its present members whose term has less than one year to run.

2. Where such an invalid appointment has been made, the appointed trustee is a de facto officer and the acts of the board as thus constituted are valid in so far as they affect the rights of the public and innocent third parties; but they

are invalid as to a third party who is guilty of fraud, connivance or collusion with respect to the invalid appointment.

To: Lawrence S. Huffman, Allen County Pros. Atty., Lima, Ohio
By: William J. Brown, Attorney General, April 11, 1972

Your request for my opinion and the underlying facts are stated in your letter as follows:

"This is to request your opinion regarding the extent of the authority of Township Trustees to appoint persons to a vacant township office.

"The post of township trustee became vacant on May 31, 1971 by reason of the resignation of a trustee. The term of the resigned trustee is to expire December 31, 1973. Within 30 days of the resignation and pursuant to Section 503.24 the other two trustees met for the purpose of appointing someone to fill the vacancy created by the resignation. At the meeting they appointed one of the two remaining trustees to fill this unexpired term. The minutes of that meeting reflect that the trustee so appointed voted for himself. He then resigned the post of trustee to which he had been elected and which term expires December 31, 1971. The trustees then appointed another person to fill the unexpired term ending December 31, 1971, the trustee who voted for himself voting in his newly assumed capacity.

"A question has arisen concerning the validity of these two appointments and the validity of subsequent action taken by the Board on which these trustees voted. Your opinion is therefore requested on the following questions:

"1. May a township trustee in exercising the appointing power provided in Section 503.24 vote to appoint himself to a vacancy created by the resignation of another trustee?

"2. If your answer to question number 1 as posed above is to the effect that the appointment is invalid, of what effect is action taken by the Board of Township Trustees under such an appointment?"

Section 503.24, Revised Code, which provides for the filling of vacancies in township offices, reads in pertinent part as follows:

"If, by reason of the nonacceptance, death, or removal of a person chosen to an office in any township at the regular election, or if there is a vacancy from any other cause, the board of township trustees shall appoint a person having the qualifications of an elector to fill such vacancy for the unexpired term.

"If a township is without a board or if no

appointment is made within thirty days after the occurrence of a vacancy on the board, the county court of such county shall appoint suitable persons, having the qualifications of electors in the township, to fill such vacancies for the unexpired term."

Prior to the replacement of justices of the peace by the county court system in 1958, one of my predecessors had occasion to deal with the second paragraph of Section 503.24, supra, in Opinion No. 7411, Opinions of the Attorney General for 1956. That Opinion held that a justice of the peace, who then had the same power to fill vacancies on the board of township trustees, which now rests with the county court, could not appoint himself to such a vacancy. In explanation of this holding, my predecessor quoted the following language from 42 Am. Jur. 955:

"A public office is a public trust, and persons to be appointed thereto should be selected solely with a view to the public welfare.
* * *

"An officer entrusted with the power of appointment should exercise it with disinterested skill and in a manner primarily for the benefit of the public, for it is the policy of the law to secure the utmost freedom from personal interest in such appointments. So, it is contrary to public policy to permit an officer having an appointing power to use such power as a means of conferring an office upon himself, or to permit an appointing body to appoint one of its own members."

(Emphasis added by my predecessor.)

Another of my predecessors held that it was not within the power of the board of trustees of Ohio University to vote compensation to one of its members for services rendered to the institution. In that Opinion (Attorney General's Annual Report, 1906, p. 151) my predecessor said:

"It is against public policy for members of any board of public officers to appoint one of its own members to any office or employment within the control of said board. Where the vote of the member appointed is necessary to the appointment, such appointments have universally been held void." (Emphasis added.)

See also Hornung v. State, 116 Ind. 458, 19 N.E. 151, 153-154, and Meglemery v. Weissinger, 140 Ky. 353, 131 S.W. 40.

In the light of the foregoing, I think it clear that the answer to your first question must be that a township trustee holds a position of public trust, and that it would violate public policy for a board of township trustees to appoint one of its voting members to a vacancy on the board created by the resignation of another board member.

You have also asked what effect can be given to actions taken by a board of township trustees subsequent to such an invalid appointment.

While it is true that the trustee's appointment to the longer term, in place of the shorter term he was then serving, was rendered void by reason of the fact that he was himself a member of the board of trustees, this would not necessarily invalidate acts subsequently taken by the board. Although no longer a trustee de jure, he was still a trustee de facto. In State, ex rel. Witten v. Ferguson, 148 Ohio St. 702, 708 (1947), the Court said:

"A de facto officer may be defined as one who, although not an officer in point of law, has the reputation of being the officer he assumes to be and is accepted as such by those who deal with him. * * *"

It is well settled that the acts of a de facto officer are valid so far as they affect the public and innocent third parties. In State, ex rel. Westcott v. Ring, 126 Ohio St. 203, 208 (1933), the Court said:

"The general rule is that acts of a de facto officer are to be upheld as valid, so far as they involve the interests of the public and of third persons, until his title to the office is adjudged insufficient."

Similar language appears in State, ex rel. Paul v. Russell, 162 Ohio St. 254, 257-258 (1954):

"It has been said that the doctrine of de facto officers rests on the principle of protection to the interests of the public and third parties, not to protect or vindicate the acts or rights of the particular de facto officer or the claims or rights of rival claimants to the particular office. The law validates the acts of de facto officers as to the public and third persons on the ground that, although not officers de jure, they are, in virtue of the particular circumstances, officers in fact whose acts public policy requires should be considered valid. * * *"

The validity of the acts of a de facto officer will be upheld, even though there is an existing challenge to his right to hold the office, so long as his title to it has not been adjudged insufficient. State, ex rel. Westcott v. Ring, *supra*, at pages 208-209. On the other hand, it would appear that a third party, who is guilty of fraud, connivance or collusion with the de facto officer will not be allowed to assert the validity of such officer's acts. *Id.*, at pages 208-209.

In specific answer to your questions it is, therefore, my opinion, and you are so advised, that:

1. Where a member of a board of township trustees resigns while his term has almost three years remaining, the board is prohibited by public policy from appointing to the vacancy one of its present members whose term has less than one year to run.

2. Where such an invalid appointment has been made, the appointed trustee is a de facto officer and the acts of the board as thus constituted are valid in so far as they affect the rights of

the public and innocent third parties; but they are invalid as to a third party who is guilty of fraud, connivance or collusion with respect to the invalid appointment.