

1169.

GENERAL HEALTH DISTRICT BOARDS OF HEALTH—WHO MAY CALL SPECIAL MEETINGS—SECTIONS 1261-16 TO 1261-25 CONSTRUED—OFFICES OF MEMBER OF DISTRICT ADVISORY COUNCIL AND DISTRICT BOARD OF HEALTH INCOMPATIBLE.

SYLLABUS:

*The district advisory council of a general health district may hold special meetings without the call of the state director of health or of the district board of health.*

*A majority of all members of the district advisory council constitutes a quorum for the transaction of general business.*

*The acts of the district advisory council, where there are less than a majority present, are illegal.*

*Members of a district board of health appointed at a special meeting of the district advisory council not properly called and without a majority of all members present, are de facto officers and all proper business transacted by such de facto members is valid and binding.*

*The offices of member of district advisory council and district board of health are incompatible.*

COLUMBUS, OHIO, January 31, 1924.

HON. JOHN E. MONGER, *Director of Health, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your recent communication as follows:

"I shall be glad to have your opinion in regard to certain questions affecting General Health District Boards of Health.

"1. Has the Advisory Council provided for in section 1261-18 the authority to hold a special meeting except upon call of the State Director of Health or the District Board of Health?

"2. If a special meeting is held other than is provided in section 1261-18, would the acts of the Advisory Council be illegal?

"3. What number of members of the Advisory Council is necessary to be present in order to constitute a quorum?

"4. Where a meeting is held at which less than a majority of all members is present, would the acts of any part of those present be of legal effect?

"5. Would persons appointed as members of the board of health, at a special meeting of the district advisory council not properly called and without a majority of all members present, have status as *de facto* officers?

"6. Is a member of the district advisory council eligible to appointment as a member of the general district board of health?"

The sections of the statute pertinent to your questions provide as follows:

"Section 1261-16. For the purposes of local health administration the state shall be divided into health districts. Each city shall constitute a health district and for the purposes of this act shall be known as and hereinafter referred to as a city health district. The townships and villages in each county shall be combined into a health district and for the purposes of this act shall be known as and hereinafter referred to as a general health district. As hereinafter provided for, there may be a union of two general health districts or a union of a general health district and a city health district located within such district."

"Section 1261-17. In each general health district, except in a district formed by the union of a general health district and a city health district, there shall be a district board of health consisting of five members to be appointed as hereinafter provided and as provided in section 4406 of the General Code. The members of a board of health of a general health district shall receive no compensation for their services but shall be reimbursed for all necessary and lawful expenses incurred in attending meetings of the board. A vacancy in the membership of the board of health of a general health district shall be filled in like manner as an original appointment and shall be for the unexpired term. Provided, that when a vacancy shall occur more than ninety days prior to the annual meeting of the district advisory council all remaining members of the district board of health may select a resident of the district to fill such vacancy until such meeting. A majority of the members of the district board of health shall constitute a quorum."

"Section 1261-18. Within sixty days after this act shall take effect the mayor of each municipality not constituting a city health district and the chairman of the trustees of each township in a general health district shall meet at the county seat and shall organize by selecting a chairman and a secretary. Such organization shall be known as the district advisory council. The district advisory council shall proceed to select and appoint a district board of health as hereinbefore provided, having due regard to the equal representation of all parts of the district. Where the population of any municipality represented on such district advisory council exceeds one-fifth of the total population of the district, as determined by the last preceding federal census such municipality shall be entitled to one representative on the district board of health for each fifth of the population of such municipality. Of the members of the district board of health, one shall be a physician. Annually thereafter the district advisory council shall meet on the first Monday in May for the purpose of electing its officers and a member of the district board of health and shall also receive and consider the annual or special reports of the district board of health and make recommendation to the district board of health or to the state department of health in regard to matters for the betterment of health and sanitation within the district or for needed legislation. It shall be the duty of the secretary of the district advisory council to notify the district health commissioner and the state commissioner of health of the proceedings of such meeting. Special meetings of the district advisory council shall be held on request of the district board of health or on the order of the state commissioner of health. On certification of the chairman and secretary the necessary expenses of each delegate to an annual or special meeting shall be paid by the village or township he represents. The district health commissioner shall attend all meetings of the district advisory council."

