

434.

VACANCY—MEMBERSHIP, RURAL BOARD OF EDUCATION—
CIRCUMSTANCES WHERE UNDER SECTION 4748 G. C.
APPOINTEE MAY HOLD OFFICE—TIME—ELECTION.

SYLLABUS:

Where a vacancy occurs in the membership of a rural board of education by reason of there having been no one elected to fill the position, and circumstances are such that no former member of the board can hold over to fill the position, a person appointed to fill this vacancy in accordance with the provisions of Section 4748, General Code, will be entitled to hold the office until the expiration of a period of four years from and after the time a person elected to the office would have taken it over if one had been elected.

COLUMBUS, OHIO, April 14, 1939.

HON. ROY L. HENRY, *Prosecuting Attorney, Ironton, Ohio.*

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

“I would like to have your opinion upon the following question:

Mrs. Dora Triplett was appointed by the County Board of Education to fill a vacancy on the Decatur Township Board of Education due to a tie among the members of the Decatur Board. Will she serve for four years from January 1, 1938, or must someone be elected at the next election?”

The filling of vacancies in rural district boards of education is controlled by Sections 4748 and 7610-1, General Code. Section 4748, General Code, provides:

“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.”

The pertinent part of Section 7610-1, General Code, reads as follows:

“If the board of education in a district under the supervision of the county board of education fails to provide sufficient school privileges for all the youth of school age in the district, *** or to fill any vacancies in the board within the period of thirty days after such vacancies occur, the county board of education of the county to which such district belongs, upon being advised and satisfied thereof, shall perform any and all such duties or acts, in the same manner as the board of education by this title is authorized to perform them. ***”

From the report of the decision of the Supreme Court of Ohio in the case of State ex rel. Henry, Prosecuting Attorney, Appellant, vs. Triplett, Appellee, 134 O. S., 480, it appears that in the November election of 1937, there were to be three members elected to the Board of Education of Decatur Rural School District, in Lawrence County. There were five candidates, and after the election the County Board of Elections certified as having been elected the three persons who had received the highest number of votes according to the tabulation of the precinct boards certified to the county board. The candidate who had received the next greatest number of votes according to the tabulation, contested the election of one of these three certified as having been elected, who had received the lowest number of votes of the three.

The Common Pleas Court of Lawrence County which heard the contest held that the votes of the contestee and the contestor were tie and that therefore neither of them was elected. Inasmuch as the law makes no provision for breaking or settling a tie vote under such circumstances, the result was that there were only two members elected to this board of education, whereas there should have been three. The terms of office of three of the members of the board expired with the end of the year 1937.

Upon the first Monday in January, 1938, the date fixed by law for the organization of the board after the election of members of the board (Section 4747, General Code) this board of education found itself with only four members instead of five as the law provides (Section 4712, General Code).

As the local board of education took no action with respect to the situation for thirty days, the county board of education of Lawrence County School District, in pursuance of its duty as provided by Section 7610-1, supra, appointed Mrs. Triplett as the fifth member of the board, to fill the vacancy brought about by reason of there having been no one elected as a fifth member of the board. That this situation brought about a

“vacancy” in said board in contemplation of law and as the term is used in Section 4748, General Code, there is no doubt. With respect to this situation, the Supreme Court, in the case cited above, said :

“It is clear that a vacancy existed beginning January 3, 1938. A. D. Bellew, Ballard Collins and Will Roth, the three members whose terms expired on that date and who were not reelected stood on an equal basis in right of succession and as there was but one place vacant on the board of education it would be impossible in any event to determine which of the three members would hold over and fill the vacant place; consequently there was no prior term to which the vacant term could be an appendage. State, ex rel. Christensen, v. Larsen, 110 Ohio St., 413, 144 N. E., 264. In this state of affairs there was a vacancy at least until Dora Triplett assumed the office after her appointment on February 26, 1938.”

