

SCHOOLS: Official action of directors of consolidated district in levying school taxes, if according to applicable statutes is valid, although attested by illegally appointed secretary of board.



November 30, 1955

Honorable James L. Paul
Prosecuting Attorney
McDonald County
Pineville, Missouri

Dear Sir:

This department is in receipt of your recent request for our legal opinion, and reads as follows:

"Would you please furnish this office with a written opinion as to the following:

"In view of the opinion rendered on April 26, 1951 and in view of Section 165.320 Revised Statutes of Missouri, 1949, where a consolidated district school board does appoint a teacher as secretary to the board and the teacher performs those duties without compensation, what, if any, is the result of such act?"

At our request the inquiry was clarified in a later letter reading as follows:

"In reply to your letter of August 29th my original inquiry of which you requested further information of August 3rd, arose due to the fact that last school year the Superintendent of schools of the Anderson Consolidated School District voluntarily served as Secretary and in such capacity attested all the acts of the board.

"There has now been some questions arise as to the legality of the school levy for the reason that the question has arisen as to his authority to attest such a levy inasmuch as he is prohibited from serving as Secretary of the board. However, such service was rendered voluntarily and there was no compensation paid him as such."

Honorable James L. Paul

From these letters we understand the inquiry to be whether or not the levy of the Anderson Consolidated School District was legally made, since the secretary of the board of directors who attested the board's action was a teacher of the district at such time and was prohibited by law from serving as secretary.

In an opinion of this department rendered to the Honorable Jermiah Nixon, Assistant Prosecuting Attorney, Jefferson County, Missouri, upon April 26, 1951, it was held that the board of a consolidated school district could not appoint a teacher as secretary of the board. No reference is made in the opinion as to whether the prospective secretary would or would not receive compensation for his services, nor do we believe this is important or necessary to a discussion of the question. Section 163.080, RSMo 1949, provides that the school board shall not appoint a teacher of the district as secretary, and it is the appointment under these conditions that is illegal, and not the fact as to whether or not the secretary will receive compensation.

In the instant case it is admitted that the appointment of the secretary is illegal, but that the secretary did not receive any compensation for his services. Applying the ruling of the above mentioned opinion to said sections, we wish to point out that the appointment of said secretary was illegal and in violation of Section 163.080, RSMo 1949, regardless of whether the secretary will or will not receive compensation. The applicable portion of said section reads as follows:

"* * * The board shall not employ one of its members as a teacher; nor shall any person be employed as a teacher who is related within the fourth degree to any board member, either by consanguinity or affinity, where the vote of such board member is necessary to the election of such person; nor shall the teacher serve as a clerk of the district. * * *"

The secretary might be proceeded against in quo warranto proceedings to oust him from office, if such proceedings are instituted in the court having proper jurisdiction.

The illegality of the appointment of the secretary and the proceedings which might be brought to oust him from office does not answer the inquiry, and is only incidental to it, hence we pass on to a discussion of such matter of inquiry.

Honorable James L. Paul

At the outset, we wish to call attention to Section 165.320, RSMo 1949, which provides for the organization of a city or town school board and 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."

From the provisions of this section we note that the president and secretary of such a district shall perform the same duties and be subject to the same liabilities as presidents and clerks of boards of other districts, and of course the reference would include such officials of a common school district.

Section 165.220, RSMo 1949, prescribes the general duties of clerks of common school districts and reads in part as follows:

"The district clerk shall keep a record of the proceedings of all annual and

Honorable James L. Paul

special meetings of the qualified voters of the district also, the proceedings of the board of directors. He shall make copies of the election notices, contracts with teachers, certificates and all other papers relating to the business of the district, and securely keep the same. He shall transmit to the county superintendent, on or before the fifteenth day of July in each year, a report embracing the following items: * * *

From this section it appears that the duties of a secretary or clerk of a school board are clerical and ministerial in nature, and require him to keep the district's records, including the minutes of all board meetings. Section 165,320, supra, providing for the organization of the board, authorizes the board to appoint a secretary and treasurer, who may, or may not be a member of the board. Unless the secretary and treasurer is a member of the board he has no voice or vote on any propositions coming before the board and his sole duties are to keep the district records.

Section 165,323, RSMo 1949, requires the board to keep a corporate seal and reads in part as follows:

"The board shall keep a common seal with which to attest its official acts. * * *"

From the facts given in the opinion request we understand that the secretary was not a member of the board, and in order to answer the inquiry we must first consider whether or not the illegally appointed secretary was a de facto officer, and then what effect, if any, his action in attesting the tax levy made by the board will have upon such tax levy. The characteristics of a de facto school officer have been given in Vol. 78 C.J.S. at pages 876 and 877 as follows:

"One who has entered into the possession and assumed to exercise the function of a district or other local school office by virtue of an apparent election or appointment is an officer de facto, and more particularly if there is acquiescence on the part of the public or public authorities, and this is so although he is not eligible to hold the office, his election or appointment is irregular or illegal, he has

Honorable James L. Paul

failed to qualify, so by taking an oath or giving a bond, the district for which he purports to act has been irregularly or illegally organized, or he has vacated his office by removing from the district. However, if there has not even been the form of an election or appointment, and no acts with acquiescence for a sufficient length of time, a person cannot become a de facto officer by merely claiming title to the office. Moreover, another person or board cannot be regarded as a de facto school officer or board if there is already in possession of the office, and exercising the functions thereof, a de facto officer or board.

