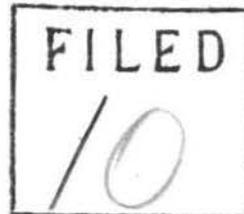


SCHOOLS: Directors in consolidated School districts shall fill vacancy in accordance with Sec. 9290 R. S. Mo. 1929, when one candidate is elected and other candidates tie in votes, where two are to be elected.
April 26, 1937.

Honorable F. C. Bollow
Prosecuting Attorney
Shelby County
Shelbina, Missouri



Dear Sir:

This office is in receipt of your letter of April 8, 1937, requesting an opinion on the following question:

"In the Emden school district which is a consolidated district having six directors, at the recent election two directors were to be elected, both for the same term of years. The election resulted in one candidate receiving twenty-nine votes and the next three candidates receiving twenty-eight votes each. I am familiar with the general law that a public officer holds an office until his successor is elected and qualified, but here that law cannot cover the situation. I believe the candidate who received the twenty-nine votes is unquestionably elected but which one of the retiring directors does he succeed and which one of these retiring directors must now step out of his way and permit him to sit on the board pending the election of the second new director.

"Again I am unable to find any section of the statute authorizing the appointment of the second director in the event of a tie, such as was had here or authorizing the holding of a second election in the event of such a tie. Again if a new election is to be held, is the candidate receiving the twenty-nine votes entitled to sit on the board calling for such special election and appointing judges to act at such election?"

Section 9329 R. S. MO. 1929, provides, among other things, that said directors elected shall qualify within four days after their election. If this section is mandatory the director who received twenty-nine votes has lost his right to qualify for said office, but, in our opinion, the section is merely directory. In *Hudgins v. School District*, 278 S. W. 269, l. c. 770, the court, in defining mandatory and directory statutes, said:

"Under a general classification, statutes are either mandatory or directory; a determination of their character in this respect is of first importance in their interpretation. If mandatory, in addition to requiring the doing of the things specified, they prescribe the result that will follow if they are not done; if directory, their terms are limited to what is required to be done."

If the Legislature had intended this provision of Section 9239 R.S. Mo. 1929, to be mandatory, they should have provided that if the elected director did not qualify within four days that his office will be deemed vacant. The rule stated in the *Hudgins* case, supra, when applied to this provision of this statute, clearly makes said provision directory.

Section 9328 R. S. Mo. 1929, provides that said directors elected shall hold office for three years and until their successors are duly elected and qualified. In *State v. Brown* 274 S. W. 965, l. c. 967, the court said:

"The law is well settled that, where a public officer is elected or appointed to hold office for a definite period, and until his successor is appointed or elected and qualified, failure to appoint or elect a successor at the end of such period does not work a vacancy. *State ex rel. Lusk*, 18 Mo. 333; *State ex rel. Stevenson v. Smith*, 87 Mo. 158. It follows that the incumbent properly holds until his successor is elected or appointed and qualified, and it is then only that his term expired.

Ordinarily, the rule in the Brown case, supra, is controlling, but in the instant case we think the exception to this general rule is applicable. The exception to the general rule, as stated in 74 A. L. R. 491, is as follows:

"The exceptions to the general rule, as stated above, are generally dependent on special constitutional or statutory provisions, or necessarily result from the peculiar facts of the particular case."

There are no special constitutional or statutory provisions in this state. The exception to the general rule in the instant case arises from the peculiar facts of the case.

The question is, if no vacancy is created by the failure to elect a second board member, which one of the two incumbents whose terms are expired would hold over? The candidates do not run to succeed any particular incumbent, but run for one of the offices which is to become vacant by reason of the expiration of the terms of the incumbents. Therefore, if the elected candidate was not elected to succeed any particular incumbent, how can it be said that either of the incumbents would have the right to hold over until his successor is elected and qualified. There has been no one elected to succeed the incumbent in particular, but merely a person elected to fill an office that has become vacant because the incumbent's term has expired. Since the elected candidate was not elected to succeed any particular incumbent, we think it necessarily follows that neither of the incumbents could hold over because of the failure to elect a member to fill the vacancy created by the expiration of his term. If this is true then a vacancy exists in the board of directors of the school district which must be filled as provided by Section 9327, R. S. 1929. This section provides that vacancies in consolidated school district boards shall be filled in the same manner as vacancies in boards of other school districts. Section 9290, R. S. 1929, of the laws applicable to common schools supplies the procedure to be followed in filling such vacancies, and is 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 9288, and shall serve until the next annual school meeting."

The case of State v. Larsen, 144 N.E. 264, we think, is authority for our ruling. This is not a parallel case, but is applicable to the instant case through the process of analogous reasoning. In that case the court said:

"At the general election, November 1921, William Hutchinson was duly elected a councilman for the village of Rocky River, Ohio, for the term of two years, beginning January 1, 1922. He duly qualified and entered upon his duties, and at the general election, November, 1923, he was re-elected to said office, but died on November 28, 1923. At the first regular meeting of the council following Hutchinson's death, the relator, Christensen, was duly elected by the council to fill his unexpired term. He duly qualified and entered upon the duties and exercised the functions thereof until the council of the village, on January 2, 1924, declared the office vacant and appointed the defendant Larsen to fill the vacancy, who thereupon qualified and entered upon the exercise of the duties of the office.

"Christensen brings this action in quo warranto, seeking the ouster of Larsen from office, and prays

that he may be adjudged entitled thereto.

"The writ must be denied for two reasons:

"1. It is disclosed that the council of the village of Rocky River consisted of six members elected at large. At the election of the new council in November, 1923, there were thirteen candidates for the six places on the council, some of whom were candidates for re-election. None of those elected could be designated as the successor of a particular former member, consequently had Hutchinson lived he could not have been regarded as his own successor in the new term, and, therefore, Christensen, by reason of his selection for the unexpired term of Hutchinson, could not hold over and become Hutchinson's successor in the new term. Under such circumstances the new term was not an appendage of the unexpired term, and the case of State ex rel. Hoyt v. Metcalfe, 80 Ohio St. 244, 88 N. E. 738, has no application."

The ruling in the Larsen case, supra, as we understand it, is that the council members are elected at large and that none of those elected could be designated as the successor of a particular former member. Consequently, had the deceased member lived and been re-elected he could not have been regarded as his own successor in the new term, and a person appointed to fill his unexpired term could not hold over as successor of the deceased member upon the new term, because the deceased member had no particular successor.

In the instant case, the two expiring terms were to be filled by board members elected at large. The successful candidate was elected at large and not to succeed any particular incumbent. That had one of the incumbents been a candidate and elected he would not be successor to himself, because he would have been elected at large to fill a vacancy created by the expiration of a term of office. The incumbents in this case, under these peculiar facts, could have no successors and cannot hold over until such a successor is elected

April 26, 1937

and qualified because this would never happen.

Therefore, from the foregoing, it is our opinion that, due to the peculiar circumstances in this case, the general rule of incumbents holding over until successors are elected and qualified does not apply. Under the exception to the general rule the offices of the incumbents expire at the end of their term, and said incumbents do not hold over. The candidate receiving twenty-nine votes should qualify and take his place as a member of the board of directors, thus filling one of the offices. The remaining members of the board whose terms have not yet expired should, together with the newly elected and qualified member of the board, select and appoint a qualified person to fill the other vacant directorship. The vacancy to be filled as provided by Section 9290 R. S. 1929.

Respectfully submitted,

James L. HornBostel
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

LLB:LC