

SCHOOLS:  
BOARD OF DIRECTORS:  
VACANCIES:

Determination of whether or not a vacancy exists in a school board in a consolidated district due to a member's refusal to serve or neglect of duty is to be made by school board. Before such determination is made member should be notified and given a chance to defend himself.

December 8, 1947

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Mrs. Ada Reynolds  
County Superintendent of Schools  
Randolph County  
Huntsville, Missouri

Dear Mrs. Reynolds:

This is in reply to your letter of recent date, requesting an official opinion of this department and reading as follows:

"I would also appreciate a ruling on the following:

"I have a six director school board in a Consolidated district. One director, elected this last April, has not attended the meetings and has refused to do so on notice. The school board have notified him by either telephone or personal visit of each meeting. He made the statement that he wouldn't have anything to do with it and they need not expect him to come. After repeated notices the board met and declared his office vacant due to negligence of duty and appointed another board member to take his place. Did the board act within their legal rights and, if not, what should have been the legal procedure in this case?"

Section 10468, R. S. Mo. 1939, provides as follows:

"The government and control of such town or city school district shall be vested in a board of education of six members, who shall hold their office for three years and until their successors are duly elected and qualified, and any vacancy occurring in said board shall be filled in the same man-

ner and with like effect as vacancies occurring in boards of other school districts are required to be filled, and the person appointed shall hold office till the next annual meeting, when a director shall be elected for the unexpired term."

Section 10423, R. S. No. 1939, provides as follows:

"If a vacancy occur in the office of director, by death, resignation, refusal to serve, repeated neglect of duty or removal from the district, the remaining directors shall, before transacting any official business, appoint some suitable person to fill such vacancy; but should they be unable to agree, or should there be more than one vacancy at any one time, the county superintendent of public schools shall, upon notice of such vacancy or vacancies being filed with him in writing, immediately fill the same by appointment, and notify said person or persons in writing of such appointment; and the person or persons appointed under the provisions of this section shall comply with the requirements of section 10421, and shall serve until the next annual school meeting."

While Section 10468 does not specifically state the facts necessary to create a vacancy in the board of directors of a consolidated school district, this department has held in a long line of opinions that the provisions of Section 10423, with regard to the facts necessary to constitute a vacancy in the board of directors of a common school district, apply also to consolidated school districts.

The question to be decided, then, is whether the determination that the person elected as director has refused to serve or has repeatedly neglected his duties, or both, and that a vacancy exists, is to be made by the remaining members of the school board or by a court of law.

In the case of State ex rel. v. Harper, 80 S. W. (2d) 849, the Supreme Court of Missouri, in ruling on the validity of the appointment of a school board member which had been made by three alleged members of the school board, held that the purported appointment was invalid because of the fact that the ap-

pointment was not made at a meeting at which a quorum of the legal members of the school board was present. While the court in that case did not directly rule that the school board was the proper body to determine the fact that a vacancy existed or did not exist because of "abandonment or refusal to act" by a member of the board, we believe that by its holding in that case the Supreme Court impliedly recognized that the school board did have this right when a quorum of the legal members of the school board make such a determination.

We also believe that it was the intent of the Legislature in passing what is now Section 10423, R. S. No. 1939, that the determination of whether or not a vacancy exists is to be made by the school board. This is clearly shown to be correct by that part of Section 10423 providing, "the remaining directors shall, before transacting any official business, appoint some suitable person to fill such vacancy." This quoted provision, placing the duty upon the school board to make the appointment before transacting any official business, obviously means that the existence of the vacancy is to be determined and the appointment made as soon as the vacancy occurs. If the question of whether or not a vacancy exists were to be determined by the courts, the time consumed by such determination would unnecessarily delay the transaction of official business by the board. While it may be true that business transacted by the board when a vacancy existed would be upheld by the courts, it still was the intention of the Legislature, as shown by such quoted language, that the vacancy should be immediately filled. The only body that could make this determination before the board proceeded with official business would be the board itself.

However, we believe that before the determination can be made by the board that a vacancy exists, the board should give reasonable notice to the person who is alleged to be refusing to serve or to be neglecting his duties, and that a hearing must be afforded such person so that he may explain or refute any facts which, if not explained or refuted, would justify the school board's determination that the office is vacant and the appointment of another person to fill the vacancy.

In the case of Commonwealth v. Gibbons, 196 Pa. 97, the Supreme Court of Pennsylvania had before it the question of whether or not notice and a hearing should be provided under a law reading as follows:

"If any person having taken upon himself the duties of his office as (school) director, shall neglect to attend any two regular meetings of the board in succession unless de-

tained by sickness or prevented by absence from the district; ... the directors present shall have power to declare his seat on the board vacant, and to appoint another in his stead to serve until the next regular election."

The court said, l. c. 100-101:

"There is another equally conclusive reason why no ouster can be declared at the second meeting. The act does not make absence from two regular meetings necessarily a cause for ouster, but only 'unless detained by sickness or prevented by absence from the district.' Conceding that the burden of showing such excuse would be upon the absent member, he would nevertheless be entitled to notice and an opportunity to be heard to present it and this could not be afforded without a subsequent meeting. The act is highly penal in that it permits a few individuals, liable to be governed by personal feeling, as is intimated not only by the learned judge in this case but also in *Zulich v. Bowman*, supra, from the same county, to oust by summary proceedings the officer duly chosen by the electors to represent them in their school matters. The act therefore must be strictly construed, and every step in the proceedings must clearly appear to have been regular and within the authority conferred by the statute."

Under the principles laid down in the above quoted decision of the Pennsylvania Supreme Court, we believe it necessary, in order for the board to make a determination of the fact that a vacancy exists, to give notice of the hearing to the person whose office is sought to be vacated, and to hold a hearing at which such person may be permitted to explain or refute facts which, if not explained or refuted, would justify the board in declaring a vacancy.

#### CONCLUSION

It is the opinion of this department that the determination of the fact that a vacancy does or does not exist in the office of director of the school board of a consolidated district, due

Mrs. Ada Reynolds

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to a member's refusal to serve or neglect of duty, is to be made by the school board.

It is further the opinion of this department that before such determination is made, the member whose office is sought to be vacated should be given notice and allowed to present any facts that he may have in his defense at a hearing to be held by the board.

Respectfully submitted,

C. E. BURNS, Jr.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

CBB:HR