

PUBLIC SCHOOLS: When there is an equal division of the Board of Education of a school district on any question pending before the Board the provisions of Sec. 165.320, RSMo 1949 are mandatory that the County Superintendent of Schools cast the deciding vote on such question; the provisions of said Sec. 165.320 are not directory; and, that the provisions of Sec. 163.090, RSMo 1949 do not exempt the said Superintendent from being a member of the Board to

April 2, 1951

cast the deciding vote upon the question of notifying teachers of their re-employment or the lack thereof.

Honorable Hubert Wheeler  
Commissioner  
Department of Education  
Jefferson City, Missouri



Dear Commissioner Wheeler:

This will be the opinion requested by you from this office whether it is mandatory or directory, under the provisions of Section 165.320, RSMo 1949, for the County Superintendent of Schools to cast the deciding vote on any question pending before the Board of Education of a school district, when there is an equal division of the whole Board on such question, if requested by at least three members of the Board to do so. Your letter requesting our opinion reads as follows:

"Each year just before the annual school elections and before April 15 following the elections, Boards of Education give consideration to the requirement of notifying teachers of their re-employment or lack thereof. Boards of Education of six director districts sometime fail to reach decisions because of equal division of the board.

"Section 165.320, R.S. 1949, provides in part, that when there is an equal division of the whole board upon any question the County Superintendent of Schools, if requested by at least three members of the board, shall cast the deciding vote upon such question. Section 163.090, commonly known as the continuing contract law, provides in part, that the Board of Education shall notify each teacher in writing concerning his or her re-employment or lack

Honorable Hubert Wheeler

thereof on or before the 15th day of April each year. Failure on the part of the board to give such notice shall constitute re-employment.

"The Attorney General in his opinion of October 30, 1933, ruled that under Section 9329, Laws of Missouri 1931, page 333, that when there is an equal division of the board in hiring a teacher the County Superintendent of Schools has authority, when requested by at least three directors, to cast the deciding vote. This opinion uses the term 'may cast the deciding vote' instead of the mandatory statement of 'shall.' It has been suggested by some school officials that the continuing contract law, which was enacted after the Attorney General rendered his opinion October 30, 1933, possibly would act to modify Section 165.320, R.S. 1949. Under the continuing contract law a teacher is considered employed until such a time as the Board of Education shall, by a majority vote, notify the teacher of lack of re-employment.

"I shall be glad to have your advice and official opinion in regard to the following questions:

- "1. Is it mandatory, when requested, for the County Superintendent of Schools to cast the deciding vote upon any question when there is an equal division of the whole board whether it be a question of notifying a teacher of re-employment or lack thereof or any other question before the Board of Education?
- "2. If the law is not mandatory in requiring County Superintendents to cast a deciding vote, does it give him discretionary power to cast such vote when requested by at least three members of the Board of Education?
- "3. Does Section 163.090, R.S. 1949, known as the continuing contract law, exempt

Honorable Hubert Wheeler

the County Superintendent from serving as a member of the Board of Education for the purpose of casting the deciding vote when notifying teachers of their re-employment or lack thereof?"

Section 165.320, RSMo 1949, reads as follows:

"Within four days after the annual meeting, the board shall meet, the newly elected members, who shall be qualified by the taking of the oath of office prescribed by article VII, section 11, of the constitution of Missouri, and the board organized by the election of a president and vice-president, and the board shall, on or before the fifteenth day of July of each year, elect a secretary and a treasurer, who shall enter upon their respective duties on the fifteenth day of July; said secretary and treasurer may be or may not be members of the board. No compensation shall be granted to either the secretary or the treasurer until his report and settlement shall have been made and filed or published as the law directs. A majority of the board shall constitute a quorum for the transaction of business, but no contract shall be let, teacher employed, bill approved or warrant ordered unless a majority of the whole board shall vote therefor. When there is an equal division of the whole board upon any question, the county superintendent of schools, if requested by at least three members of the board, shall cast the deciding vote upon such question, and for the determination of such question shall be considered as a member of such board. The president and secretary, except as herein specified, shall perform the same duties and be subject to the same liabilities as the presidents and clerks of the school boards of other districts."

It will be observed that Section 165.320, supra, provides that no contract shall be let, teacher employed, bill approved or warrant ordered, unless a majority of the

Honorable Hubert Wheeler

whole Board shall vote therefor. The section further provides that if there is an equal division of the whole Board on any question, the County Superintendent of Schools, if requested by three members of the Board, shall cast the deciding vote on such question, and for the determination of such question shall be considered as a member of the Board. It will be apparent, we believe, from the express provisions of Section 165.320 that if the school board became equally divided on any question and the County Superintendent should refuse, upon the request of three members of the Board, to vote to break the tie on the question being considered, the interests of every person in the school district would be either directly or indirectly and adversely, affected. The Superintendent himself in such case would be subject to mandamus to compel him to perform the duty imposed upon him by the statute. To prevent such distress and injury the statute makes the County Superintendent a member of the Board, and commands him to cast the deciding vote in case of such tie in the Board. These express terms of the statute are mandatory we believe.

