

2039

1. EDUCATION, BOARD OF—WHEN ALL MEMBERS OF CITY SCHOOL DISTRICT RESIGN AT SAME TIME, DUTY OF PROBATE COURT TO FILL EACH VACANCY BY APPOINTMENT—TIME, UNEXPIRED TERMS OF SEVERAL MEMBERS RESIGNING—SECTION 4846 G. C.
2. WHEN ONE OR MORE VACANCIES OCCUR IN MEMBERSHIP, CITY BOARD OF EDUCATION, AND BOARD FAILS TO FILL VACANCY WITHIN THIRTY DAYS, PROBATE COURT REQUIRED TO FILL VACANCIES—COURT NOT AUTHORIZED TO ACT IN PLACE OF BOARD OF EDUCATION.

SYLLABUS:

1. Where all of the members constituting the board of education of a city school district resign at the same time, Section 4846, General Code, imposes the duty on the probate court of the county in which such district is located, to fill each of such vacancies by appointment for the unexpired terms of the several members so resigning.

2. When one or more vacancies occur in the membership of a city board of education which said board for any reason fails to fill within thirty days after it occurs, the probate court of the county in which such district is located is required to fill such vacancies as promptly as possible, and is not authorized to act in place of the board of education until the beginning of a new term or terms of persons who may thereafter be elected to succeed the former incumbents.

Columbus, Ohio, July 8, 1947

Hon. Carson Hoy, Prosecuting Attorney, Hamilton County
Cincinnati, Ohio

Dear Sir:

I have before me your letter in which you request my opinion, your request reading as follows:

“A few days ago a City Board of Education in this County resigned en masse. Of the five resigning members, two were serving terms due to expire December 31, 1947 and three terms due to expire December 31, 1949. Pursuant to General Code, 4846, the Probate Court is now acting as such Board of Education and performing all duties imposed upon the Board.

We are now in receipt of certain inquiries from the Board of Elections concerning the preparation of proper ballots for the elections of Board of Education members in November.

Examination has been had of various decisions relating to the appointment of Board members for unexpired terms under General Code 4832-10 rather than until the next election. Two prior opinions of your office (1944 O. A. G. page 92 and 1935 O. A. G. No. 3933) deal with this general subject, but leave unanswered the following specific questions:

1. May or must the Court continue to act as the Board until an election, or until the beginning of new terms for one or more or all members of a new Board?
2. In case vacancies are not or may not be filled by appointment, which terms are to be filled by election this November and when do any such terms begin?
3. Must the Court cease to act as the Board of Education upon the qualification of *any* new member or members?"

Section 4832-10, General Code, dealing with vacancies in the membership of boards of education, reads as follows:

"A vacancy in any board of education may be caused by death, nonresidence, 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. A majority vote of all the remaining members of the board may fill any such vacancy for the unexpired term.*"
(Emphasis added.)

Section 4846, of the General Code, provides as follows:

"If the board of education *of any city or exempted village school district* fails to perform the duties imposed upon it by law or *fails to fill a vacancy* in such board within a period of thirty days after such vacancy occurs, the probate court of the county in which such district is located, upon being advised and satisfied of such failure, *shall act as such board of education and perform all duties* imposed upon such board by law.

If the board of education of any local school district fails to perform the duties imposed upon it by law or fails to fill a

vacancy in such board within a period of thirty days after such vacancy occurs, the county board of education in which such district is located, upon being advised and satisfied of such failure, shall act as such board of education and perform all duties imposed upon such board by law." (Emphasis added.)

This latter statute refers to the failure of a board of education to perform its legal duties and its failure to fill a vacancy. The law does not contain any limitations as to the cause of such failure. Obviously, in most cases the failure might come about by inability to agree or perhaps refusal of several members of a board of education to take any action. However, it is obvious that a failure results equally if for some reason the board is unable to act legally by reason of resignation, removal or death of so much of its membership that it can no longer function as a board. In the case you present, we have the unusual situation of a board all of whose members have resigned.

We come then to the duty of the probate court where he is advised that the entire membership of a city board of education has for any reason ceased to hold such membership and there is therefore no board which could fill the vacancies. Plainly, a duty devolves upon the probate court in such case. The law says that in case the board fails to fill a vacancy within a period of thirty days after it occurs, the probate court shall "act as such board and perform all duties imposed upon it by law."

It appears to me that the question underlying your inquiries is as to the procedure required by the law on the part of the probate court in performing the duties which the board cannot immediately perform. May he allow the vacancies in the membership of the board to continue unfilled until a time arises, perhaps almost two years hence, when the electors shall elect a new board of education—part for a term of two years and part for a four year term? Or, is the court to proceed without delay to create a board of education by appointment so that it may perform the duties which are imposed upon it by law? It appears to me it would be a plain perversion of the legislative intent to conclude that the duty cast by the statute upon the probate court would give him the right to prevent for a long time the existence of a legally constituted board of education, and take to himself the exercise of all the wide reaching powers of such board. The powers to be exercised and the duties to be performed by a board of education in the state of Ohio are very numerous and of wide variety.

They involve the hiring, and in some cases the removal of superintendents, teachers and other employes; the adoption of budgets, the levying of taxes and the issuing of bonds; the making of contracts for construction and remodeling of school buildings, the purchase of supplies and many other functions requiring the expenditure of a large amount of time and the exercise of a wide discretion. To me it seems absurd that the legislature would cast upon a probate court whose duties are judicial, and in its own field multifarious, the burden of continuing longer than absolutely necessary the operation of the schools of a city school district.

