465.

BOARD OF EDUCATION—VOTE FOR EMPLOYMENT OF TEACHER—MOTION TO RECONSIDER MADE AT A CONTINUED SESSION PERMITTED—EXCEPTION—EFFECT OF RESOLUTION.

SYLLABUS:

1. *A motion to reconsider the action taken by a board of education may be made by a member thereof who voted with the majority at any time during the same session at which the original vote which it is sought to reconsider was taken, provided no rights have vested thereunder, in the meantime, although it be done at an adjourned meeting of the session.*

2. *The adoption by a board of education of a resolution to employ a superintendent, or teacher, janitor or other employe, by authority of Section 7705, General Code, and in accordance with Section 4752, General Code, does not have the effect of making such employment, but merely authorizes the employment. The resolution is subject to the implied condition that it may be reconsidered in accordance with the ordinary parliamentary practice at any time before rights become vested thereunder.*

COLUMBUS, OHIO, May 31, 1929.

HON. F. H. BUCKINGHAM, *Prosecuting Attorney, Fremont, Ohio.*

DEAR SIR:—This will acknowledge your request for my opinion as follows:

> "At a meeting of one of the township school boards of this county the application of one of the teachers was submitted to a vote. There were only four members present at this meeting, and at the first ballot two voted for the appointment, and two against the appointment.
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> After this there were some argument and consideration made upon which they decided to vote again. One of the members suggested that a new motion be made to accept this application, and a new vote taken on the new motion. No motion was actually made, but the clerk was instructed to write in the resolution, and the vote was to be taken on the new motion. The new vote resulted in the application being accepted, and the meeting was then put over until another date but not adjourned.
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> The record as drawn up by the clerk does not show that a new motion was made to consider this application, but does show that the vote on the motion to accept this application was in favor of accepting the application.
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> The school board now wish to change their decision, and the question was put to me whether or not this resolution as explained constitutes an acceptance of the application, and therefore making a contract between the board of education and the teacher for employment for the next year.
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> The board is very anxious to get this decision before June 3rd, as that is the date set for the recalling of the meeting. If this can be sent out so it will reach me by that time I will appreciate it very much."

Under the circumstances set forth in your inquiry, the strict proper procedure, after a vote resulting in a tie had been taken, to bring the matter again before the board for a vote, would have been the making of a formal motion to employ the applicant teacher, or a motion to reconsider the former action. However, inasmuch as the clerk was instructed to note the fact that a new motion had been made before the second ballot was taken, the minutes should show that fact, even though the mo-

tion was not formally made, as clearly the intention of the members of the board of education was that a motion be made at that time.

Section 4754, General Code, provides as follows:

> "The clerk of the board of education shall record the proceedings of each meeting in a book to be provided by the board for that purpose, which shall be a public record. The record of proceedings at each meeting of the board shall be read at its next succeeding meeting, *corrected, if necessary,* and approved, which approval shall be noted in the proceedings. After such approval, the president shall sign the record and the clerk attest it."
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> (Italics the writer's.)

At any rate, whether the minutes of the meeting when finally drawn show that a motion had been made upon which the second ballot was taken, or whether they be corrected to show that fact, I take from your statement that the record, even as now drawn, shows that the proposal to employ the teacher carried by a majoriy vote and that the application of the teacher was accepted.

The records of a board of education should not be judged too strictly. If the intent of the board can be gathered from the face of the record, courts, in passing on the force and effect of the proceedings of the board, will be governed by the apparent will of the board, even though by a strict application of the principles of parliamentary law another result would be reached.

In *State ex rel.* vs. *Evans, et al.,* 90 O. S. 243, at page 251, Judge Wanamaker said:

> "Obviously the proceedings of boards of education, of county commissioners, township trustees and the like must not be judged by the same exactness and precision as would the journal of a court."

McQuillin in the second edition of his work on Municipal Corporations, recently published, Section 636, quotes with approval the language of the Supreme Court of Wisconsin in *Hark* vs. *Gladwell,* 49 Wis. 172, 177; 5 N. W. 323, where in speaking of county boards, it is said:

> "It will not do to apply to the orders or resolutions of such bodies nice verbal criticism and strict parliamentary distinctions because the business is transacted generally by plain men not familiar with parliamentary law. Therefore, their proceedings must be liberally construed in order to get at the real meaning and intent of the body."

See also *Whitney* vs. *Hudson,* 69 Mich. 189, and *Madden* vs. *Smeltz,* 2 O. C. C. 168.

It is a principle of parliamentary law upon which many of the rules and proceedings are founded, that when a question has once been put to a deliberative assembly and decided, whether in the affirmative or the negative, that decision is the judgment of the assembly, and cannot be brought in question.

