

1681

ELECTION TO FILL VACANCY IN LEGISLATIVE AUTHORITY OF A CITY—TIE RESULTS—PRESIDENT OF LEGISLATIVE AUTHORITY VOTES TO BREAK TIE—AUTHORITY TO VOTE—MODE OF ELECTIONS TO VOTE— §§731.43, 731.45, 733.09, R.C.

SYLLABUS:

1. Where in an election under Section 731.43, Revised Code, to fill a vacancy in the legislative authority of a city, a tie results, the president of the legislative authority is authorized to vote to decide the issue; and such right to vote is not precluded by a legislative rule which requires the filling of a vacancy by a majority vote of council, nor by a legislative rule which defines a majority to mean a simple majority of the members elected to council.

2. While under Section 731.43, *supra*, no particular mode of election for filling a vacancy is specified, the legislative authority of a municipal corporation is authorized by Section 731.45, Revised Code, to adopt its own rules, and may require that a majority vote of the membership is necessary for election.

3. In an election under Section 731.43, Revised Code, where one member receives two votes, another receives two votes, a third receives one vote, and one member does not vote, four votes being required to elect under the rules, there is no existing tie within the purview of Section 733.09, Revised Code, authorizing the president of the legislative authority to vote, since there is not an equal division of the votes and a vote by the president could not, of itself, decide the issue; and the president in such an instance is not entitled to vote.

Columbus, Ohio, September 6, 1960

Hon. James A. Rhodes, Auditor of State
State House, Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“Frequently the question of the validity of procedures of council is raised during the course of our examinations of the several municipalities of Ohio. Usually we do not question such procedures until an examination is under way. However, it has come to our attention that a situation exists in a municipality in Franklin County that raises very serious questions which will confront the examiner at the time of the next examination of this municipality.

“This municipality is in the midst of a number of programs which involve expenditure of considerable amounts of money, the

validity of which depends upon the legality of certain proceedings of the council as follows:

“In a seven member council one member resigned, leaving a vacancy. At a regular meeting of council, members of council proceeded to fill the vacancy and, during the course of procedure, the names of three candidates were submitted. Two of the three candidates each received two votes while the third received one vote, there being one councilman in addition to the president of council (having no right to vote) who abstained from voting. Under these circumstances the president of council declared a tie vote and invoked his right to break the tie, which he did by casting his vote for one of the candidates who had received two votes. In addition, the president of council also announced that the vote of the member abstaining was considered to have been cast in favor of the candidate receiving the three votes, which gave that candidate a majority of the votes of all members of council.

“In this municipality there is a difference of opinion as to the validity of this procedure and the fiscal officer is uncertain as to his duty to disburse funds of the municipality by order of council under these circumstances.

“This difference of opinion, I believe, stems principally from certain rules of procedure, one of which requires the filling of a vacancy by a majority vote of council and another which defines a majority to mean a simple majority computed on the basis of the members elected to council as provided by law.

“Furthermore, a distinction is made between concurrence of a majority and a majority vote when considering the problem of the disposition of the vote of an abstaining member who was present at the council meeting.

“Several opinions of the solicitor of the municipality in question are attached so that you may have the opportunity to examine the reasons which he believes support his conclusion that the councilman in question was not properly elected to a position on council.

“The Bureau, of course, will be called upon to determine the validity of disbursements authorized by council which in many cases will be dependent upon the vote of the member seated pursuant to the action described above.

“I believe this question is of general interest and your opinion will be of benefit to many municipalities in Ohio. Your opinion is respectfully requested with respect to the following questions:

“1. Under the circumstances above outlined, did a tie vote exist giving the president of council the right to cast his vote to break the tie?

"2. In view of the rules of council, can a councilman be elected to fill a vacancy by a plurality or may he be so elected only upon receiving a majority vote of all members of council?"

"3. Can the nominee be considered to have received a majority of the votes of all members elected to council when such majority is composed of three affirmative votes (one of which is the president's vote) and one vote is cast by ruling of the president because of the abstention of one councilman?"

The statute pertaining to the filling of a vacancy in a city council is Section 731.43, Revised Code, which reads:

"When the office of a member of the legislative authority of a municipal corporation becomes vacant, the vacancy shall be filled by election by the legislative authority for the unexpired term. If the legislative authority fails within thirty days to fill such vacancy, the mayor shall fill it by appointment."

Under Section 733.09, Revised Code, the president of the legislative authority of a city is authorized to vote "in case of a tie." This section reads as follows:

"The president of the legislative authority of a city shall be elected for a term of two years, commencing on the first day of January next after his election. He shall be an elector of the city, and shall preside at all regular and special meetings of such legislative authority, but he shall have no vote therein except in case of a tie."

In the case of *The State, ex rel. Roberts v. Snyder, Aud.*, 149 Ohio St., 333, it was held that the president of a city council has the right to vote in the event of a tie in the election of a clerk of the council. The opinion by Weygandt, C. J., states, beginning at page 336:

"It should be noted, too, that the exception is not limited to *some* ties. No mention is made of a particular tie vote such as on an ordinance, a resolution or the adoption of a report. Rather, it is all-inclusive—'a' tie—*any* tie, inasmuch as 'any' is a dictionary synonym of 'a.'

"Hence, irrespective of whether a duly elected council president be regarded as a 'member' of council, under these statutory provisions he is empowered to vote in case of any tie.

"But the respondent insists further that the council president was prohibited from voting under the provisions of the follow-

ing rule adopted by the council at the beginning of the organization meeting before an attempt was made to elect a clerk :

“The vice-president or president pro tem, and clerk, shall be elected by nomination only, and no one shall be considered a candidate for either office until he has been nominated, and when candidates for such office are voted for, a secret ballot shall be taken unless council by a majority vote may otherwise direct, and no one shall be declared elected unless he receives a majority vote of members of council.’