The General Assembly has seen fit to provide that a board of education shall consist of a certain number of members. In case that number should for any reason be reduced, the statute has provided that the remaining members of the board shall fill the vacancy *at its next regular or special meeting*. Only in the event of failure to do so does the probate court step in, and his duty to fill these vacancies is at least as peremptory as was that of the board. The Supreme Court in the case of *State ex rel. Henry v. Triplett*, 134 O. S., 480, had before it a case where a vacancy had occurred in a local school district, and it appeared that the remaining members of the local board having failed promptly to fill the vacancy, the county board of education stepped in and made an appointment to fill the same. The validity of that appointment having been challenged the court held that the vacancy was properly filled by the county board under the provisions of the statute. The court, in its opinion used this significant language:

“Since it is provided by legislative enactment that the board shall consist of five members, the legislative intent in that behalf could be carried out only by filling the vacancy. While Section 4748 enumerates causes which may result in vacancies, there is no language employed therein which prescribes that a vacancy arising from other causes shall remain unfilled. *The law abhors a vacancy as nature abhors a vacuum*. Faithful to this principle the courts do not favor a construction of a doubtful statute that will leave an office without an incumbent. Rather the courts assume that in creating an office the Legislature intends that it should not remain unoccupied.” (Emphasis added.)

I do not think it necessary to attempt to suggest or discuss what other duties a probate court might exercise in acting “as the board of education.” There might be certain situations requiring immediate action by the court

without the delay incident to securing, appointing and qualifying new members to fill the vacancies, but it appears to me that the foremost and immediate duty of the court would be to fill the membership on the board, so that it could at once begin the performance of the duties imposed upon it by law. This would be the more apparent if only one of the five members had resigned and the others failed to fill the vacancy. Certainly, the court in "acting as the board" could hardly sit as the fifth member, or completely supplant the other four while delaying the appointment of one to fill the vacancy. Manifestly, the duty of the court would be to appoint with the least possible delay, the member necessary to complete the full legal organization of the board.

Accordingly, it is my opinion that in the case you present the court would not be justified in delaying its action until the beginning of the new terms of one or more or all the members of the new board. Furthermore, I do not consider that it would be within the province of the court immediately to appoint only one or two members of the board in order to create a sufficient number to constitute a quorum of the entire board and then allow these appointees to complete the task of appointing the other members to fill out the entire complement of the board. In order to do that the court would be required to select one or more of the positions to be filled, and there would be no reason why he could select one or more of those whose terms were the first to expire and whose successors would be first elected and fill those vacancies, rather than to select one or more of those whose unexpired terms were longest. If the court were confronted with the obligation to fill two vacancies he should fill them both at the same time. By the same reasoning, if he is confronted with five vacancies in a board comprised of five members he should appoint five persons to fill the vacancies, and under the provisions of the statute to which I have called attention, these appointments would be for the unexpired terms.

You have referred to two opinions of former Attorneys General. The opinion found in 1935 Opinions of the Attorney General, page 133, throws some light on the question we are here considering. It dealt with the rights of the clerk of a board who had been appointed for a term of two years by a board, all the members of which subsequently resigned. In that particular case, it appeared that all five members of the local board resided in that portion of the school district which by change of boundary

lines had been disconnected from the district in which they had been elected to serve. Thereby the original district was left without any board of education. In that situation the county board of education stepped in, and as it plainly had the right and duty to do, appointed an entirely new board. The opinion in question clearly assumes that the action of the county board of education in so doing was in accordance with law. Referring to this situation, the then Attorney General said:

“There still remained the obligation to continue to maintain schools and carry out the objects for which school districts exist. This, of course, could only be done by a board of education which is the governmental agency by which a school district functions, and when a new board of education was provided for this district in accordance with law, it became the duty of that board to take up the affairs of the district and continue them as though there had been no interruption.”

If in that case the county board, instead of proceeding promptly to appoint a new local board, had allowed the situation to drift until the time for the next election of board members, the county board would presumably have had to assume all of the intricate duties of the local board for a period of possibly two years, which certainly was not within the contemplation of the law.

The above discussion and the conclusions stated constitute a substantial answer to your second question in regard to the election of members of the school board at the coming November election. You will note the provisions of Section 4832-10 which I have quoted, to the effect that it is the duty of the remaining members of the board to fill any vacancy “for the unexpired term.” It appears clear that in the event of their failure for any reason to perform that duty then the probate judge is to fill such vacancy or vacancies, and as I interpret the law it is likewise his duty to fill them for the unexpired term or terms. Nowhere is there any authority given either the remaining members of the board or the probate judge to make only an interim appointment effective until the next election.

Accordingly, assuming that the probate judge has made the appointments as I have indicated, filling all of the five vacancies for the unexpired terms, it would follow that at the November election of 1947, there will be two members to be elected to succeed the two appointees whose terms

expire on the first Monday in January next following, and that at the election to be held in November, 1949, there will be three members to be elected to fill the terms of the three appointees whose terms expire on the first Monday in January next following.

In view of my conclusion in answer to your first question, I do not consider that it is necessary to discuss your third question.

Accordingly, in specific answer to your questions it is my opinion:

1. Where all of the members constituting the board of education of a city school district resign at the same time, Section 4846, General Code, imposes the duty on the probate court of the county in which such district is located, to fill each of such vacancies by appointment for the unexpired terms of the several members so resigning.

2. When one or more vacancies occur in the membership of a city board of education which said board for any reason fails to fill within thirty days after it occurs, the probate court of the county in which such district is located is required to fill such vacancies as promptly as possible, and is not authorized to act in place of the board of education until the beginning of a new term or terms of persons who may thereafter be elected to succeed the former incumbents.

Respectfully,

HUGH S. JENKINS,
Attorney General.