The inconvenience of this rule, which is still maintained in all its strictness in the British Parliament, although divers expedients are there resorted to, as, for instance, explanatory or amendatory acts to contradict or evade the rule, has led to the introduction into the parliamentary practice in this country of the motion for reconsideration, which, while it recognizes and upholds the rule in all its strictness, yet allows a deliberative assembly, for sufficient reasons, to relieve itself of the embarrassment and inconvenience which would accordingly result from a strict enforcement of the rule in a particular case.

In Reed's Parliamentary Rules, Chapter 12, page 147, it is said:

"Even after a measure has passed the ordeal of consideration, of debate and amendment, and of final passage by the assembly, it has not yet, in American assemblies, reached an end. It is subject to a motion to reconsider. In England the motion to reconsider is not known. If any error has been committed, it is rectified by another act. * * *

A motion to reconsider, if agreed to, reopens the entire question for further action, as if there had been no final decision. * * *

A motion to reconsider must be made on the day on which the action sought to be revised was had, and before any action has been taken by the assembly in consequence of it. * * * *"

It is usual, in legislative assemblies, to regulate by rule, the time, manner and by whom a motion to reconsider may be made. In the National Congress and most State Legislatures the rule has been adopted that a motion to reconsider must be made on the same day that the motion was made which it is sought to reconsider, or on the next succeeding legislative day, and in some instances it is provided by rule that it must be made at a time when there are as many members present as there were when the original vote which it is sought to reconsider, was taken.

Boards of education are authorized by Section 4750, General Code, to adopt such rules as they may deem necessary for their government. Where there is no rule, as there probably is not with the board of education to which you refer, when reconsideration of actions once taken may be had, it is quite generally held that reconsideration of the action of such boards may be taken at any time before interests involved become vested or rights of third persons intervene.

In Cushing's Manual of Parliamentary Practice, Section 257, it is said:

"Where there is no special rule on the subject, a motion to reconsider must be considered in the same light as any other motion, and is subject to no other rule."

In McQuillin on Municipal Corporations, Second Edition, Sections 642 et seq., it is said:

"Unless restrained by charter or statute applicable, the legislative body of a municipal corporation, like all deliberative bodies, possesses the undoubted right to vote and reconsider its vote upon measures before it, at its own pleasure, and to do and undo, consider and reconsider, as often as it thinks proper, until by final vote or act, accepted as such by the body, a conclusion is reached. It is the result only which is important. A municipal council, like other legislative bodies, has a right to reconsider under parliamentary law, its votes and actions upon questions rightfully pending before it and rescind its previous action. The trustees of a village have like power as has the state legislature. Courts uniformly sustain the right of town meetings to reconsider votes and actions taken.

A deliberative body may lawfully reconsider a vote previously taken at the same meeting, and when the meeting is regularly adjourned to a fixed day, a reconsideration may occur at the adjourned meeting as such meeting is a continuation of the regular meeting. * * *

In accordance with the doctrine of the last section, the legislative body of the corporation or any board or department thereof, possesses the unquestioned power to rescind prior acts or votes at any time thereafter until the act or vote is complete, provided vested rights are not violated and such rescission is in conformity to the law applicable, and the rules and regulations adopted for the government of the body."

In *State ex rel. McClain* vs. *McKisson et al.*; 15 O. C. C. 517, affirmed by the Supreme Court without report, 54 O. S. 673, it is held with respect to the power of a city council to reconsider its action after rejecting all bids submitted for a pumping engine for the waterworks, as stated in the headnote:

> "The council has the power, after having once voted to reject all bids offered for a public contract, to reconsider its action and accept one of the bids where no rights have vested under the first action of the council, or where its first action has not so fully disposed of the matter that council could not take any further action in the matter."

See also *Adkins* vs. *Toledo,* 27 O. C. C. 417, and Dillon on Municipal Corporation, Fifth Edition, Section 539.

A leading case, frequently referred to by the courts and cited with approval in Cushing's Manual, Section 254, is *State* vs. *Foster,* 7 N. J. Law Reps. 101, in which it is said:

> "All deliberative assemblies have a right during the same session to reconsider any votes which they have taken, and only the final result is operative."

After an exhaustive search, I have found no case in which the right of a deliberative assembly or of any board or committee to reconsider its action at the same meeting in which the action was taken, has been denied. In the instant case the board, after taking the action spoken of, did not finally adjourn, but continued the session to a later date. It is well settled that under those circumstances the later session is but a continuation of the same meeting.

In Dillon on Municipal Corporations, Fifth Edition, Section 535, it is said:

> "A regular meeting, unless special provision is made to the contrary, may adjourn to a future fixed day; and at such meeting it will be lawful to transact any business which might have been transacted at the stated meeting, of which it is, indeed, but the continuation."

In McQuillin on Municipal Corporations, Section 633, it is said:

> "An adjourned meeting of either a regular or stated or special or called meeting is but a continuation of the same meeting."