Mrs. Triplett in pursuance of her appointment by the County Board of Education of the Lawrence County School District, qualified for the position and assumed her duties as member of the Decatur Rural School District Board of Education. The case of State ex rel. vs. Triplett, 134 O. S., 480, supra, was an action brought by the Prosecuting Attorney of Lawrence County to oust her from the office of member of this board of education. The prayer of the petition was that she be adjudged not entitled to the office and that judgment of ouster be pronounced against her. The Court held that the appointment was regular and proper and that she was entitled to the office. The ouster as prayed for was denied. The syllabus of this case reads as follows :

“Under the provisions of Sections 4748 and 7610-1, General Code, a vacancy in the office of member of board of education in a rural school district, which results from a tie vote at the general election under such circumstances that the choice cannot be determined by lot due to the fact that the tie is found to exist by the court in an election contest (the county board of elections having found the contestee had more votes than the contestor and having declared and certified the contestee to have been elected), may be filled by the board of education of the district, or, if such board fails to fill the vacancy within thirty days after it occurs, then by the county board of education of the county to which such district belongs.”

It will be observed from the provisions of Section 7610-1, supra, that upon failure of a local rural board of education to fill a vacancy within thirty days it becomes the duty of the county board to fill the vacancy

“in the same manner as the board of education by this title is authorized” to do so. That was done in this case and by reference to Section 4748, *supra*, it will be observed that the right of the local board to fill the vacancy was to fill it “for the unexpired term”. It clearly follows, therefore, that this appointment was for the unexpired term. The term of office of a member of a rural district board of education is for four years, as fixed by Section 4712, General Code.

The term of an office means the period of time for which an incumbent has the right to it. Ohio Jurisprudence, Volume 2, page 1035. The phrase “term of office” or the word “term” as applied to an office, should not be confused with the tenure of a particular incumbent in an office although these expressions are sometimes used interchangeably—incorrectly so—from a strictly legal standpoint. In *Corpus Juris*, Volume 46, page 963, it is said :

“The phrase ‘term of office’ is one generally used to mean the fixed period of time for which the office may be held, although it is also used to designate the period for which the office is actually held.”

In support of the text there are cited among others, the cases of *People v. Sweitzer*, 280 Ill., 436, 117 N. E., 625; *Atl. County v. Lee*, 76 N. J. Law, 327, 70 Atl., 925; *State v. Hingle*, 60 La. A., 380, 381.

In *People v. Sweitzer*, *supra*, it is said :

“The term of office as fixed by law is sometimes used interchangeably with the term or time of occupancy of the incumbent of such office, but it must be distinctly borne in mind that the term of office as fixed by law is entirely different from the period of time such office is held by the incumbent thereof, sometimes referred to as the term.”

In *State v. Hingle*, *supra*, the court said :

“Now the term of an office must be distinguished from the tenure of the incumbent. The term means the time during which the officer may claim and hold the office of right and fixes the interval at which the several incumbents shall succeed each other. The tenure represents the time during which the incumbent actually holds the office. The one has reference to the right to hold the office the other to the fact of holding it. Terms begin and end at fixed periods, and the several terms succeed each other at regular intervals and without intermission. On the other hand, a tenure has no fixed duration, it may be for a whole term or several terms, or it may be only for the unexpired portion of

a term. It may even lap over from one term into another, as when an officer holds over until his successor qualifies. There may even be intervals between two tenures as when an officer resigns or dies and his successor is not appointed at once. One may hold office during a number of successive terms, yet there would be but one continuous tenure during the whole time."

In the case of *State v. Knight*, 76 Mont., 71, 245 Pac., 267, it is said:

"'Term of office' describes the period during which the elected officer or appointee is entitled to hold the office, perform its functions, and enjoy its privileges and emoluments."

The same thought is expressed by the court in *Wilson v. Shaw*, 194 Iowa, 28, 33, 188 N. W., 940, where it is said:

"The term lives on even though the incumbent resigns, is impeached or dies. Personality has nothing to do with the question."

If anyone had been elected to the office of Member of the Board of Education of the Decatur Rural Board of Education which was held by the Supreme Court to be vacant by reason of the failure of anyone to be elected to fill it at the November 1937 election, he of course would have served for four years, the term fixed by law, from the first Monday in January, 1938 (January 3, 1938) unless he resigned or died or was removed. No one was elected, and circumstances were such that no one could hold over to fill this office. The office was vacant until February 26, 1938, when Mrs. Triplett was appointed to fill the vacancy for the unexpired term. It clearly follows that Mrs. Triplett having been appointed to fill this vacancy, and having been appointed in accordance with the provisions of Section 4748, General Code, for the unexpired term, is entitled to the office until the expiration of four years from and after the first Monday in January, 1938.

Respectfully,

THOMAS J. HERBERT,
Attorney General.