

board are limited and do not comprehend the determination of questions of election irregularities. Attention need only be directed to the cases of *State ex rel. vs. Tanzey*, 49 O. S. 656; *State vs. Patterson*, 73 O. S. 305; *State ex rel. vs. Graves*, 91 O. S. 113. These authorities make it clear that the canvassing board has no jurisdiction to go beyond the returns and consider other possible irregularities in the election.

In view of this rule, it must be concluded that, in cases of the character which are here under consideration, the canvassing board should declare the election of the three candidates receiving the highest number of votes, irrespective of any doubts which may exist in the minds of the board as to the legal effect of the election itself. This is not a matter which is within their jurisdiction.

It should perhaps be stated that one of the specific cases before us deals with the election of two justices of the peace. By Section 5118 of the Code the township clerk is the canvassing authority in the election of a justice of the peace and his duties would be similar to those of the board of elections in the case of an election of members of that board.

One of the inquiries also presents a situation of where there existed a tie vote in the case of the three members of the school board. Section 5121 of the Code, which has heretofore been quoted, specifically permits the board to determine by lot which of the persons shall be duly elected.

It should be understood that in reaching these conclusions I am not attempting in any way to express final opinion upon the validity of these elections. I am here dealing with the duties enjoined by law upon certain boards and officers. As I view the law, the duties under the circumstances are purely ministerial and it is not within the power of any official, other than such boards as have been designated by law as having authority in election contests or a proper court in a quo warranto or other appropriate proceeding, to pass upon the validity of these elections. Under the circumstances, and in view of the fact that there is no official to whom an opinion of this office can be directed having authority in this matter, it would be inappropriate for me to express any definite conclusion.

It is not my province to anticipate the considered judgment of a court or other tribunal having before it all of the pertinent facts.

I am accordingly of the opinion that, after an election has been held and the returns are certified to the proper canvassing official or board, it is the duty of such official or board to proceed to canvass the vote and determine the persons duly elected to the offices to be filled at such election, if it is possible upon the face of the returns to determine such result. It is not within the province of such canvassing official or board to pass upon questions of irregularities in connection with such election resulting from the use of improper forms of ballot, or otherwise, since the duty of such official or board is ministerial in character and confined to a consideration of the returns alone.

Respectfully,

GILBERT BETTMAN,

Attorney General.

1292.

ELECTION—VILLAGE BOARD OF EDUCATION—DUTY TO CANVASS VOTE
WHEN RETURNS JUSTIFY—PROCEDURE WHEN SAME CANDIDATES
RECEIVE HIGHEST VOTES FOR FOUR AND TWO YEAR TERMS.

SYLLABUS:

1. *Where, in an election of members of a village board of education, the returns certified to the board of education by the precinct officials are such as to enable the board to determine which candidates are elected, it is the duty of the board of education to canvass*

the vote and declare such persons elected, and there is no authority in the board to withhold such declaration because of claimed irregularities in connection with the election.

2. Where five members of a board of education are to be elected, three for four years and two for two years, and the two receiving the highest number of votes for the two year term also are among the three receiving the highest number of votes for the four year term, it is the duty of the board of education canvassing the vote to declare such persons elected to both terms. Since such persons cannot qualify for both terms, their failure to qualify for the one will create vacancies which the board is authorized to fill in accordance with the provisions of Section 4748 of the General Code.

COLUMBUS, OHIO, December 13, 1929.

HON. CLARENCE J. BROWN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent request for an opinion based upon the following letter to you from a citizen of Delaware County:

“I hereby file a protest against the findings of the Delaware County Board of Elections in regard to the election of the members of the Board of Education of the Galena Village Schools at the election held November 5th and raise in question the validity and conduct of said election. I accordingly filed a protest with the chairman of the Delaware County Board of Elections on November 9, and asked that a ruling be obtained from the Attorney General of Ohio on the following grounds:

1. Whereas the creation of the New Galena School District has terminated the term of office of all members of the old board, it was necessary for five new members to be elected: three for four (4) years and two for two (2) years and the ballots should have so designated. This fact evidently was overlooked and as no nominations had been made, the ballots were printed as follows: ‘Vote for three’ followed by several blank spaces and distributed to only five of the six precincts of the Galena district. In three of the precincts the ballots were voted in this form ‘Vote for three’ all day and the electors in said precincts were misled to the extent that many voted for three without designation as to time when in reality they should have voted for all five members. Even when a voter did attempt to vote for five he rendered his ballot void in its entirety, inasmuch as the time was not stated.