It is to be noted that the statute uses the word "shall". The Supreme Court of this State has held that, generally, in a statute, the word "may" is permissible or directory and that the word "shall" is mandatory. State ex inf. McKittrick vs. Wymore, 119 S.W. (2d) 941, 343 Mo. 98.

In Kansas City, Mo. vs. J.I. Case Threshing Mach. Co., 87 S.W. (2d) 195, the Court, in discussing statutory construction said l.c. 205:

"The words 'may, must, and shall' are constantly used interchangeably in statutes and without regard to their literal meaning; and in each case are to be given that effect which is necessary to carry out the intention of the Legislature as determined by ordinary rules of construction. \* \* \* 'A mandatory construction will usually be given to the word "may" where public interests are concerned and the public or third persons have a claim de jure that the power conferred should be exercised or whenever something is directed to be done for the sake of justice or the public good.' \* \* \* ."

Honorable Hubert Wheeler

There are times when words of a statute which are generally regarded as mandatory are given a directory meaning, but this rule is limited in its application. In 59 Am. Jur., Section 32, pages 53 and 54, the following is stated:

"There are cases in which words of a statute, which are generally regarded as mandatory, are nevertheless given a directory or permissive meaning, in order to give effect to the legislative intent. This is true of the word 'shall.' A legislative intention that the word 'shall' is to be construed as permissive, may appear from the spirit or purpose of the act, or from the connection in which it is used or the relation into which it is put with other parts of the same statute. The rule applies where no advantage is lost, when no right is destroyed, when no benefit is sacrificed, either to the public or the individual, by giving it such construction. \* \* \*." (Emphasis ours.)

And, at pages 55 and 56 of the same work it is said:

"A statutory provision is generally regarded as mandatory, where the power or duty to which it relates is for the security or protection of private rights. This is true of rights of third persons who have a claim de jure that the right should be exercised. An interpretation of a statute as directory is to be avoided where to put it in that category would result in serious impairment of the private interests that were intended to be protected by the statute. \* \* \*."

It appears clear to us from the provisions of said Section 165.320 and the above cited authorities, answering your first question, that the provisions of said Section 165.320 are mandatory for the County Superintendent of Schools to cast the deciding vote upon any question when there is an equal division of the whole Board, if requested so to do by at least three members of the Board, on any question pending before the Board, including the employment, or re-employment of teachers, or the giving of notice to the

Honorable Hubert Wheeler

teachers of their re-employment or the lack thereof, under the terms of Section 163.090.

We will now consider your second question.

In holding, in answer to question one, that the terms of Section 165.320 are mandatory, it necessarily follows that the section could not be and is not directory, respecting the casting of the deciding vote by the County Superintendent in case of an equal division in the Board on any question, and that the section does not give him "discretionary" power to cast such vote or not to cast it. There is no authority in or out of Section 165.320 directing the Superintendent how he shall vote, but the section expressly requires that he shall cast such vote to break the tie where the Board is equally divided on any question, regardless of its subject. We now come to question three.

Section 163.090 commonly called the continuing contract law, must be considered and the provisions therein construed along with the provisions of Section 165.320 to harmonize and make effective the provisions of both sections. Section 165.320 constitutes the County Superintendent a member of the Board of Education of a school district for the purpose of casting, and such provisions direct him to cast, the deciding vote, if requested so to do by at least three members of the Board, when there is an equal division of the whole Board upon any question. We believe the Superintendent is by the statute made a member of the Board of Directors to cast the deciding vote upon such equal division of the whole Board on any question, including both the original employment of teachers under Sections 163.080 and 165.320, and their re-employment, and the notification to the teachers of their re-employment, or lack thereof, under Section 163.090.

#### CONCLUSION.

It is, therefore, the opinion of this Department, considering the above cited statutes and authorities that:

1) The provisions of Section 165.320 RSMo 1949 are mandatory for the County Superintendent of Schools to cast the deciding vote upon any question pending before the Board of Education when there is an equal division of the whole Board, if requested so to do by at least three members of the Board;

Honorable Hubert Wheeler

2) The terms and provisions of Section 165.320, RSMo 1949 are not directory and do not permit the County Superintendent of Schools to exercise any discretionary power to cast such deciding vote or not to cast it;

3) That Section 163.090, RSMo 1949, commonly known as the continuing contract law, does not by any of its provisions exempt the County Superintendent from serving as a member of the Board of Education for the purpose of casting the deciding vote when notifying teachers of their re-employment or lack thereof. The County Superintendent is constituted a member of the Board of Directors of a school district for the purpose of casting the deciding vote, where there is an equal division of the whole Board upon the request of three members of the Board that he do so, upon any question pending before the Board including the notifying of teachers of their re-employment or the lack thereof.

Respectfully submitted,

GEORGE W. CROWLEY  
Assistant Attorney General

APPROVED:

  
\_\_\_\_\_  
J. E. TAYLOR  
Attorney General

GWC:ir