

OPINION NO. 2004-027**Syllabus:**

When four vacancies occur on a five-member board of education of a local school district, the sole remaining member of the board does not constitute the board and has no authority to fill vacancies on the board.

To: David Kelley, Adams County Prosecuting Attorney, West Union, Ohio
By: Jim Petro, Attorney General, July 19, 2004

You have requested an opinion concerning the filling of vacancies on a board of education of a local school district. In your situation, Manchester Local School District and Peebles Local School District were created from part of the territory of the Adams County/Ohio Valley Local School District.¹ Although the Adams County/Ohio Valley Local School District continues to exist, its territorial boundaries were altered. The change in the boundaries of the Adams County/Ohio Valley Local School District made four of its five² board members nonresidents of the district, and thereby, produced four vacancies on its board of education.³

¹R.C. 3311.26 provides for "the creation of a new local school district from one or more local school districts or parts thereof."

²The board of education of a local school district is composed of five members. R.C. 3313.01.

³Pursuant to R.C. 3313.01, a member of a board of education of a local school district must be an elector residing in the territory composing the school district. When a board

In light of these events, you ask, if four vacancies occur on the board of education of a local school district, whether the sole remaining member of the board is authorized to fill vacancies on the board. For the reasons that follow, when a board of education of a local school district has only one duly serving member remaining, that board member does not have the power to fill vacancies on the board.

R.C. 3313.11 addresses the subject of vacancies on boards of education, including boards of education of local school districts, but excluding joint vocational or cooperative education school districts.⁴ The statute first lists those events that may result in a vacancy, and then sets forth detailed provisions for filling board vacancies, declaring, in pertinent part, as follows:

If the board members are selected by appointment pursuant to division (B) or (F) of [R.C. 3311.71, applicable only to certain municipal school districts], the appointing authority responsible for the appointment shall fill any such vacancy by appointment of an individual to serve the remainder of the unexpired term from a slate of at least three persons proposed by the municipal school district nominating panel established under that section....

If the board members are selected by election, the board shall fill any such vacancy at its next regular or special meeting, not earlier than ten days after such vacancy occurs. A majority vote of all the remaining members of the board may fill any such vacancy. Immediately after such a vote, the treasurer of the board of education shall give written notice to the board of elections responsible for conducting elections for that school district that a vacancy has been filled, and the name of the person appointed to fill the vacancy. Each person selected by the board or probate court to fill a vacancy shall hold office for the shorter of the following periods: until the completion of the unexpired term, or until the first day of January immediately following the next regular board of education election taking place more than ninety days after a person is selected by the board or probate court to fill the vacancy. (Emphasis added.)

Members of a board of education of a local school district are selected by election, rather than by appointment pursuant to R.C. 3311.71(B) or R.C. 3311.71(F). R.C. 3313.01. Accordingly, a vacancy on a board of education of a local school district may be filled by the board, and “[a] majority vote of all the remaining members of the board” is sufficient to fill the vacancy. R.C. 3313.11; *see* 1961 Op. Att’y Gen. No. 2439, p. 444; 1928 Op. Att’y Gen. No. 1577, vol. I, p. 106; 1924 Op. Att’y Gen. No. 1292, vol. I, p. 137. Pursuant to R.C. 3313.85, if

member ceases to reside in the territory composing the school district, a vacancy occurs on the board of education. *See* R.C. 3313.11; *accord State ex rel. Sheppard v. Magnet*, 106 Ohio St. 89, 139 N.E. 154 (1922); *State ex rel. Van Den Eynden v. Paulson*, 29 Ohio App. 121, 162 N.E. 653 (Hamilton County 1928); *see also* R.C. 3311.22 (“if a member of the board of education lives in [a] part of a school district transferred [to another district] the member becomes a nonresident of the school district from which the territory was transferred and he ceases to be a member of the board of education of such district”); R.C. 3311.231 (same).

⁴R.C. 3313.11 states that it does not apply to any joint vocational school district or any cooperative education school district even though such districts are, pursuant to R.C. 3311.19(D) and R.C. 3311.52(D), respectively, generally subject to the provisions of law that apply to city school districts.

the board of education of a local school district does not fill a vacancy of the board within thirty days after the vacancy occurs, the board of the educational service center in which the district is located shall fill the vacancy. *See State ex rel. Sheppard v. Magnet*, 106 Ohio St. 89, 139 N.E. 154 (1922); 1928 Op. Att'y Gen. No. 1577, vol. I, p. 106.

