5111.

APPROVAL—BONDS OF EUCLID VILLAGE SCHOOL DISTRICT, CUYAHOGA COUNTY, OHIO, $11,000.00.

COLUMBUS, OHIO, January 22, 1936.

Sinking Fund Commission, Columbus, Ohio.

5112.

APPROVAL—BONDS OF AKRON CITY SCHOOL DISTRICT, SUMMIT COUNTY, OHIO, $15,750.00.

COLUMBUS, OHIO, January 24, 1936.

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

5113.

APPROVAL—BONDS OF CITY OF TOLEDO, LUCAS COUNTY, $15,000.00.

COLUMBUS, OHIO, January 24, 1936.

State Employes Retirement Board, Columbus, Ohio.

5114.

BOARD OF HEALTH—MEMBER OF DISTRICT ADVISORY COUNCIL OF GENERAL HEALTH DISTRICT INELIGIBLE TO APPOINTMENT AS MEMBER OF DISTRICT BOARD OF HEALTH.

SYLLABUS:

1. A public officer possessing the power of appointment or employment may not appoint or employ himself, nor may a public board possessing such power appoint or employ one of their own number, in the absence of a statute expressly authorizing such action, even though his vote is not essential to a majority in favor of his appointment or employment and although he was not present when the appointment was made.

2. Where an office exists under the law and a person is elected or

appointed to fill it, and duly qualifies and enters upon the discharge of his duties, he is a de facto officer and his acts in said position are valid, even though he may not possess the necessary qualifications for the office.

3. Where the appointment to an office is a nullity for the reason that the appointee is ineligible to hold such office, a legal appointment to the said office may be made without first ousting such first appointee by proceedings in quo warranto.

4. A member of the district advisory council of a general health district is ineligible to appointment as a member of the district board of health of the said health district.

5. Although some of the members of a board of health of a general health district are ineligible to serve on said board, their acts as such members are valid if they qualify and actually discharge the duties attendant upon the office. The appointment of a district health commissioner by such a board is valid.

6. Where the law directs a public board to hold regular meetings and perform certain public duties at such meetings, the members thereof are not performing their full duty under the law if they fail to hold the meetings as directed.

COLUMBUS, OHIO, January 25, 1936.

HON. WALTER H. HARTUNG, M. D., *Director of Health, Columbus, Ohio.*

DEAR SIR: This will acknowledge receipt of your request for my opinion concerning the personnel of the Board of Health of the Tuscarawas County General Health District and the legal status of a district health commissioner chosen by the said board of health as now constituted. In your communication you state:

> "I enclose a communication I have just received from Dr. Jos. Blickensderfer, Health Commissioner of Tuscarawas General Health District and also Clerk of the Tuscarawas County Advisory Council.
>
> This record will show Robert Maxwell, Mayor of the Village of Dennison, and Martin Mizer, Chairman of the Board of Township Trustees of Franklin Township, have been holding membership on the Tuscarawas General District Board of Health.
>
> We shall be glad to have your opinion as to whether Messrs. Maxwell and Mizer are members of the board of health, and if the election of a health commissioner with Mizer, Hanson and Finzer voting constitutes a legal election.
>
> The question is also asked if the board of health should be reduced to two legal members; that these two could fill the vacancies on the board of health authorized by Section 1261-18 G. C."

From enclosures submitted with your letter it appears that there has been no meeting of the Tuscarawas County Health District Advisory Council since May 2, 1932. At that meeting nominations were made for members of the Tuscarawas County District Board of Health. Among those nominated were Robert Maxwell who at the time was mayor of the Village of Dennison, in Tuscarawas County, and therefore a member of the District Advisory Council, and Martin Mizer, Chairman of the Board of Trustees of Franklin Township, in Tuscarawas County, by reason whereof, he was also a member of the District Advisory Council.

Upon motion duly made and seconded, it was resolved that the council proceed to ballot, and that the candidate receiving the highest number of votes be elected as a member of the District Board of Health for five years; the next highest for four years; the next highest for three years, and the next highest for two years, and the next highest for one year.

