

OPINION NO. 70-060**Syllabus:**

Where a member of a school board failed to be re-elected at the last general election and thereafter resigned from the board, he is eligible and can be elected by the school board to fill a vacancy for a two-year unexpired term on the board created by the resignation of another member.

To: William D. Kennedy, Lawrence County Pros. Atty., Ironton, Ohio
By: Paul W. Brown, Attorney General, June 1, 1970

I have your request for my opinion which reads as follows:

"Can a vacancy on a local school board be filled for a two year unexpired term, by the members appointing a person who had not been re-elected, at the last regular election, and who had resigned his membership on the school board, on December 12, 1969, and was appointed by the members of the school board, on December 16, 1969 to complete said two year term."

You explain that one of the members resigned December 2, 1969, leaving about two years of his term yet to be served. Another member whose term ended December 31, 1969, and who was defeated for re-election at the previous general election, resigned December 12, 1969. On December 16, 1969, the members of the school board elected him to fill the above mentioned unexpired two year term.

Section 3313.11, Revised Code, reads as follows:

"A vacancy in any board of education may be caused by death, nonresidence, resignation, removal from office, failure of a person elected or appointed to qualify within ten days after the organization of the board or of his appointment, removal from the district, or absence from meetings of the board for a period of ninety days, if such absence is caused by reasons declared insufficient by a two-thirds vote of the remaining members of the board, which vote must be taken and entered upon the records of the board not less than thirty days after such absence. Any such vacancy shall be filled by the board 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 for the unexpired term."

The legislature has clearly provided that when a vacancy in any board of education has occurred by resignation, a majority vote of all the remaining members at a regular or special meeting of the board not earlier than ten days after the vacancy occurs shall serve to fill the vacancy for the unexpired term. Under the given facts, the ten day provision was complied with. The vacancy occurred December 2, 1969, and the meeting filling the vacancy was held December 16, 1969. From the statement, it further appears that all the remaining members of the board voted favorably so that the majority vote provision was complied with.

There is nothing in Section 3313.11, supra, or in related sections of the Revised Code to indicate that a defeat of one member for re-election to the school board at the last general election in any way disqualified him from being elected by the board to fill a newly created vacancy. The case of State, ex rel. Mittendorf, v. Hensing, 10 Ohio App. 205, presented a similar question. Mittendorf had been defeated for re-election to the school board at the last general election and then was elected by the board to fill an unexpired term of another member who resigned. The issue was formed in a quo warranto action. The court said at page 209:

"Defendant further urges that the conduct of the board in the election of Mittendorf at its meeting November 30, 1917, was improper, and a conspiracy to thwart the will of the people as expressed at the preceding general election, when Mittendorf was defeated for reelection. * * *"

The Court found that this question could not properly be raised in a quo warranto action and that Mittendorf was legally elected by the board of education at its meeting November 30, 1917.

The conditions of Section 3313.11, supra, providing for election by a board of education to fill the unexpired term of a vacancy occurring in the board membership appear to have been fulfilled in this case.

I am of the opinion therefore and you are so advised that where a member of a school board failed to be re-elected at the last general election and thereafter resigned from the board, he is eligible and can be elected by the school board to fill a vacancy for a two-year unexpired term on the board created by the resignation of another member.