R.C. 3313.11 states that, "the board" shall fill any such vacancy on the board. This means that the power to fill a vacancy rests with the board, and so may be exercised only by the board. The statute further declares that a "majority vote of all the remaining members of the board" is sufficient to fill such vacancy on the board. The statute's use of the term "majority," as well as the plural "members," suggests that the General Assembly intends that the power to fill board vacancies is to be exercised by more than one member of the board, in order to ensure that a vote in favor of filling a vacancy is, as a matter of law, the action of the board. It also means that a single member of the five-member board does not constitute the board, and thus has no power to make appointments to board vacancies. *See also, e.g., R.C. 3313.18* ("[a] majority of the members of a board of education shall constitute a quorum[.]" and further specifying that with respect to certain matters (*i.e.*, the purchase or sale of property, employment decisions, the election or appointment of officers, the payment of debts or claims, and the adoption of textbooks), the motion is carried when affirmed by a majority of "all the members of the board"). *See generally State ex rel. Cline v. Trustees of Wilkesville Township*, 20 Ohio St. 288, 294 (1870) (the term "quorum" means "such a number of the members of a body as is competent to transact business in the *absence* of the other members"); *Black's Law Dictionary* 1263 (7th ed. 1999) (defining "quorum"); Gen. H. Robert, *Robert's Rules of Order, Newly Revised*, 20 (10th ed. 2000) ("[t]he minimum number of members who must be present at the meetings of a deliberative assembly for business to be legally transacted is the *quorum* of the assembly").

The conclusion that the single remaining member of a local school district board of education cannot act to appoint other board members is consistent with principles expressed by the Ohio Supreme Court. For example, in *State ex rel. Saxon v. Kienzle*, 4 Ohio St. 2d 47, 48, 212 N.E.2d 604 (1965), the court ruled that "[a] single member does not constitute a board and, unless authorized by statute, cannot act as the board. The fact that all the offices but one on a board are vacant does not authorize the sole remaining member to act as the board."

In *State ex rel. Saxon v. Kienzle* a trustee of a three-member board of township trustees resigned. One of the two remaining trustees was then found to be no longer a resident of the township because of a change in township boundaries. This resulted in a second vacancy on the three-member board. Because there were two vacancies, only a single member remained serving as a township trustee. This member appointed relator Saxon to serve as a township trustee. The municipal court having appointing power in the matter under R.C. 503.24⁵ subsequently appointed respondent Kienzle to serve as township trustee. Relator Saxon then brought an action in *quo warranto* to oust respondent Kienzle from the office of township trustee.

⁵When *State ex rel. Saxon v. Kienzle*, 4 Ohio St. 2d 47, 212 N.E.2d 604 (1965), was decided, R.C. 503.24 stated that, "[i]f, by reason of the nonacceptance, death, or removal of a person chosen to an office in any township at the regular election, or if there is a vacancy from any other cause, the board of township trustees shall appoint a person having the qualifications of an elector to fill such vacancy for the unexpired term." 1956-1957 Ohio Laws 1039, 1041 (Am. H.B. 937, eff. Jan. 1, 1958). The statute then described the procedure for filling such a vacancy whenever there is no board of township trustees within a township or the board fails to make an appointment within the time specified:

The Ohio Supreme Court denied the requested writ, finding that respondent Kienzle was appointed by the municipal court in accordance with R.C. 503.24. The court held that the appointment of relator Saxon was a nullity, insofar as the remaining township trustee was without authority to make any trustee appointments: "If Swigart was the sole remaining member of the board, there was no board and he could not act as one; if there was a board, Swigart acting alone could not act for such board. His appointment of relator was, therefore, invalid." *State ex rel. Saxon v. Kienzle*, 4 Ohio St. 2d at 48, 212 N.E.2d 604. The court thus determined that the duty of filling the vacancy rested with the municipal court under the alternate appointment provisions of R.C. 503.24. *Id.*; see also *Brophy v. Landman* 28 Ohio St. 542 (1876) (finding that the affirmative votes of two of the five members of a city improvements board was not a lawful exercise of board power, and thus insufficient to bind the board and authorize the award of a contract); *Goshen Township Trustees v. Heywood*, Case No. CA84-02-007, 1985 Ohio App. LEXIS 6415, at *14-15 (Clermont County Apr. 8, 1985) ("R.C. 505.60(A) does not permit a single member of the board of township trustees to authorize the acquisition of and payment for medical insurance on the part of township officers and employees"); 1999 Op. Att'y Gen. No. 99-004 at 2-26 ("under R.C. 5709.73, if two members of a board of township trustees abstain from voting on issues of tax abatement for a particular company on the grounds that they have conflicts of interest, then the board lacks a sufficient number of voting members to act on those issues, and the vote of the remaining trustee is not effective to adopt township resolutions regarding those issues"); 1993 Op. Att'y Gen. No. 93-020 at 2-111 ("[w]hen vacancies on the township board of trustees leave only one trustee, however, there is no board of trustees. In such a situation, the alternative appointment provisions of R.C. 503.24 come into play" (citation omitted)).