After tellers were appointed and a ballot taken, the chairman announced the result of the ballot to be, that Robert Maxwell had received the largest number of votes, and he was declared elected as a member of the Board of Health for the Tuscarawas County General Health District, for a period of five years. Martin Mizer received the fourth highest number of votes, and he was declared elected for a two year term. Others who do not appear to have been members of the advisory council, were elected for the four year, three year and one year terms.

At the time of the election, both Maxwell and Mizer were present at the meeting but did not vote.

Inasmuch as no meeting of the District Advisory Council has been held since that time, and therefore no successors have been elected to the members of this board at the expiration of their terms or at any other time, this board of health as announced to have been elected at that time, including on its membership both Maxwell and Mizer, has since May 2, 1932, functioned as the Board of Health for the Tuscarawas County General Health District.

On December 17, 1935, at an adjourned meeting of the board of health, three members were present, among whom was Mr. Mizer. At this meeting a district health commissioner was appointed.

At different times it appears that the legality of the election of Maxwell and Mizer, as members of the District Board of Health, has been questioned, on the grounds that they were not qualified for election on this board, inasmuch as they were at the time of their election, members of the District Advisory Council that elected them. Particularly, have they been advised to this effect by the Prosecuting Attorney of Tuscarawas County who, by law, is the legal adviser of this board, prior to the adjourned meeting on December 17, 1935, at which time the district health commissioner was appointed.

However, no action has ever been taken to remove them, nor have

the remaining members of the board taken any steps to declare their positions vacant and appoint persons to fill their places, and they have at all times acted in the capacity of members of the said board.

The question now arises as to the legality of action taken by the board of health with Maxwell and Mizer participating as members thereof, particularly with respect to the appointment of a health commissioner at the adjourned meeting of December 17, 1935. A further question arises as to the appointment of members of the board of health, to take the place of Maxwell and Mizer, should it be held that they were ineligible to serve as such members.

The law creating health districts and providing for the administration of matters pertaining to public health in such districts was enacted in 1919, and was codified as Sections 1261-16 et seq., of the General Code of Ohio. It is provided in Section 1261-16, that the State shall be divided into health districts, for the purpose of local health administration. Each city is constituted a health district, to be known as a city health district. General health districts consist of the townships and villages in each county. Two general health districts may be united, as may there also be a union of a general health district and a city health district.

Section 1261-17, General Code, provides that in each general health district, except in a district formed by the union of a general health district and a city health district, there shall be a district board of health, consisting of five members to be appointed as provided in Section 1261-18 and Section 4406 of the General Code. Section 1261-17, provides further:

> "A vacancy in the membership of the board of health of a general health district shall be filled in like manner as an original appointment and shall be for the unexpired term. Provided, that when a vacancy shall occur more than ninety days prior to the annual meeting of the district advisory council the remaining members of the district board of health may select a resident of the district to fill such vacancy until such meeting. A majority of the members of the district board of health shall constitute a quorum."

Section 1261-18, General Code, provides that the mayors of municipalities not constituting city health districts and the chairman of each board of township trustees in a general health district shall constitute a district advisory council within the district. Among other duties imposed on the district advisory council is that of selecting and appointing a board of health for the district, one member of which shall be a physician. The statute directs that the district advisory council shall meet annually on the first Monday of May, for the purpose of electing its officers and a member of the district board of health, and for the further

purpose of receiving and considering the annual or special reports of the district board of health, and the making of recommendations to the district board of health as to matters looking to the betterment of health and sanitation within the district, and for needed legislation.

Section 4406, General Code, referred to in Section 1261-17 supra, as noted above, reads as follows:

> "The term of office of the members of the board shall be five years from the date of appointment, and until their successors are appointed and qualified, except that those first appointed shall be classified as follows: One to serve for five years, one for four years, one for three years, one for two years, and one for one year, and thereafter one shall be appointed for each year."

It is a general rule of law that a public officer cannot lawfully exercise the powers reposed in him by law to his own personal advantage. The corollary of this rule is that a public officer possessing by law the power of appointment to another public office or to a public employment, cannot use that power to place himself in office or to employ himself in the absence of a statute permitting the same. This rule extends to public boards. In Corpus Juris, Vol. 46, page 940, it is stated:

> "It is contrary to the policy of the law for an officer to use his official appointing power to place himself in office, so that, even in the absence of a statutory inhibition, all officers who have the appointing power are disqualified for appointment to the offices to which they may appoint; nor can an appointing board appoint one of its members to an office, even though his vote is not essential to a majority in favor of his appointment, and although he was not present when the appointment was made, and notwithstanding his term in the appointing body was about to expire; nor can the result be accomplished indirectly by his resignation with the intention that his successor shall cast his vote for him."

