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BOARD OF EDUCATION—WHEN RESIGNATION OF MEMBERS EFFECTIVE
—FORMAL ACCEPTANCE UNNECESSARY—POWER OF REMAINING
MEMBER TO FILL VACANCIES—TERMS OF SUCH APPOINTEES.

SYLLABUS:

1. *Resignations of members of a board of education take effect from the time of their presentation and need not be formally accepted.*
2. *Where all the members of a board of education resign except one, the remaining one member is authorized to fill the vacancies created by the resignation of the other members.*
3. *When a person is elected to fill a vacancy occurring in the membership of a board of education, the person so elected is elected for the unexpired term of the person whose place had become vacant.*

COLUMBUS, OHIO, May 6, 1929.

HON. J. L. CLIFTON, *Director of Education, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion which reads as follows:

“It seems necessary for us to ask your opinion in the following situation:

A city has a three member board of education. Two of these members write resignations and present them to the clerk. Apparently they were presented at the same time.

This seems to allow no action in accepting them. Is any action necessary? That is, do the resignations become effective and if so do they become effective at once?

If these two members are no longer on the board, how are the vacancies filled and for what term?”

Section 4748, General Code, provides as follows:

“A vacancy in any board of education may be caused by death, non-residence, resignation, removal from office, failure of a person elected or appointed to qualify within ten days after the organization of the board or of his appointment, removal from the district or absence from meetings of the board for a period of ninety days, if such absence is caused by reasons declared insufficient by a two-thirds vote of the remaining members of the board, which vote must be taken and entered upon the records of the board not less than thirty days after such absence. Any such vacancy shall be filled by the board at its next regular or special meeting, or as soon thereafter as possible, by election for the unexpired term. A majority vote of all the remaining members of the board may fill any such vacancy.”

At common law, a public office is regarded as a public trust which it is the duty of every good citizen to bear for the public benefit. Accordingly, it has been held at common law that a public officer cannot resign his office without the consent of the appointing power, manifested either by an express acceptance of the resignation or by the appointment of another in his place. The American courts are in considerable conflict on this question. Mr. Justice MacLane, in an early case, *U. S. vs. Wright*, 1 MacL (U. S.) 509, said:

"There can be no doubt that a civil officer has a right to resign his office, and it is not within the power of the executives to compel him to remain in office. It is only necessary that the resignation should be received to take effect, and this does not depend upon the acceptance or rejection of the resignation by the president."

Although the above case has practically been overruled by the Supreme Court of the United States in later cases, the doctrine thus laid down has been recognized and followed by many state courts, where courts have held that an absolute and unqualified resignation by a public officer, in the absence of any statute to the contrary, vacates the office from the time the resignation reaches the proper authority without any acceptance express or implied.

In Ohio, the leading case which has since been accepted as settling the question, so far as this State is concerned, is that of *Reiter vs. State, ex rel., Durrell*, 51 O. S., 74, in which case it was held, as stated in the syllabus:

"By the rules of the common law, a resignation of an office does not take effect, so as to create a vacancy, until such resignation is accepted by the proper authority; but the common law in this regard is not in force in this state, to its full extent, and here a resignation without acceptance creates a vacancy, to the extent at least, of giving jurisdiction to appoint or elect a successor, unless otherwise provided by statute."

Applying the principles laid down in the *Reiter* case, *supra*, to the facts stated in your letter, it would seem clear that the resignations of the two members of the board of education referred to therein took effect as soon as presented, and vacancies occurred at that time at least to the extent that their successors might lawfully be appointed without the resignations having been formally accepted.

A more difficult question arises with reference to the manner by which those vacancies may be filled. It will be observed that the statute provides that such vacancies shall be filled by the board, by election for the unexpired term, and that a majority vote of all the remaining members of the board may fill such vacancy. There is but one remaining member of the board. The question, therefore, is whether or not this one remaining member has authority, by virtue of the statute, to fill one or both of the vacancies.

After considerable search, I find no decided case by any court or any previous opinion of this office where a similar situation has been considered. In 1913, there was before the then Attorney General for his consideration the question of filling the vacancy in a school board where but two members remained. The situation which called forth the question arose by reason of the fact that a school district had been divided and the territory which had been detached from the original district contained the homes of three members of the district board of education. As there had been but five members originally, and these three members had been removed from the district there remained but two members. In that case, the Attorney General held that these two members might lawfully fill the three vacancies. In the course of the opinion the Attorney General said:

'Section 4748, General Code, authorizes the board of education to fill a vacancy at its next meeting. And in order to obviate all doubt as to how many members shall constitute a quorum for the purpose of filling such vacancy, or vacancies, said section further provides that

'A majority of all the remaining members of the board may fill any such vacancy.'

In your case there would be but two remaining members of the township board and these two members may fill the three vacancies."

Annual Report of the Attorney General, 1913, p. 460.

In the case set up in your inquiry, there remains but one member, and in accordance with the statute, and following the opinion of the Attorney General, referred to above, I am of the opinion that this one member may fill the vacancies created by the resignation of the other two members. Although the statute, Section 4748, supra, uses the expression "remaining members," in the plural, it is provided in Section 27, General Code, that "In the interpretation of parts first and second, * * * words * * * in the plural include the singular and in the singular include the plural * * *."

It will be observed that the statute provides that when the vacancies are filled the elections thereto shall be for the unexpired term. Therefore the person elected to fill each vacancy will be elected for the unexpired term of the member, the resignation of whom had caused the vacancy.

Respectfully,
GILBERT BETTMAN,
Attorney General.

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APPROVAL, BONDS OF LAKE COUNTY, OHIO—\$112,400.58.

COLUMBUS, OHIO, May 6, 1929.

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

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APPROVAL, BONDS OF CENTERVILLE RURAL SCHOOL DISTRICT,
GALLIA COUNTY, OHIO—\$22,000.00.

COLUMBUS, OHIO, May 6, 1929.

Industrial Commission of Ohio, Columbus, Ohio.