The decision in *State ex rel. Saxon v. Kienzle* supports the conclusion that, absent a specific statutory provision that states otherwise, a single member of a public board composed of multiple members does not constitute the board, and thus cannot act as the board or for the board. Applying that analysis in this instance, we conclude that the sole remaining member of a board of education of a local school district does not constitute the board, and has no authority to make appointments to fill four vacancies on the board.

Under R.C. 3313.11 the local school district board of education "shall fill any such vacancy," and to do that the board acts by means of "[a] majority vote of all the remaining members of the board." The statute's express language is thus consistent with the prevailing rule that one member of a board is not the board and so, acting alone, cannot exercise any

If a township is without a board or if no appointment is made within thirty days after the occurrence of a vacancy on the board, the county court of such county shall appoint suitable persons, having the qualifications of electors in the township, to fill such vacancies for the unexpired term.

Wherever, in any township, a municipal court replaces the county court and there is no board of township trustees, or if no appointment is made within thirty days after the occurrence of a vacancy on the board, the municipal judge or the presiding municipal judge if there is more than one, may fill vacancies on the board. In those townships wherein there are no judges of a county court or municipal judges and there is no board of township trustees, or if no appointment is made within thirty days after the occurrence of a vacancy on the board, the probate judge may fill vacancies on such board.

Id.

power conferred upon the board. Indeed, R.C. 3313.11 is silent regarding action taken by a single member of the board, from which we may properly infer that the only remaining member of the board does not have the authority to fill board vacancies. *Cf., e.g., Price v. Tennant Comty. Serv. Dist.*, 239 Cal. Rptr. 572, 576, 194 Cal. App. 3d 491 (3rd App. Dist. 1987) (rejecting the argument that the single remaining member of the board of directors of a community services district could lawfully exercise the powers of the board, and thereby make appointments to fill four board vacancies, the court instead finding that “a single director does not have the power [to] fill [a] vacancy”).

This conclusion draws support from the fact that the General Assembly has provided an alternate mechanism in R.C. 3313.85 for ensuring that the board’s duties are carried out whenever the board does not fill a vacancy within a period of thirty days after such vacancy occurs. In that circumstance R.C. 3313.85 states that, “the board of the educational service center in which such district is located, upon being advised and satisfied of such failure, shall act as such board and perform all duties imposed upon such board.” This means that the board of the educational service center shall fill vacancies on the local school district board of education when the board of the educational service center is satisfied that the board of education has failed to fill the vacancies within the time specified. *See State ex rel. Sheppard v. Magnet* (finding that the action of a rural school district board of education in filling two of the three vacancies was without legal effect, since the appointments were carried by the votes of two persons who were no longer members of the board; the vote of the single remaining qualified board member was not sufficient to sustain the appointments); 1928 Op. Att’y Gen. No. 1577, vol. I, p. 106.

That the General Assembly has foreseen the possibility of board inaction with respect to filling vacancies and has provided a separate statutory procedure in R.C. 3313.85 that will ensure continuity and effectiveness in school district governance, an area often fraught with dissension and controversy, are strong evidence against the proposition that the sole remaining member of a local school district board of education may act to fill board vacancies that result from a change in school district boundaries. Moreover, the notion that a single member of a five-member board of education may make appointments to fill four board vacancies runs counter to sound public policy, and the principles of democracy that are the hallmarks of our system of constitutional government. *Cf. generally Brophy v. Landman*, 28 Ohio St. at 544-45 (the General Assembly “has wisely determined that the guardianship of these grave interests should be reposed in some body that would give due consideration to the questions upon which it was called to pass[,]” and “[i]t certainly was not the intention of the law that two should be competent to perform duties which the law had in this peculiar way imposed upon five”); Gen. H. Robert, *Robert’s Rules of Order, Newly Revised*, 20 (10th ed. 2000) (“[t]he requirement of a quorum is a protection against totally unrepresentative action in the name of the body by an unduly small number of persons”).

It is, therefore, my opinion, and you are hereby advised that, when four vacancies occur on a five-member board of education of a local school district, the sole remaining member of the board does not constitute the board and has no authority to fill vacancies on the board.