The rule is well stated in the case of Parrish v. Town of Adel, 86 S. E., 1095 (Ga.), as follows:

> "Where a statute confers the appointing power, and does not expressly authorize self-appointment, the appointment of some one other than self is always contemplated."

See also, McQuillin on Municipal Corporations, 2nd Ed., Section 476.

A leading case in Ohio, and one which is frequently cited by courts and textwriters as illustrative of this principle is the case of State of Ohio ex rel. v. Taylor, 12 O. S., 130. In that case it was held that a board of directors of a county infirmary could not lawfully appoint one of their number as superintendent of the county infirmary and expressly held that such an appointment was illegal and void. In the course of the court's opinion it was said:

> "The word *appoint,* when used in connection with an office, *ex vi termini,* implies the conferring of authority upon *another.* It is not necessary, therefore, that the statute should, in express terms, prohibit the infirmary directors from appointing one of their own number superintendent; for the language, 'the board of directors shall appoint a superintendent,' necessarily means, that the person appointed shall be different from those who appoint." (Italics the writer's.)

In the instant case there can be no doubt but that the appointment of Maxwell and Mizer to membership on the district board of health by the district advisory council, of which board both Maxwell and Mizer were members, was clearly unauthorized and beyond the power of the council to make, not only for the reasons stated, but for the further reason that the positions are incompatible inasmuch as under the law, Section 1261-18, General Code, the advisory council at its annual meetings to be held on the second Monday in May in each year is directed to "receive and consider the annual or special reports of the district board of health and make recommendations to the district board of health * * * in regard to matters for the betterment of health and sanitation within the district."

It would be anomalous indeed, for the members of the advisory council to receive and consider reports made by themselves as members of the health board, and to make recommendations to themselves as to matters covered by such reports or as to matters reposed by law in their care.

However, both Maxwell and Mizer, in spite of their disqualification, assumed the duties of the offices of members of the district board of health under the appointments as made, and have since performed the duties of these offices, and their right to hold the offices has not been challenged in legal proceedings looking to their ouster, nor have any successors been appointed or their positions regarded as vacant by the other members of the board to the extent at least, so far as appears, of filling such vacancies or pretending to do so. They therefore must be regarded as having been de facto officers during this time and their official acts as such officers, judged in the light of the law respecting the acts of such officers.

It is well settled that when an office exists under the law and a person is elected or appointed to fill it, and duly qualifies and enters upon the discharge of his duties, he is a de facto officer and his acts are valid, even though he may not possess the necessary qualifications for the office.

Ruling Case Law, Vol. 22, page 319;
Ohio Jurisprudence, Vol. 32, page 1090;
State ex rel. Brown v. Constable, 7 Ohio, Part 1, page 7;
State ex rel. Newman v. Jacobs, 17 Ohio, 143;
Sliess v. State, 103 O. S., 33;
Greenlee v. Cole, 113 O. S., 585;
State ex rel. Westcott v. Ring, 126 O. S., 203.

"The legal doctrine as to de facto officers rests on the principle of protection to the interests of the public and third parties, and not on the rights of rival claimants.

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 fact officers whose acts public policy requires should be considered valid.

A de facto officer exists when he is acting under color of a known election and appointment, void because the officer was not eligible to election or appointment, or because there was a want of power in the electing or appointing body, such ineligibility or want of power being unknown to the public."

Ruling Case Law, Vol. 22, page 589.

In Ruling Case Law, Vol. 22, page 602, it is said:

"If an official person or body has appointing authority to appoint to public office, and apparently exercises such authority, and the person so appointed enters on and performs the duties of such office, his acts will be held valid in respect to the public whom he represents, and to third persons with whom he deals officially, notwithstanding there was a want of power to appoint him in the person or body which professed to do so. * * *

The consequence of the rule that the acts of a de facto officer are valid so far as the public and third persons are concerned is that the official acts of a de facto officer cannot be collaterally attacked. This doctrine has been established from the earliest period and repeatedly confirmed by an unbroken current of decisions down to the present time."