"Section 1261-19. Within thirty days after the appointment of the members of the district board of health in a general health district, they shall organize by selecting one of the members as president and another member as president pro tempore. The district board of health shall appoint a district health commissioner upon such terms, and for such period of time, not exceeding two years, as may be prescribed by the district board. Said appointee shall be a licensed physician and shall be secretary of the board and shall devote such time to the duties of his office as may be fixed by contract with the district board of health. Notice of such appointment shall

be filed with the state commissioner of health. The district health commissioner shall be the executive officer of the district board of health and shall carry out all orders of the district board of health and of the state department of health. He shall be charged with the enforcement of all sanitary laws and regulations in the district, and shall have within the general health district all the powers now conferred by law upon health officers of municipalities. It shall be the duty of the district health commissioner to keep the public informed in regard to all matters affecting the health of the district."

*Section 1261-25.* If the state commissioner of health shall find that the district health commissioner or the members of the board of health of a general or city health district, or any member thereof, has failed to perform any or all the duties required by this act, he shall prefer charges against such district health commissioner or such members of the board or such member before the public health council and shall notify such commission or the members of the board or such member as to the time and place at which such charges will be heard. If the public health council shall, after hearing, find the district health commissioner or members of such board or such member guilty of the charge or charges it may remove such district health commissioner, members of the board, or such member from office. When all, or a majority of the members of the board of health of a general or city health district are so removed from office, the district advisory council or the mayor of the city, upon notice of such removal, shall within thirty days after receipt of such notice select a new board of health or members to fill the vacancies caused by removal, and if the district advisory council or mayor fails within sixty days to select such board or such member or members, the state commissioner of health with the approval of the public health council, may appoint a board of health for such general or city health district or fill the vacancies caused by removal."

The duties of the district advisory council, as set out in General Code sections, supra, are to organize, select and appoint a district board of health to meet annually on the first Monday in May for the purpose of electing its officers and a member of the district board of health, to remove any or all members of the district board of health for cause, to receive and consider the annual or special report of the district board of health and to make recommendations to the district board of health or state department of health in matters for the betterment of health and sanitation within the district or for legislation. The same section provides for one annual meeting and special meetings at the request of the district board of health or on the order of the state director of health. The holding of these meetings is mandatory and in case of failure to meet on the first Monday in May for the annual meeting, such failure will not excuse the advisory council from holding such meeting thereafter.

In the case of *State ex rel. vs. Roose*, 90 O. S. 345, it was held as follows :

"The duty of a county auditor to place on the tax lists of the county the rate required by law for state purposes, as certified to him by the auditor of state, and to enter the same in one column denominated 'state taxes,' as provided by section 5626, General Code, is a ministerial duty specifically enjoined by law, the performance of which may be required by mandamus."

On page 350 of the opinion, supra, the court say :

"The placing of this levy on the tax duplicate is a mere ministerial duty. In the discharge of this duty the county auditor has no discretion. If he did not perform his official duty within the time the law directed him to do it, he must do it now."

The statute provides that the advisory council may make recommendations to the district board of health and to do so would require a meeting of the district advisory council. It might not be expedient to make such recommendation at the time of the annual meeting and the district board of health or the state director of health might not call a special meeting, and to hold that the district advisory council might not hold special meetings except at the call of the district board of health or the state director of health would place them at the mercy of the above officials.

In the case of *State of Ohio ex rel Cline vs. Wilkesville*, 20 O. S. 288, on page 293 of the opinion the court say :

"That other or special meetings of the trustees are authorized, though not expressly required by law, is clear, from the fact that many duties are enjoined upon the trustees which cannot be properly discharged at the regular meetings."

The common law rule in matters of public concern is that all must be present, but the majority will conclude the minority. *State ex rel. Cline vs. Wilkesville*, supra.

The sections relating to the district advisory council do not recite how many shall constitute a quorum, and of the various duties placed upon them, in only one place is it stipulated that there shall be a certain number voting in the affirmative. Section 1261-20 provides in part :

"When it is proposed that a city health district unite with a general health district in the formation of a single district, the district advisory council of the general health district shall meet and vote on the question of union and it shall require a majority vote of the total number of townships and villages entitled to representation voting affirmatively to carry the question."

Section 1261-17, relating to the district board of health, as far as pertinent, provides :

"A majority of the members of the district board of health shall constitute a quorum."

The general rule is that where a quorum of a board or commission may transact business, a majority of that quorum constitutes the action of the board or commission.

It is evident from a consideration of the statutes relating to health matters that it was the intention of the legislature that a majority of the members of the district advisory council constitute a quorum for the transaction of all business, except the question of combining a city health district with a general health district, in which case there must be a majority of all members.

Webster's International Dictionary defines *de facto* as follows: "Actual; in fact; in reality; existing; as a king *de facto*, as distinguished from a king *de jure*."

