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MINIMUM WAGE BOARD—MEMBER A PUBLIC OFFICER—TO BE ELIGIBLE TO MEMBERSHIP ON SUCH BOARD, MEMBER MUST BE POSSESSED OF QUALIFICATIONS OF ELECTOR IN THIS STATE—LEGAL RESIDENCE—DE FACTO OFFICER.

SYLLABUS:

A member of the Minimum Wage Board is a public officer and, to be eligible for membership on such Board, must be possessed of the qualifications of an elector in this state.

Columbus, Ohio, June 22, 1949

Hon. Albert A. Woldman, Director, Department of Industrial Relations
Columbus, Ohio

Dear Sir:

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

“The Department of Industrial Relations requests your opinion on the following questions which have arisen relative to minimum wage hearings conducted by this department under authority of Sections 154-45(d) to 154-45(k), inclusive.

“Item I. As provided for in Section 154-45(g), the Director of the Department of Industrial Relations on February 23, 1949, appointed a minimum wage board to investigate minimum wages being paid to women and minors in the food and lodging industries of the State of Ohio. This Board consisted of 3 persons representing the employers, 3 persons representing the employees, and 3 disinterested persons representing the public. This board conducted several public hearings, heard a number of witnesses, and obtained a substantial amount of evidence pertaining to the problem involved. On or about May 13, 1949, the said board, after several executive sessions, recommended certain modifications of Mandatory Order #3 governing women and minors at work in establishments at occupations relating to the furnishing of food or lodging or both, and submitted said recommendations to the Director for approval or rejection as provided for in Section 154-45(h). At a public hearing conducted by the Director under authority of Section 154-45(i), the legality of the board was challenged by an attorney representing the Ohio State Restaurant Association, for the alleged reason that Mrs. F. R., one of the

board members representing the employees, was not at the time of her appointment nor is at the present time an elector or resident of the State of Ohio. An investigation conducted by this department reveals that this board member, business manager of the Waitresses' Union of Cincinnati, Ohio, and with offices in Cincinnati, Ohio, is actually a resident in the City of Covington, Kentucky, across the Ohio River from Cincinnati. Mrs. R. admits that she has been an elector and resident of Covington, Kentucky, for at least five years past.

"Question: Was Mrs. R. eligible for membership on the wage board? If she was not eligible and her appointment is illegal, does that affect the legality of the wage board and the legality of the recommendations submitted by said board? Or do these facts make a nullity of the entire proceedings and recommendations?

"Item II. L. N., a member of the aforesaid wage board representing the employers, after participating in all of the proceedings of said wage board, did not attend the deliberations of the board on Friday, May 13, 1949. Instead he addressed a letter to the board which reads as follows:

'As you know, I will be unable to attend your Friday meeting of the Minimum Wage Board, May 13.

'I would like at this time to respectfully request that Mr. B. J., another employer representative of the Board, be authorized to vote my proxy on matters brought before the board which requires a vote.

'Since I have listened to, and examined all the testimony, and have attended all the meetings of the board, and have discussed with Mr. S. and Mr. J. the problems confronted by employers on our subject matter, and since many drug stores will be amendable to the order, I would like to have my vote recorded through Mr. J. as my proxy.

'Trusting the board will grant this permission and regretting my inability to be with you, I am

Very truly yours,

/s/ L. C. N.'

"In compliance with this request, the board approved the arrangement whereby Mr. J., another member of the board also representing the employers, would be permitted to record the vote of Mr. N. as his proxy in all subsequent proceedings. Mr. J. actually did vote as the proxy of Mr. N. on all subsequent issues presented to the board for vote.

"Question. Was this delegation of the power to vote by proxy given by Mr. N. to Mr. J. legal?

"I call your attention to the requirement of Section 154-45(h) which states :

' * * * Two-thirds of the members of such wage board shall constitute a quorum and the recommendations or report of such wage board shall require a vote of not less than the majority of *all* its members.' (Emphasis supplied.)

"The minutes of the proceedings of the board reveal that a number of decisions of the board were decided by a vote of less than a majority of all its members—several decisions having been made by a 4 to 3 vote.

"Section 154-45(j) provides that the Director must make his decision of approving or disapproving the report of the wage board within ten (10) days after the public hearing. I must make my decision by Wednesday, June 22. I would, therefore, appreciate receiving your opinion in time to enable me to make my decision in accordance with the statute."

Sections 154-45d to 154-45t, General Code, comprise what is known as the Minimum Wage Act of Ohio. This act is a welfare measure passed by the General Assembly of Ohio pursuant to the authority conferred by Article II, Section 34 of the Constitution of Ohio. The act sets forth the policy motivating its enactment, outlines standards to be observed in the determination of a "fair wage" and prescribes the procedure to be followed by the Department of Industrial Relations to carry the law into execution.