2. In Galena Village precinct the presiding judge called up the County Board of Elections about nine o’clock on election day and called attention to the error in the ballots and asked for instructions. Sometime later, about ten or eleven o’clock, the clerks in the two Galena precincts wrote on the ballots ‘vote for three for four years,’ ‘two for two years.’ We raise the question had the clerks a right to tamper with the ballots? In three other precincts the correction was not attempted and the voters voted the erroneous ballots all day, and accordingly the electors only exercised three-fifths of their rights and were disfranchised to that extent.

3. In Harlem Township precinct of which territory the Galena District embraces about one fourth, no school ballots were furnished and the electors were completely disfranchised, except in one or two instances where the elector from Harlem Township left his own precinct and went to Galena Village precinct and voted, which we claim he had no right to do and that his voting in another township was illegal.

4. An inspection of the summary of the County Board of Elections showing tabulated returns, a copy of which is herewith attached, does not record any votes from Harlem, Trenton and only four from one Genoa precinct. Why are there no votes recorded in two of the six election precincts

of Galena School District and only four in another? Is it not probable that more votes would have been cast in these precincts if proper ballots had been furnished?

5. An inspection of the summary shows that the three highest for the four year term received 43, 54 and 63 votes respectively while the reported winners for the two year term were 17 and 14 votes whom by the way do not think were elected in any event as they were the third and fourth highest and not the two highest. Obviously these totals are minorities and not majorities of the electorate and therefore they do not express its will.

6. The results are inconsistent since the two of the three candidates receiving the greatest number of votes for four years also received the greatest number of votes for two years and they cannot possibly qualify for both terms. Hence a vacancy is created in two members either for the four year term or the two year term whichever way the votes are counted.

7. No regular and systematic plan of voting and counting ballots prevailed. Votes were thrown out and votes were counted according to the whims of the different election officials. An inspection of the summary shows how haphazard the election really was; and the chairman of the county board is cooperating in requesting you to pass on the validity of said elections.

Finally, in view of all these facts and others which I think could be secured, but more it seems to me would be unnecessary, and inasmuch as a reasonable doubt I am told was raised in the minds of the County Board of Elections, I am asking whether there was in reality a valid and legal election or whether the old members of the Board should hold over until their successors are duly elected and qualified."

With your letter you submit an abstract of the votes cast in the six election precincts of the Galena school district. I deem it unnecessary to set forth the abstract in full herein. It may be stated, however, that the abstract shows no votes cast in two precincts, only four votes in a third precinct and but thirty-three votes cast in a fourth precinct. Substantially all of the votes, accordingly, were cast in what are designated as the two Galena village precincts.

The three candidates receiving the highest number of votes for the four year term were O. D. Nelson, H. Shoaf and P. H. Walker. The abstract further shows that P. H. Walker and Homer Shoaf also received the highest number of ballots for the short term.

In the view that I take of the law, it is unnecessary to give extended consideration to all the objections raised in the letter which I have quoted. The canvass of the vote for the board of education of a school district is provided for by Sections 5120 and 5121 of the General Code, which are as follows:

SECTION 5120. "In school elections, the returns shall be made by the judges and clerks of each precinct to the clerk of the board of education of the district, not less than five days after the election. Such board shall canvass such returns at a meeting to be held on the second Monday after the election, and the result thereof shall be entered upon the records of the board."

SECTION 5121. "In the canvass of the vote for members of the board of education, or assessors of real property, the person having the highest number of votes shall be declared elected, and the next highest, and so on, until the number required to be elected shall have been selected from the number having the highest number of votes. If any number of persons greater than the number to be elected at such election have the highest and an equal number of votes, the board making the canvass shall determine by lot which of the persons shall be duly elected."

You will observe that the returns by the precinct judges and clerks are made to the clerk of the board of education, and it becomes the duty of the board of education to make the canvass and declare the successful candidates. Consequently there exists no duty on the part of the board of elections in this respect.

The law is well settled that the duties of a canvassing board are purely ministerial and such a board has no right to make inquiry into any irregularities which may be claimed with respect to the election. *Phelps vs. Schroder*, 26 O. S. 549; *State vs. Graves*, 91 O. S. 113; *State vs. Tanzey*, 49 O. S. 656. The duties of the board of education to which the returns are certified are, therefore, confined to counting the votes and declaring the result. In the present case those receiving the three highest number of votes for the long term are plainly apparent on the face of the abstract which you have submitted. Accordingly, I see no reason why the board should not declare the election of these persons.

