

162.

BOARD OF EDUCATION—MEMBER MAY NOT CAST DECIDING VOTE
FOR HIMSELF FOR CLERK—CLERK OF BOARD OF EDUCATION
NOT AN OFFICER—APPOINTMENT OF SUCCESSOR DISCUSSED.

SYLLABUS:

1. *Where a member of a city, exempted village, village or rural board of education is elected clerk of such board by his own vote, which was necessary to give him a majority, there is no election. This rule is not altered by the fact that another member of the board who was also nominated for clerk, voted for himself.*

2. *Since the clerk of such board of education is not an officer, he does not retain office until his successor is appointed and qualified.*

COLUMBUS, OHIO, February 22, 1933.

HON. PAUL A. BADEN, *Prosecuting Attorney, Hamilton, Ohio.*

DEAR SIR:—I have your letter of recent date which reads as follows:

“In the matter of the election of a clerk by the Board of Education, we have read an earlier decision of the Attorney General which provides that when a member of the Board of Education is elected clerk and his vote is necessary to get a majority, there is no election.

We have a situation in Fairfield Township of this County in which two of the members of the board were nominated for clerk; one candidate received three votes, including his own, and the other candidate received two votes, including his own.

The question we would like to ask is whether or not in your opinion this situation can be distinguished from the situation decided by the opinion of the former Attorney General. In other words, would it make any difference if the fact that the vote of the candidate for clerk was necessary to get a majority in view of the fact that this situation was caused by the other candidate voting for himself.

If in your opinion there is no election, then the members of the board are hopelessly deadlocked with no chance of electing a clerk. We understand that they cannot agree on anyone, not even an outsider.

We would like to have you inform us as to whether or not in this situation the old clerk retains his position until a legal election is finally had.”

Facts very similar to those which you present were before my immediate predecessor and considered in an opinion numbered 4104, bearing date of February 27, 1932. That opinion is material to your first question, and it was held, as appears from the syllabus:

“1. Where a member of a city, exempted village, village or rural board of education is elected clerk of such board by his own vote, which was necessary to give him a majority, there is no election.

2. Where a member of a board of education is elected clerk of the board by a majority vote the board which does not include the vote of the member so elected, the member so elected may not participate

by his vote in the fixing of a salary for himself. In either case, if his vote is not necessary to his election as clerk or the passage of a resolution fixing his salary, and the result would have been the same had he not voted, his vote does not render the proceedings void."

It is pointed out in the body of the opinion that except for the provisions of sections 4747 and 4757 of the General Code, "it would not * * * be legal for a board of education to appoint one of its own number to a public position to which a salary or compensation from public funds attached." The reason is that membership on the board would be "incompatible" with the position of clerk of the board, and it is well settled that the same person may not hold two public offices which are incompatible. The positions of member of the board and clerk thereof are within this principle because included by the reason behind it, which my predecessor stated to be "that a public trust committed to a board or commission may not be exercised for the benefit of one of its own members."

The former opinion of this office continues in this language:

"The statutes, Sections 4747 and 4757, General Code, abrogate the common law rule so far as the appointment of a clerk and the fixing of his salary is concerned; being in derogation of the common law these statutes must be construed strictly and can not be extended beyond their plain import. They do not expressly or impliedly abrogate the common law principle relating to personal disinterestedness of a public officer in the performance of his public duties. They merely authorize a board of education to select one of its own number as clerk and pay him for his services, but they do not authorize the person so selected to participate personally in such action, in direct opposition to the principle that he may not exercise his public franchise for his private gain."

The conclusion of my predecessor, based upon numerous authorities cited in the former opinion, was that sections 4747 and 4757 do not sanction the election of a member of the board of education to the position of clerk of the board when his own vote is necessary to give him a majority.

In the question presented by you, the vote of one member of the board was necessary to give him a majority, or three votes. Another member of the board voted for himself to bring his total to two votes. The vote of the latter member did not result in his election as clerk and would not have invalidated the election if the other member had received three votes excluding his own. I am unable to find any reason for holding the present case outside the principle of the former opinion merely because another member of the board was nominated for clerk and cast his vote for himself.

The question whether the clerk is an "officer" is material to your second question. Section 8 of the General Code reads:

"A person holding an office of public trust shall continue therein until his successor is elected or appointed and qualified, unless otherwise provided in the constitution or laws."

In *Board of Education vs. Juergens*, 110 O. S. 667, and *Board of Education vs. Featherstone*, 110 O. S. 669, the clerk of the Board of Education was held not to be an officer. It follows that Section 8 does not apply to such clerk and therefore he does not hold over until his successor is appointed and qualified.

There may be an additional reason why Section 8 does not apply if the same clerk has served for two years. Where Article XVII, Section 2 of the Constitution limits the term of an officer to an "even number of years, not exceeding four," Section 8 has been held inapplicable. See *State ex rel. vs. Brewster*, 44 O. S. 589. The exception in Section 8 is "unless otherwise provided in the constitution or laws." Section 4747 provides that the clerk shall be appointed for a term "not to exceed two years." Thus, Section 4747 might be deemed to be a "law" precluding the applicability of Section 8.

You state that the members of the board are hopelessly deadlocked and cannot agree upon a clerk. I therefore direct your attention to section 7610-1, General Code, which provides in part:

"If the board of education in a district under the supervision of the county board of education fails to provide sufficient school privileges for all the youth of school age in the district, or to provide for the continuance of any school in the district for at least thirty-two weeks in the year, or to provide for each school an equitable share of school advantages as required by this title, or to provide suitable school houses for all the schools under its control, or to elect a superintendent or teachers, or to pay their salaries, or to pay out any other school money, needed in school administration, or to fill any vacancies in the board within the period of thirty days after such vacancies occur, the county board of education of the county to which such district belongs, upon being advised and satisfied thereof, shall perform any and all such duties or acts, in the same manner as the board of education by this title is authorized to perform them. But in a city district, or in an exempted village district, or where the county board of education is unable or fails for any reason to fill any vacancies in such county board of education as provided by section 4748 of the General Code, within the period of thirty days after such vacancies occur, the probate court, or in counties in which the probate court and the court of common pleas have been combined, the court of common pleas, upon being advised and satisfied thereof, shall act instead of the county board of education."

Broad powers are conferred by this section upon the county board of education in the event that the local board is neglectful of its duties. If the refusal of the rural board to elect a clerk results in the board's failure to perform any of the duties enumerated in the section, the county board "shall perform any and all such duties and acts."

Specifically answering your questions, I am of the opinion that:

1. Where a member of a city, exempted village, village or rural board of education is elected clerk of such board by his own vote, which was necessary to give him a majority, there is no election. This rule is not altered by the fact that another member of the board who was also nominated for clerk, voted for himself.

2. Since the clerk of such board of education is not an officer, he does not retain office until his successor is appointed and qualified.

Respectfully,

JOHN W. BRICKER,
Attorney General.