“However, there are at least two fatal difficulties with this contention. First, the council was without authority to adopt a rule in conflict with a statute; and, second, the rule contains no language whatsoever relating to the authority of the council president to vote in case of any tie.”

Also, in the case of *Babyak v. Alten*, 106 Ohio App., 191 (Court of Appeals, Lorain County, 1958), it was held that the mayor of a village, as president of the legislative authority, may vote, in case of a tie, on either a resolution or an ordinance. Referring to the president voting, the opinion by Hunsicker, P. J., states at page 193 :

“His vote as a member of such legislative authority can only be exercised in case of a tie. No distinction is provided by statute as to what kind of legislative action may be voted on in case of a tie, so we must conclude that it means any tie, that is, a tie vote with respect to a resolution or an ordinance. It makes no difference what the nature of the tie is: a permanent legislative matter or an organizational matter. *State, ex rel. Roberts. v. Snyder, Aud.*, 149 Ohio St., 333, 336, 78 N. E. (2d), 716. See also: 43 A.L.R. (2d), 733 *et seq.*”

It is significant that the question in *Babyak, supra*, dealt with a vote on an ordinance and that under Section 731.17, Revised Code, no ordinance “shall be passed without the concurrence of a majority of all members elected to the legislative authority.”

In view of the foregoing, therefore, I conclude that the president of council may vote in case of tie even though, as in the instant case, one council rule requires the filling of a vacancy by a majority vote of council, and another defines majority to mean a simple majority computed on the basis of the members elected to council. Thus, the question arises whether a tie existed after the first vote of council so as to authorize the president to vote.

In Ballentine’s Law Dictionary, Second Edition, at page 1282, the word “tie” is defined as follows :

“* * * as applied to an appointment by election, the word signifies a state of equality between two or more competitors for the same position.”

In the case here considered there were three candidates and two of these had an equal number of votes and were tied for the lead. Thus, a tie did exist, but was it a tie within the purview of Section 733.09, *supra*? While said section does not specifically provide that the president shall vote only where his vote will decide the issue, the legislature must have intended that the president should vote only where his vote would have some effect; and, to have any effect in itself, it must necessarily be decisive of the issue. Accordingly, I conclude that a tie exists under Section 733.09, *supra*, only where there is an equal division of the votes and the president's vote for either side would decide the issue.

In the instant case, the president's vote, alone, could not have elected any of the candidates because four votes were needed to elect. While under Section 731.43, *supra*, a vacancy may be filled by a plurality vote or even by motion (See *State, ex rel. Shinnich v. Green*, 37 Ohio St., 227), the legislative authority of a municipal corporation may determine its own rules, and a requirement of majority vote for election as here involved, would appear to be a proper rule (Section 731.45, Revised Code; *State, ex rel. Reed v. DeMaioribus*, 131 Ohio St., 201). The president's vote could only have given (A) or (B) three votes and (C) two votes which, taken by itself, would not have elected anyone, four votes being required.

I am aware that under the generally accepted rule of law the legal effect of refusing to vote is an acquiescence in the action taken by a majority of those who do vote (*Babyak v. Alten*, *supra*), and might be construed to be an acquiescence in the choice of those voting even where such choice is not made by a majority of those voting, but only a plurality is obtained as in the instant case (*State, ex rel. Shinnich v. Green*, 37 Ohio St., 227). It might be argued that, with this rule in mind, the vote of the president would be of some significance since the abstaining vote could be added to his vote to attain the majority vote required. In determining whether the president has a right to vote in the instant case, however, it would not appear proper to consider what might occur *after* the president voted; rather, the question should be decided on the validity and effect of the president's vote, itself, without considering what might happen after such a vote were cast.

In view of the above, I am of the opinion that under Section 733.09, Revised Code, the president of the legislative authority is authorized to vote in case of tie, but only where his vote will decide the issue; and since such a vote in the instant case could not have decided the issue, I conclude that a tie did not exist within the purview of Section 733.09, *supra*, authorizing the president to vote.

Answering your second question. I have already stated that under Section 731.43, Revised Code, a vacancy could be filled by a plurality vote, but that the legislative authority of a municipal corporation may, by rule, require a majority vote.

Coming to your third question, a nominee could not be considered to have received a majority vote for election under the fact situation which you have presented because, as noted above, the president of council was not authorized to vote. If, however, there had been two candidates and each received three votes the president would have been entitled to vote, as a tie would have existed and his vote would have been decisive.

Answering your specific questions, therefore, it is my opinion and you are advised:

1. Where in an election under Section 731.43, Revised Code, to fill a vacancy in the legislative authority of a city, a tie results, the president of the legislative authority is authorized to vote to decide the issue; and such right to vote is not precluded by a legislative rule which requires the filling of a vacancy by a majority vote of council, nor by a legislative rule which defines a majority to mean a simple majority of the members elected to council.

2. While under Section 731.43, *supra*, no particular mode of election for filling a vacancy is specified, the legislative authority of a municipal corporation is authorized by Section 731.45, Revised Code, to adopt its own rules, and may require that a majority vote of the membership is necessary for election.

3. In an election under Section 731.43, Revised Code, where one member receives two votes, another receives two votes, a third receives one vote, and one member does not vote, four votes being required to elect under the rules, there is no existing tie within the purview of Section 733.09, Revised Code, authorizing the president of the legislative

authority to vote, since there is not an equal division of the votes and a vote by the president could not, of itself, decide the issue; and the president in such an instance is not entitled to vote.

Respectfully,

MARK McELROY

Attorney General