See also *Young* vs. *Village of Rushsylvania,* 8 O. C. C. 75, and Opinions of the Attorney General, 1917, page 1393.

It seems clear that unless the action of the board of education at the meeting referred to vested some rights in the person who was an applicant, the action so taken may be reconsidered at the adjourned session of that meeting to be held on June 3rd. The question is whether or not the mere vote of the board to accept the application of the teacher or to employ the teacher so closed the matter as to vest in the applicant the right to the position from that time on, or whether the action of the board at that time merely authorized the entering into of a contract, and that the employment was not consummated until the contract was entered into.

Boards of education are authorized by Section 7705 to employ teachers, the procedure in so doing to be in accordance with Section 4752, General Code. There is no provision that contracts with teachers must be in writing, although it is customary

in many places to enter into written contracts with teachers after the same have been authorized by the board of education; and if such contracts are drawn and executed, upon the authority of the board, a contractural relation exists between the person so employed and the board, which could not, in my opinion, be set aside by a mere reconsideration by the board of its former action in authorizing the contract. The same might, of course, be done orally.

In the case of *Reed* vs. *Barton*, 176 Mass. 473; 57 N. E. 961, a similar question was considered. It was there held:

> "A board of school committees which had voted to elect a school superintendent at one meeting may rescind the vote at an adjourned meeting which is held to be a continuation of the same meeting, the rescinding being regarded as a vote of reconsideration at the same meeting."

A similar question was considered in an earlier Massachusetts case, *Wood* vs. *Cutter,* 138 Mass. 149. In the course of the opinion in the last named case, the court said:

> "Under these circumstances, no reason has been suggested to us why this vote should not stand on the same footing as any other vote of a deliberative body and remain subject to reconsideration at the same meeting and before it has been consummated. It begs the question to say that the board had once definitely voted in pursuance of the instructions of the town meeting and therefore was *functus officio* and could not reconsider its vote. The vote was not definitive if it contained the usual implied condition, that it was not reconsidered in accordance with ordinary parliamentary practice, and it must be taken to have been passed subject to the usual incidents of votes, unless some ground is shown for treating it as an exception to common rules.
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> Whether the board could have cut down their powers of deliberation by communicating their vote before the meeting was closed, or otherwise, is not a question before us. It is enough to say that an implied condition is as effectual as an express one; and that, in this case, the condition which has been stated must be implied."

In 1898 there was decided the case of *Board of Education* vs. *McFadden,* 6 O. N. P. 227. At that time it was provided by Revised Statutes, Section 3915, that the board of education of each township school district divided into sub-districts should consist of the township clerk and one director from each sub-district. Each sub-district had a board of directors consisting of three members, one director and two sub-directors. The manner of employing teachers was set forth in Section 4017 of the Revised Statutes, which provided, in substance, that each board of directors of a sub-district should make an appointment of a teacher for the sub-district to the township board of education who then confirmed or rejected the appointment.

In the case under consideration (*Board of Education* vs. *McFadden,* supra), a a sub-district board had certified an appointment to the township board which had voted to confirm the appointment but later, at the same meeting, voted to reconsider the action, and thereafter took no further steps in the matter. The court held that the teacher was not legally elected.

It is, of course, possible that the board, in the case submitted in your inquiry, by some action of its own, might have caused the rights of the applicant to become vested and thus foreclosed its power to reconsider the action taken. I take it, however, from your statement that the resolution merely provided for accepting the ap-

plication of the teacher, or was, in the words in the statute, Section 4752, General Code, "a motion to adopt a resolution * * * to employ a * * * teacher," and no further action was taken in the matter.

In the light of the foregoing authorities, and upon the facts submitted in your letter, it is my opinion that the action of the board of education in question in voting to accept the application of the teacher, did not amount to the making of a contract with the applicant, and did not vest in the applicant any rights which would preclude a reconsideration by the board of its former action at the same meeting. The action of the board was subject to the implied condition, as stated in the Massachusetts case referred to, that the action taken might be reconsidered in accordance with ordinary parliamentary practice and the resolution was passed subject to the usual incidents of votes of that kind.

I am therefore of the opinion that the board may reconsider its former action at the adjourned session to be held on June 3rd, next. A motion to reconsider should be made by one who had voted with the majority at the time the vote was taken on the motion which it is sought to reconsider, and requires a majority vote for its passage.

Respectfully,
GILBERT BETTMAN,
Attorney General.

466.

APPROVAL, NOTES OF MADISON RURAL SCHOOL DISTRICT, GUERNSEY COUNTY, OHIO—$15,000.00.

COLUMBUS, OHIO, June 1, 1929.

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

467.

APPROVAL, BONDS OF WILLOUGHBY RURAL SCHOOL DISTRICT, LAKE COUNTY—$50,000.00.

COLUMBUS, OHIO, June 1, 1929.

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