An examination of the act discloses that a wage board has no permanent status, but is of a transitory nature, appointed by the Director of the Department of Industrial Relations for the specific purpose of obtaining all evidence and information relating to the wages of women and minor workers in the occupation or occupations for which the wage board was appointed, and then report its recommendations as to minimum fair wage standards for such occupation or occupations to the Director.

Section 154-45g, General Code, deals with the appointment of wage boards by the Director and provides :

"The director or the superintendent shall have the power, and it shall be the duty of the director on the petition of fifty or more residents of the state, to cause an investigation to be made by the superintendent or any authorized representative of the superintendent of the wages being paid to women or minors in any occupation to ascertain whether any substantial number of women or minors in such occupation are receiving oppressive and

unreasonable wages as defined in section one (G. C. §154-45d). If, on the basis of information in the possession of the director or the superintendent, with or without a special investigation, the director is of the opinion that any substantial number of women or minors in any occupation or occupations are receiving oppressive and unreasonable wages as defined in section one (G. C. §154-45d), he shall appoint a wage board to report upon the establishment of minimum fair wage rates for such women or minors in such occupation or occupations.”

Section 154-45h, General Code, relates to the membership of the board, and its powers and duties. This is the only provision in the act relating to qualifications of members and it will be observed that this section is silent on the question of the residence of members of the board. Section 154-45h provides in part as follows :

“1. A wage board shall be composed of not more than three representatives of the employers in any occupation or occupations, an equal number of representatives of the employees in such occupation or occupations and of not more than three disinterested persons representing the public, one of whom shall be designated as chairman. The director after conferring with the superintendent shall appoint the members of such wage board, the representatives of the employers and employees to be selected so far as practicable from nominations submitted by employers and employees in such occupation or occupations. Two-thirds of the members of such wage board shall constitute a quorum and the recommendations or report of such wage board shall require a vote of not less than a majority of all its members. Members of a wage board shall serve without pay, but may be reimbursed for all necessary traveling expenses. The director after conferring with the superintendent shall make and establish from time to time rules and regulations governing the selection of a wage board and its mode of procedure not inconsistent with this act. * * *”

The Constitution of Ohio, in Article XV, Section 4, provides in part as follows :

“No person shall be elected or appointed to any office in this state unless possessed of the qualifications of an elector ; * * *”

Article V, Section 1, dealing with the qualifications of an elector, provides as follows :

“Every citizen of the United States, of the age of twenty-one years, who shall have been a resident of the state one year next preceding the election, and of the county, township, or ward, in

which he resides, such time as may be provided by law, shall have the qualifications of an elector, and be entitled to vote at all elections."

This constitutional section has been implemented by statute in a manner not necessary to consider here, Section 4785-29, et seq., General Code.

This brings us to the question of whether or not membership on the minimum wage board is an "office" within the meaning of the constitutional provision above quoted.

The courts and text writers have given numerous definitions of a "public officer." Two characteristics which bear on this problem are found in all of them: (a) a public officer is clothed with some part of the sovereignty of the state, and (b) he receives his authority from the law and discharges some of the functions of government.

There is no doubt that a wage board member receives his authority from the law and discharges a governmental function. Is he clothed with some part of the sovereignty of the state?

The Minimum Wage Law has been held constitutional by the Supreme Court of Ohio against a challenge that it was an unconstitutional delegation of authority, *Strain v. Southerland*, 148 O. S. 153. That case holds that the law sets up standards to be observed in the determination of a minimum fair wage and "prescribes the procedure to be followed by the governmental agency designated to carry the law into execution." It follows that carrying the law into execution is an executive function of government. That part of the execution of the law which fixes the "minimum fair wage standards" is exclusively the function of a wage board. Its report can be either accepted or rejected by the director charged with issuing orders, but its findings as to wages can not be changed. Nor can the Director supervise its proceedings or direct what its findings shall be. Since it is the only body that can exercise the state's power to fix a minimum wage, it is submitted that a wage board is clothed with part of the state's sovereignty. Since the board is so clothed, so are each of its members.

The above conclusion is in keeping with the decisions of the Supreme Court of Ohio. In *State, ex. rel. Bricker v. Gessner*, 129 O. S. 290, the court had before it the question of whether a member of a county charter commission was a public officer. After reviewing the Ohio decisions and approving the definition set out above, the court examined the duties of

the charter commission. Those duties were to frame a charter and to submit it to the electors to be voted upon. This charter, like the report of a wage board, could be accepted or rejected, but it could not be altered except by another charter commission. The court pointed out that the actual exercise of the power to frame the charter was in the hands of the commission and held that a member of the commission was a public officer. The Gessner case is very similar to the instant case so far as the question of sovereignty is concerned and necessitates a holding that a member of a wage board is a public officer.