I therefore conclude that the appointment of Maxwell and Mizer in the first place, as members of the Tuscarawas County District Board of Health, was a nullity. To use the words of the Supreme Court, in the Taylor case, supra, the appointments were illegal and void. Inasmuch,

however, as the appointments were made under color of authority, and both these officers held their positions under color of title, their acts as such members so far as third persons are concerned, must be regarded as valid. It follows that the appointment of a district health commissioner at the adjourned meeting of December 17, 1935, is a valid appointment, assuming, of course, that the meeting and appointment were in all other respects regular. In the cases of State ex rel. Newman v. Jacobs and State ex rel. Westcott v. Ring, supra, a question of the validity of an appointment made by boards part of the membership of which were merely de facto officers, was involved, and in each case the appointments were upheld.

Coming now to the question of the manner of removing the two members of the board of health whose original appointments were irregular, it will be observed by the terms of Section 1261-17, General Code, that a vacancy in the membership of a board of health of a general health district shall be filled in like manner as an original appointment and shall be for the unexpired term. The statute further provides:

> "Provided, that when a vacancy shall occur more than ninety days prior to the annual meeting of the district advisory council the remaining members of the district board of health may select a resident of the district to fill such vacancy until such meeting."

It follows that if the positions now held by Maxwell and Mizer may be regarded as vacant, because at the time they were originally appointed they were ineligible to appointment, the remaining members of the board of health may appoint someone else at this time, and up to ninety days prior to the time for the annual meeting of the district advisory council. It is not necessary that any action be taken to oust these two members of the board of health. Someone may be appointed in accordance with the statute, to take their positions, and the persons appointed will have a legal right to qualify for the positions and perform the duties of the offices until the first Monday in May, at which time the district advisory council should hold a meeting and properly appoint a district board of health. In the case of State ex rel. Attorney General v. Craig, 69 O. S., 236, it is held:

> "Where the appointment to an office is a nullity, for the reason that the appointee is by statute ineligible to hold such office, a legal appointment to such office may be made without first ousting such first appointee by proceedings in quo warranto."

In the case of State v. Gard, 8 O. C. C., 599, it is held:

> "Where one is elected to council who is already serving in the office of a school examiner and is further employed as superintendent of a public school, the election is a nullity by reason of

his ineligibility, and council has the right to so determine without notice to the one so affected, or the taking of any proceedings against him, and may proceed to fill the vacancy forthwith."

This case was affirmed by the Supreme Court without opinion. See State ex rel. v. Gard, 75 O. S., 606. See also Ohio Jurisprudence, Vol. 32, page 918.

I am therefore of the opinion in specific answers to your question, that the appointment by the District Advisory Council of the Tuscarawas County General Health District, of Maxwell and Mizer to the Board of Health of the Tuscarawas County General Health District in 1932, was a nullity, for the reason that these two men being members of the District Advisory Council, were ineligible to appointment as members of the District Board of Health.

I am of the further opinion that inasmuch as they assumed the duties of members of the district board of health, their official acts as such members, cannot be collaterally attacked, and that during the time they acted as members of the District Board of Health they were de facto officers, and that the appointment of a District Health Commissioner made at the adjourned meeting of the Board of Health, on December 17, 1935, was valid, assuming of course, that the meeting and appointment were in all respects regular.

I am also of the opinion that the other three members of the District Board of Health may at this time, and at any time prior to ninety days before the first Monday in May of 1936, regard the positions now held by Maxwell and Mizer to be vacant, and may select residents of the health district to fill such vacancies until the time of the next regular meeting of the District Advisory Council. If the board of health does not act in the matter prior to ninety days before the first Monday of May, 1936, the district advisory council should at that time correct the situation. In any event, the district advisory council should hold its regular annual meeting on the first Monday in May, 1936, as the law provides, and elect a board of health composed of members who are eligible to serve on the said board.

Respectfully,
JOHN W. BRICKER,
Attorney General.