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1. VACANCY—RESIGNATION OF PUBLIC OFFICER—CREATES VACANCY WHETHER OR NOT ACCEPTED—JURISDICTION GIVEN TO APPOINT OR ELECT SUCCESSOR — UNLESS OTHERWISE PROVIDED BY STATUTE.
2. EDUCATION, BOARD OF—EXEMPTED VILLAGE—VACANCY OCCURRED IN MEMBERSHIP—IF VACANCY NOT FILLED WITHIN THIRTY DAYS, PROBATE COURT AUTHORIZED TO FILL VACANCY.

SYLLABUS:

1. Unless otherwise provided by statute, the resignation of a public officer, whether or not such resignation be accepted, creates a vacancy, at least to the extent of giving jurisdiction to appoint or elect a successor. *Reiter v. State*, 51 Ohio St., 74.

2. When a vacancy occurs in the membership of an exempted village board of education which such board for any reason fails to fill within thirty days after it occurs, the probate court of the county in which such district is located is authorized to fill such vacancy.

Columbus, Ohio, October 22, 1951

Hon. Louis F. Sheridan, Prosecuting Attorney
Lawrence County, Ironton, Ohio

Dear Sir:

Your request for my opinion reads in part as follows:

“1. When a member of a board of education submits, in writing, a resignation to the remaining board members, does the said resignation have to be accepted by the remaining board members, in order to create or cause a vacancy?”

“2. If a special meeting of a school board is called by two school board members, and all of the requirements for calling said meeting have been met, and the purpose of the meeting was to fill a vacancy created by the resignation of a board member, and the two members, who called the meeting met at the place designated and the remaining two members sat just outside the meeting room and refused to come in and meet with the two members who called the meeting, does such refusal and inaction amount to an inability of the board members to agree on an

appointee to fill the vacancy and thereby authorize the probate court to fill the vacancy within 30 days according to the statutory authority granted said court?"

It appears that your first question is squarely answered by the decision in *Reiter v. State*, 51 Ohio St., 74, the first paragraph of the syllabus in which is as follows:

"By the rules of the common law, a resignation of an office does not take effect, so as to create a vacancy, until such resignation is accepted by the proper authority; but the common law in this regard is not in force in this state, to its full extent, and here a resignation without acceptance creates a vacancy, to the extent at least, of giving jurisdiction to appoint or elect a successor, unless otherwise provided by statute."

This rule was noted with approval as recently as *State ex rel Gordon v. Barthalow*, 150 Ohio St., 499, 509, and I conclude, therefore, that it represents the settled law in this state. Because I do not find, in the instant case, that it is "otherwise provided by statute," I am forced to the conclusion that the resignation of a member of a board of education becomes effective so as to create a vacancy when such resignation is presented to the authority which is empowered to fill such vacancy.

Your second question appears to require a consideration of the provisions of Sections 4832-10 and 4846, General Code. These sections are as follows:

Section 4832-10 General Code:

"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. A majority vote of all the remaining members of the board may fill any such vacancy for the unexpired term."

Section 4846, General Code:

"If the board of education of any city or exempted village school district fails to perform the duties imposed upon it by law

or fails to fill a vacancy in such board within a period of thirty days after such vacancy occurs, the probate court of the county in which such district is located, upon being advised and satisfied of such failure, shall act as such board of education and perform all duties imposed upon such board by law.

“If the board of education of any local school district fails to perform the duties imposed upon it by law or fails to fill a vacancy in such board within a period of thirty days after such vacancy occurs, the county board of education in which such district is located, upon being advised and satisfied of such failure, shall act as such board of education and perform all duties imposed upon such board by law.”

In the instant case it is obvious that it is the duty of the remaining board members to fill the existing vacancy and equally obvious that such members have so far failed to discharge that duty. In this situation, the district concerned being an exempted village school district (as I am informed by representatives of the Department of Education), it follows that the provisions of the first paragraph of Section 4846, are applicable.

This section provides that where a board fails within a period of thirty days to fill a vacancy in such board, “the probate court of the county in which such district is located, * * * shall act as such board of education and perform all duties imposed upon such board by law.” In considering a somewhat similar case involving a city school district, in Opinion No. 2039, Opinions of the Attorney General for 1947, p. 381, one of my predecessors reached the following conclusion:

“When one or more vacancies occur in the membership of a city board of education which said board for any reason fails to fill within thirty days after it occurs, the probate court of the county in which such district is located is required to fill such vacancies as promptly as possible, and is not authorized to act in place of the board of education until the beginning of a new term or terms of persons who may thereafter be elected to succeed the former incumbents.”

The case then under consideration was one in which the whole membership of the board had resigned en masse, and the primary question involved was whether the probate court should (1) “act as such board of education” until new members could be elected or (2) fill up all vacancies so as to constitute a new board. On this point the writer of the 1947 opinion said, pp. 383, 384:

“It appears to me that the question underlying your inquiries is as to the procedure required by the law on the part of the probate court in performing the duties which the board cannot immediately perform. May he allow the vacancies in the membership of the board to continue unfilled until a time arises, perhaps almost two years hence, when the electors shall elect a new board of education—part for a term of two years and part for a four year term? Or, is the court to proceed without delay to create a board of education by appointment so that it may perform the duties which are imposed upon it by law? It appears to me it would be a plain perversion of the legislative intent to conclude that the duty cast by the statute upon the probate court would give him the right to prevent for a long time the existence of a legally constituted board of education, and take to himself the exercise of all the wide reaching powers of such board. The powers to be exercised and the duties to be performed by a board of education in the State of Ohio are very numerous and of wide variety. They involve the hiring, and in some cases the removal of superintendents, teachers and other employes; the adoption of budgets, the levying of taxes and the issuing of bonds; the making of contracts for construction and remodeling of school buildings, the purchase of supplies and many other functions requiring the expenditure of a large amount of time and the exercise of a wide discretion. To me it seems absurd that the legislature would cast upon a probate court whose duties are judicial, and in its own field multifarious, the burden of continuing longer than absolutely necessary the operation of the schools of a city school district.”

I concur in the reasoning above set out and deem it to be equally applicable in the instant case. I conclude, therefore, that in the situation you describe the probate court of your county is authorized to make an appointment to fill the existing vacancy on the board.

Respectfully,

C. WILLIAM O'NEILL

Attorney General