A much more difficult question is suggested by the fact that of these three persons, two also received the highest number of votes for the two year term. Manifestly it is impossible for them to be members of the board of education for both terms and the effect of this situation must be determined.

It would be manifestly true that these persons could not have had their names placed upon the ballots for both positions, since this would be countenancing a situation which might possibly result in the existence of a vacancy in office. Here, however, the voters have written in the names and their will has been definitely expressed. I am of the view that it is the duty of the canvassing board to declare the two receiving the highest number of votes elected in spite of the fact that they also have been elected for the four year term. Quite obviously they cannot qualify for both positions, but they are at liberty to select the term which they desire and qualify therefor, thus creating a vacancy as to the term which they reject.

Section 4748 of the General Code provides as follows:

"A vacancy in any board of education may be caused by death, non-residence, 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, or as soon thereafter as possible, by election for the unexpired term. A majority vote of all the remaining members of the board may fill any such vacancy."

In view of this section, it must follow that the failure of these persons to qualify for one of the terms for which they were elected creates a vacancy which the board may fill at its next regular or special meeting by a majority vote of the remaining members of the board. So far as I have been able to find, this situation has not received consideration of the courts. I find, however, that the Hon. George K. Nash, when he was Attorney General, rendered an opinion upon a similar question and reached the same conclusion. This opinion is found in Volume 2 of the Opinions of the Attorney General for the years 1870 to 1883, at page 1068.

As has heretofore been stated herein, the action of the canvassing board with respect to the return submitted to it by the precinct officials is ministerial in character. That board has no jurisdiction to inquire into extraneous matters which might affect the validity of the election. Similarly, there is no authority in the board of deputy state supervisors and inspectors of elections to make inquiry of this character after the election. If irregularities are claimed to exist, which are of such a character as may

result in declaring the election invalid, these irregularities should be developed by way of appropriate proceedings in quo warranto, or otherwise. An examination of the General Code reveals no authority for the contest of an election for members of a board of education and consequently any questions concerning the validity of the election must be raised in proper court proceedings. Suffice it to say, I do not regard it as the function of the Attorney General to hold an election invalid by reason of claimed irregularities, at least where the returns are such as to enable the proper canvassing officials to determine that certain candidates for public office at an election have received the necessary votes to elect them to office under the statutes applicable.

I may suggest, however, that one of the main bases for complaint appears to be the fact that no ballots were provided in certain of the precincts. Your attention is directed to Section 4711 of the General Code, which provides that electors, residing in territory attached to a village school district, for school purposes, may vote for school officers at *the proper voting place in the village* to which the territory is attached. It further provides for the designation by the board of the proper precinct in which voters from outside of the village shall vote, and, in the absence of such designation, the voter is entitled to vote in the precinct nearest his residence. The school district here in question was a village district, and, accordingly, there was no authority for voting in any precinct other than the Galena village precincts. In fact, it was irregular to permit any one to vote anywhere except in Galena. A few votes were cast in the outside precincts but apparently most of the voters proceeded regularly and voted in the village precincts. It follows that this ground for objection cannot be sustained.

As to the other irregularities, no special consideration need be given in view of what has been said.

Answering the questions suggested by your inquiry specifically, I am of the opinion:

1. Where, in an election of members of a village board of education, the returns certified to the board of education by the precinct officials are such as to enable the board to determine which candidates are elected, it is the duty of the board of education to canvass the vote and declare such persons elected, and there is no authority in the board to withhold such declaration because of claimed irregularities in connection with the election.

2. Where five members of a board of education are to be elected, three for four years and two for two years, and the two receiving the highest number of votes for the two year term also are among the three receiving the highest number of votes for the four year term, it is the duty of the board of education canvassing the vote to declare such persons elected to both terms. Since such persons cannot qualify for both terms, their failure to qualify for the one will create vacancies which the board is authorized to fill in accordance with the provisions of Section 4748 of the General Code.

Respectfully,

GILBERT BETTMAN,
Attorney General.

1293.

APPROVAL, BONDS OF EUCLID VILLAGE SCHOOL DISTRICT, CUYA-
HOGA COUNTY—\$100,000.00.

COLUMBUS, OHIO, December 14, 1929.

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