

3932.

APPROVAL, BONDS OF LIBERTY TOWNSHIP RURAL SCHOOL DISTRICT,  
TRUMBULL COUNTY, OHIO, \$10,000.00.

COLUMBUS, OHIO, February 9, 1935.

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

3933.

BOARD OF EDUCATION—DISQUALIFICATION OF BOARD MEMBERS SUC-  
CEEDED BY NEW BOARD DOES NOT DISQUALIFY CLERK APPOINTED  
FOR TWO-YEAR TERM BY ORIGINAL BOARD.

*SYLLABUS:*

*In the event all the members of a board of education become disqualified for any reason to further serve as such members of the board and an entirely new board of education is appointed to succeed the board whose members so became disqualified, the clerk who had been appointed by the original board at its organization meeting in January, 1934, for a term of two years, is entitled to the position in accordance with his original appointment.*

COLUMBUS, OHIO, February 11, 1935.

HON. LELSTER S. REID, *Prosecuting Attorney, Chillicothe, Ohio.*

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

"In January, 1934, the Board of Education of S. Township appointed a clerk for two years. The clerk qualified and gave bond which called for a two year term. In December, 1934, the County Board of Education created a new district and placed a large part of S. Township in the new district. It so happened that all the former members of the Board of Education of S. Township resided in the newly created district. None of them were therefore eligible to serve as board members of the remainder of S. Township, and the county board of education appointed an entirely new board for S. Township.

This new board appointed a different clerk and the clerk of the former board refuses to give the books and records up, and claims that he was appointed for two years, has given bond and qualified, and served a part of this term, and claims that the new board as a successor to the old board of S. Township is bound to retain him until the expiration of his term.

The exact question I desire to have answered is whether the clerk appointed by the old S. Township Board of Education is still the clerk of the new S. Township Board of Education?"

The situation which prompts your inquiry is somewhat unique to say the least. I know of no other instance where such a situation has arisen and therefore, no direct precedent is available. The fact that a portion of the S. Township Rural School District was transferred out of the district did not have the effect of destroying the S. district. The territory remaining after the transfer was made, is the S. township rural

school district, with the rights and obligations of the original district; nor does the fact that all the members of the board of education of the district as it originally existed, became disqualified as such members, serve to destroy the district or suspend or cancel any of its governmental incidents or obligations. 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. In an opinion of the Attorney General found in the reported Opinions of the Attorney General for 1932, page 91, it is said:

“School districts are political subdivisions of the state, created for the purpose of maintaining and administering a system of public education. Boards of education for these school districts, are arms or agencies of the state for the promotion of education throughout the state.”

It certainly can not be said that contracts with teachers, or any other contracts that had been made by the original board of education on behalf of the district were invalid or that they were suspended or cancelled by reason of the fact that all the members of that board became disqualified to act and it became necessary to fill the vacancies occasioned by reason of such disqualification. Theoretically, a board of education is a continuing body, and when vacancies occur by reason of expiration of term, resignation or otherwise, and the vacancies are filled, the board continues to function as though there had been no vacancies. This is true, in my opinion, whether there is one vacancy or several, and even if the vacancies cover all the members of the board.

A somewhat analogous situation was involved in an inquiry which was the subject of an opinion found in the Opinions of the Attorney General for 1933, page 559. It appeared in that case that the entire membership of a certain board of education had been suspended by the Common Pleas Court of Brown County. Thereupon, the county board of education of the Brown county school district assumed the duties of the suspended board by authority of Section 7610-1. General Code, until such time as the suspension might be lifted or a new board provided for the district in case the members of the suspended board should finally be removed. The question presented, was whether or not the clerk of the board who had not been suspended but who had no duties to perform during the suspension of the members of the board, was entitled to his regular salary during said period of suspension. It was held as stated in the syllabus of the said opinion:

“A clerk of a board of education appointed for a definite term, who lawfully occupies the position and holds himself in readiness to perform the duties incident thereto is entitled to the remuneration fixed by the board for the position during the full term for which he was appointed, even though all the members of said board of education may have been suspended for a portion of that term during which time the board did not function and the clerk had no duties to perform.”

In the course of the opinion it was said with reference to the clerk of the board of education:

"Whether that position rises to the dignity of a public office is questionable and for the purposes of this opinion need not be decided. It at least is a public position or employment the occupant of which is appointed for a definite term, is required to give a bond as such occupant and is charged by law with the performance of distinct onerous duties for and on behalf of the public, to which there attaches definite remuneration, which the board is directed to fix by the terms of Section 4781, General Code. \* \*

It is a familiar principle of law that a person rightfully holding a public office is entitled to the compensation attached thereto. This right does not rest on contract. The compensation provided by law for the office is said to be an incident of the office, and the occupant of the office, so long as he rightfully holds the office is entitled to the compensation provided by law for the office regardless of whether or not he has any duties to perform as such officer. If a clerk of a board of education is to be regarded as a public officer he is clearly entitled to the salary attached to the office for the full term for which he is elected or appointed thereto, unless he is lawfully removed or the office is abolished.

If a clerk of a board of education is not a public officer his right to remuneration is based on contract, and until that contract is abrogated for some cause or other, and so long as he holds himself in readiness to perform the duties and obligations of the contract he is entitled to the remuneration provided by the terms of the contract even though the other contracting party may not require of him the service which he has contracted to perform or may not be in a position to, or be able to require the performance of those services. \* \*"

Whether or not a clerk of a board of education is a public officer is not material in the present situation. He may be appointed for a definite term, by authority of Section 4747, General Code, and in the present instance the clerk in question was so appointed. The mere fact that the appointing power may have gone out of existence can not have the effect of terminating the term for which the clerk was appointed, any more than an appointee of the governor, who might be appointed for a definite term, would have his term terminated by the resignation or death of the governor.

I am therefore of the opinion that the clerk in question, who was appointed for two years upon the organization of the board in January, 1934, is entitled to serve as such clerk until the organization of the next elective board in 1936.

Respectfully,

JOHN W. BRICKER,

*Attorney General.*

3934.

BOARD OF EDUCATION—UNAUTHORIZED TO PAY TUITION FOR RESIDENT PUPILS FOR ATTENDANCE IN HIGH SCHOOL OUTSIDE DISTRICT WHEN.

**SYLLABUS:**

*A board of education which has afforded high school privileges for its resident high school pupils for a period of three years, either within or without its district, is*