In another recent decision the court held that a city health commissioner was not a public officer but an employe, since he performed his duties under the direction and authority of the board of health, *Scofield v. Strain*, 142 O. S. 290. In *State, ex rel. Herbert v. Ferguson*, 142 O. S. 496, the question was whether members of the General Assembly could be appointed to a Post War Planning Commission, when the contention was made that they were being appointed to a civil office in violation of Article II, Section 19 of the Constitution of Ohio. The court pointed out that the commission was only a fact finding and recommending body whose findings as such had no effect in law and held that membership was not an office. These cases highlight the difference between bodies which work at the direction of some other authority and who merely recommend, and those bodies whose actions have an independent status of their own.

Article XV, Section 4, referred to above, has a proviso, which is as follows:

“* * * provided that women who are citizens may be appointed as members of boards of, or to positions in, those departments and institutions established by the state or any political subdivision thereof involving the interests or care of women or children or both.”

It is submitted that this proviso does not alter the law set out in the first part of the section for two reasons. In the first place, the provision was added at a time when women who possessed the residence qualifications of voters were still not allowed to vote. Since women have now been given the franchise, the provision is obsolete and meaningless. It would require a strained and artificial interpretation which slavishly followed the literal meaning of words for a court to say that this provision extends the privilege of holding certain offices in Ohio to any woman who is a citizen, while any equally qualified male applicant must be a resident of Ohio.

Secondly, the provision probably was intended to refer only to citizens of *Ohio*. The only case in which the Supreme Court has considered the provision was *State, ex rel. McNamara v. Campbell*, 94 O. S. 403. There the relator stated in her petition that she was a citizen of the State of Ohio and the court also stated that fact in the opinion, apparently on the ground that only female citizens of Ohio were intended to come within the provision. In light of this interpretation, even a following of the literal wording of the provision would not change the conclusion that Mrs. R. must be a resident of Ohio.

This conclusion is in keeping with the law in other jurisdictions. An examination of the judicial decisions discloses that it seems to be a fundamental principle of our government that none but qualified electors can hold a public office unless otherwise specifically provided and that where the law is silent respecting qualifications to office, it must be understood that only electors are eligible. See: *State, ex rel. Perine v. Van Beek*, 87 Iowa 569, 54 N. W. 525, 19 L. R. A. 622, 43 Am. St. Rep. 397; *Attorney General v. Abbott*, 121 Mich. 540, 80 N. W. 372, 47 L. R. A. 92.

It is, therefore, my opinion that a member of the Minimum Wage Board is a public officer and to be eligible for membership on such Board must be possessed of the qualifications of an elector in this state.

I come then to your second question as to the legality of proceedings conducted by such board when one of its members did not possess the qualifications necessary to such membership.

This question in turn brings us to a consideration of the question of whether such member was a *de facto* officer.

A *de facto* officer has been defined as one who has the reputation of being the officer he assumes to be and yet is not a good officer in point of law. This definition was originally made by Lord Ellenborough and has been quoted with approval in many cases. An excellent and more comprehensive definition is found in *Ex Parte Strang*, 21 O. S. 610, where the statement is made in substance that a person is a *de facto* officer where the duties of office are exercised under color of a known election or appointment, void because the officer was not eligible or because there was a want of power in the electing or appointing body, such ineligibility being unknown to the public.

It might possibly be contended that Mrs. R., although clearly and undisputably ineligible to serve as a member on the Minimum Wage

Board, is nevertheless a de facto officer and the acts of the Board can not be collaterally attacked since public rights are involved and the acts were performed under color of right; color of right being furnished by the appointment, even though illegal. (See *Ex Parte Strang*, supra.) However, there is no legal finality to the action of the Board until its report has been acted upon by the Director of the Department of Industrial Relations. Since the ineligibility of this member is now publicly known and its report and recommendations have not as yet become final by acceptance, you would be without authority to now accept such report. This conclusion makes it unnecessary to pass upon the problem that would have been presented had the Wage Board's report been accepted by you and a subsequent attack made upon the validity of the Board's action.

In view of the conclusion that you are without authority to now accept the report of the Minimum Wage Board heretofore appointed by you, it will be unnecessary to pass upon the question of whether or not the proxy voting engaged in by the Board is or is not valid.

Therefore, in view of the foregoing and in specific answer to your question, it is my opinion, and you are accordingly advised, that a member of the Minimum Wage Board is a public officer and to be eligible for membership on such Board must be possessed of the qualifications of an elector in this state.

Respectfully,

HERBERT S. DUFFY,
Attorney General.