A *de facto* officer is one who holds office under color of title as distinguished from a mere usurpation, that is, the elective or appointive authority is invested in

the person or parties attempting to exercise same, but that the manner of exercising same is illegal.

In the case of *Smith vs. Lynch*, 20 O. S. 261, it was held:

“A board of health appointed under an invalid ordinance are *de facto* officers.”

In the case under discussion, the members of the district board of health are appointed under a valid statute by a proper board, at a meeting at which there was not a legal quorum, and such members qualified and presume to act as members in the transaction of the business of the board. It must be remembered that an illegal election or appointment does not invalidate the acts of persons illegally elected or appointed.

In the case of *State of Ohio vs. Constable*, 7 Ohio, p. 9, on page 10 of the opinion, the court say:

“It may, perhaps, be thought that the election of constable being void, his acts performed as recorder are void. But it is not so. He was recorder *de facto*, and the business transacted by him in the office must be considered equally valid as if he had been properly elected.”

There is no constitutional or statutory inhibition preventing a member of the district advisory council from being eligible to appointment as member of the district board of health. The common law rule of incompatibility, as stated by the circuit court in *State ex rel. vs. Gebert*, 12 C. C. (n. s.) 274, is as follows:

“Offices are considered incompatible when one is subordinate to, or in any way a check upon, the other; or when it is physically impossible for one person to discharge the duties of both.”

The matter of a physical impossibility to hold both offices may be eliminated, as neither the duties of a member of the district advisory council or the district board of health require much time. This leaves only the question as to whether one office is subordinate to or in any way a check upon the other.

Section 1261-18 provides that the district advisory council shall appoint the members, shall receive and consider the annual or special reports, shall make recommendations, and, under section 1261-25, may remove any or all members of the district board of health. A member of the district advisory council who is a member of the district board of health would be in the position of passing on the appointment of himself and on his removal; of making reports and passing on same.

Taking up your questions in the order presented, it is therefore my opinion that:

First. The district advisory council may hold special meetings without the call of the state director of health or of the district board of health.

Second. The answer to your first question makes unnecessary an answer to your second question.

Third. A majority of all members of the district advisory council constitutes a quorum for the transaction of all business except that of combining a special health district with a general health district.

Fourth. At a meeting where less than a majority are present, the acts of the members present are illegal.

Fifth. Members of district boards of health appointed at a special meeting of the district advisory council not properly called and without a majority of all mem-

bers present, are *de facto* officers and all proper business transacted by the district board of health in which such *de facto* members participated, is valid and binding.

Sixth. Offices of members of the district advisory council and district board of health are incompatible and a member of the district advisory council is not eligible to appointment as a member of the district board of health.

Respectfully,

C. C. CRABBE,

*Attorney General.*

1170.

COUNTY COMMISSIONERS—COMPENSATION—SECTION 6502 G. C. APPLIES TO BOTH SINGLE AND JOINT COUNTY DITCH IMPROVEMENTS.

*SYLLABUS:*

*Under the provisions of section 6537 of the General Code, the provisions of section 6502 of the General Code, relating to the compensation of County Commissioners, have application to both single and joint county ditch improvements.*

COLUMBUS, OHIO, February 1, 1924.

HON. J. F. VANDENBROEK, *Prosecuting Attorney, Napoleon, Ohio.*

DEAR SIR:—Receipt is acknowledged of your recent letter, transmitting the following statement and request for an opinion:

“Section 6502 of the G. C. amended in House Bill 569—110 Ohio Laws, provides additional salary for County Commissioners per diem and it specifies further in this section that said allowance is for work so defined in this chapter. Is it the intention of the Legislature that this chapter shall mean single county ditches only, or does that mean ditches which includes joint and other ditches?”

Enacted House Bill No. 569, referred to by you, was an emergency act, passed April 3, 1923, and is found in 110 O. L. 161. The purpose of this act was to codify the drainage laws of the state. This enactment is made up of Chapters one, two, five, six and eight. Chapter one covers the subject of single county ditches; chapter two, joint county ditches; chapter five, township ditches; chapter six, underground drains; and chapter eight, cleaning and repairing of ditches, drains and watercourses.

Said section 6502, General Code, is a part of chapter one, and reads:

“In addition to the salary otherwise provided by law for county commissioners, each commissioner shall receive, for performing all duties required of him in this chapter, five dollars per day for each day actually engaged in work on an improvement as defined in this chapter, but not to exceed one hundred days in any one year, and not to exceed four days on any one improvement and the one-half part thereof shall be paid out of the general fund of the county, and the one-half part thereof shall be charged as costs in the location and construction of the improvement and paid in the first instance out of the general ditch improvement fund of the county.”