

1935.

APPROVAL, NOTES OF WOODLAWN SCHOOL DISTRICT, HAMILTON COUNTY, OHIO—\$2,798.00.

COLUMBUS, OHIO, November 29, 1933.

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

1936.

ASSISTANT COUNTY SUPERINTENDENT OF SCHOOLS — WHEN TERM OF OFFICE EXPIRES AFTER LIFE OF COUNTY BOARD OF EDUCATION HE MAY NOT RESIGN PRESENT TERM AND BE REEMPLOYED FOR TERM EXTENDING BEYOND LIFE OF BOARD THEN IN EXISTENCE.

SYLLABUS:

1. A county board of education is without power to anticipate the expiration of the term of an assistant county superintendent of schools which will take place after the time when the life of the board of education has ended, and appoint or employ a successor to the said assistant county superintendent of schools.

2. In the event an assistant county superintendent of schools should resign during the term for which he is elected he is ineligible for reappointment for a term extending beyond the time of the reorganization of the county board of education following the next general election of members of such board.

COLUMBUS, OHIO, November 29, 1933.

HON. CHARLES W. LYNCH, *Prosecuting Attorney, Woodsfield, Ohio.*

DEAR SIR:—I am in receipt of your request for my opinion, which reads as follows:

“The Assistant County Superintendent of Monroe County has presented the following questions, regarding Section 4739 of the General Code of Ohio, upon which we respectfully request your opinion:

‘My term of office as Assistant County Superintendent of Schools, expires August 1, 1934. Three new board members were elected on November 7th. Two of the old members hold over for a period of two years. Could the present board give me a new contract before they go out of office in January? For how long a period could they give a new contract? Would it be necessary for me to resign my old contract before accepting another?’

If it is legal for the old board to give me a new contract, could the newly elected board refuse to make appropriation to carry out the contract of the old board?’”

The appointment of assistant county superintendent of schools is authorized by Section 4739, General Code. This statute delegates to the county board of education

the power to make such appointments and to fix the terms of such appointees not to exceed three years. The duties of such appointees are fixed by Section 7706, General Code.

There is no statutory provision which provides for the filling of vacancies which might be created upon the resignation of a county superintendent of schools or an assistant county superintendent of schools as there is with reference to city superintendents of schools. Section 7702, General Code, provides with respect to the filling of vacancies occurring in the office of a city superintendent of schools, that the same may be filled by the city board of education for the unexpired portion of the school year in which the vacancy occurred. It is further provided that if the vacancy occurs through resignation or removal for cause, the superintendent thus resigning or removed, shall be ineligible for reappointment until after the organization of the board of education following the next general election of members of such board.

It is a well recognized principle of law, that a public officer or board is without authority to usurp the powers of his or its successors by making appointments to fill anticipated vacancies, and that what it can not do directly, it is forbidden to do indirectly. The provisions of Section 7702, *supra*, regarding the reappointment of a person who has resigned from a position is nothing more than a declaration of the common law.

The principle that a public officer is forbidden to make appointments to fill anticipated vacancies was stated and applied by the Supreme Court in the case of *State ex rel. Morris vs. Sullivan*, 81 O. S. 79; the first branch of the syllabus of this case reads:

“The well settled rule of the common law forbids that an officer clothed with power of appointment to a public office, shall forestall the rights and prerogative of his successor, by making a prospective appointment to fill an anticipated vacancy in an office the term of which cannot begin until after his own term and power to appoint have expired.”

It clearly follows that the assistant county superintendent of schools in question, whose term does not expire until August 1, 1934, may not be reappointed to a new term to begin upon the expiration of his old term, by the board of education now in office. Such an appointment at this time would be illegal even though all the members of the present board whose terms will expire on the third Saturday in January, 1934, had been re-elected. The life of the board will expire on the third Saturday in January, 1934, upon the reorganization of the succeeding board, regardless of the personnel of the succeeding board.

In the present instance, the succeeding board which will organize on the third Saturday in January, 1934, will be composed of two members of the present board and three other elected members who are not members of the present board. It is the prerogative of this new board to appoint an assistant county superintendent of schools to succeed the one whose term will expire August 1, 1934. The present board has nothing to do with the matter.

For this man to resign and be re-appointed for a term extending beyond August 1, 1934, would simply amount to the board doing indirectly what it is clearly forbidden to do under the law directly, and this, in my opinion, it is not permitted to do.

In view of the answer to these questions, the last question submitted by the assistant county superintendent of schools needs no answer.

I am therefore of the opinion that:

1. A county board of education is without power to anticipate the expiration of the term of an assistant county superintendent of schools which will take place after the time when the life of the board of education has ended, and appoint or employ a successor to the said assistant county superintendent of schools.

2. In the event an assistant county superintendent of schools should resign during the term for which he is elected he is ineligible for reappointment for a term extending beyond the time of the reorganization of the county board of education following the next general election of members of such board.

Respectfully,

JOHN W. BRICKER,
Attorney General.

1937.

SPECIAL CONSTABLE—CANNOT BE APPOINTED UNDER SECTION 3331, G. C. FOR PURPOSE OF ENFORCING GENERAL PROVISIONS OF SECTION 614-92, G. C.—DUTIES OF SPECIAL CONSTABLE DEFINED—AUTHORITY OF JUSTICE OF PEACE TO APPOINT.

SYLLABUS:

1. *A special constable cannot be appointed under section 3331, General Code, for the general purpose of enforcing the provisions of section 614-92, General Code, since the appointment of a special constable under section 3331, General Code, is limited to the particular occasion for which the special constable is appointed. (Opinions of the Attorney General for 1931, page 1162, followed and approved.)*

2. *A justice of the peace is not authorized under paragraph 4 of section 3331, General Code, to appoint a special constable to enforce the provisions of section 614-92, General Code, where the inability of the duly elected constable of the township to perform the duties of his office is not due to the pressure of official business.*

3. *A special constable appointed by a justice of the peace by virtue of section 3331, General Code, must be a resident and elector of the township for which the justice of the peace who appointed him was elected.*

COLUMBUS, OHIO, November 29, 1933.

HON. ERNEST L. WOLFF, *Prosecuting Attorney, Norwalk, Ohio.*

DEAR SIR:—This will acknowledge your letter which reads in part:

“The question has arisen in this county as to the discretion and authority of a Justice of the Peace to appoint a special constable under paragraph 4 of Section 3331, General Code, for the purpose of apprehending violators of Section 614-92, General Code, and prosecuting such violators under Section 614-100, General Code.

The question at issue is, can a Justice of the Peace appoint a special constable to handle such violations as a class, the appointment being a continuing one, and being made once for all; or, must there be a special appointment for each separate violation, or misdemeanor? It is understood that there