* * * * *

"The official acts of a de facto school officer, which a de jure officer would be authorized to do, are if performed in the prescribed manner, as valid and binding on the public and third persons as the acts of de jure officers, and authority to act cannot be questioned collaterally. This is true even though the acts are performed pending a contest or quo warranto proceeding which subsequently terminates in the ouster of the de facto officer from office. * * *"

In the case of State ex rel. v. Cartwright, 122 Mo. App. 257, the court discussed the powers of a de facto school district clerk, and at l.c. 264 and 265 said:

"We readily concede that the appointment of the district clerk should have been made by the board at a regular or special meeting thereof, (Pugh v. School District No. 5, 114 Mo. App. 688). And as this was not done, that Mr. Cartwright was not the district clerk de jure. But it does not follow that he must be regarded as a mere interloper and his acts in the discharge of his duties of the office held to be void because of the absence of his formal appointment. In a recent case, this court, speaking through ELLISON, J., quoted with approval the doctrine in State v. Carroll, 36 Conn. 449, that, "An officer de facto is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the

Honorable James L. Paul

office were exercised (1) without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people without inquiry to submit to or invoke his action, supposing him to be the officer he seemed to be., etc.) (Usher v. Telegraph Co., (not yet reported).) The school board by a course of conduct extending over a period of years recognized Mr. Cartwright as district clerk, adopted and profited by his official acts and knowingly permitted the county officers and the general public to deal with him as a legal officer. These facts constituted him such officer de facto and the enumeration taken and filed by him in 1905 in the usual way and in compliance with the requirements of the statute must be deemed to have been authorized by the school board. * * *

The neglect or failure of a secretary to perform his duties in keeping the minutes of a school board meeting which was actually held, does not affect the legality of the board's proceedings, as declared in the case of Lowland School District v. Woolridge, 216 S. W. 2d 549 the court said:

" * * * The duties of the secretary of the board were nearly clarified, and the statute in reference to the performance of his duty is directory. Hudgins v. Mooresville Consolidated School District, 312 Mo. 1.c. 10, 278 S.W. 769. We find that the basis of appellants' contention rests wholly upon the technicality that the clerk failed to record the minutes of the board's proceedings in reference to calling the special election. Such contention cannot be approved as will later appear.

* * * * *

"In the case of Peter v. Kaufman, 327 Mo. 915, 32 S. W. 2d 1062, the sufficiency of a notice of an annual school election and for the levy and assessment of taxes

Honorable James L. Paul

for school purposes was involved. In discussing the matter the court, 327 Mo. on page 922, 38 S. W. 2d on page 1064 says: 'A. Raaf, who signed and posted up these notices, was shown to be the regular secretary of the board. It is true that the minutes of the board meeting on March 1, 1927, do not show a formal order of the board directing the secretary of the board to post these notices, prescribing what the notices should contain, but we decline to hold that this is a fatal defect.' Applicable and pertinent expressions are also found in the case of Breuninger v. Hill, 277 Mo. 239, 253, 210 S.W. 67. An election was held to incur bonded indebtedness for road purposes. Mere irregularities in the proceedings, such as the failure of the county board to enter of record an order directing the clerk to give notice of the supplemental registration, did not invalidate the proceedings. Attention is directed to what is said on page 253 of the opinion in 277 Mo., on page 71 of 210 S.W. In the present proceedings there was substantial compliance with the applicable statute, and that is all the law requires."

Again in the case of Hudgins v. Consolidated School District, 312 Mo. 1, a school board election was attacked upon the grounds that the proceedings were illegal because the school board appointed a clerk pro tem to act in place of the regular clerk in posting notices of the election ordered by the board. The court held this to be an irregularity in no wise affecting the validity of the bonds, since such bonds had been authorized by more than the two-thirds majority of qualified voters required by the statute. In view of the foregoing it is apparent that the illegally appointed secretary was a de facto and not a de jure officer. As such, his official acts would be as binding upon the district as if he were a de jure officer, provided the official acts performed by him were authorized by statute.

We have previously called attention to statutes prescribing the general duties of a secretary or clerk of a school district, which are clerical in nature, and have to do with keeping records of the district. We have also called attention to Section 165.323, supra, requiring, among other things, that the board shall keep a corporate seal with which to attest its official acts. The actual attestation referred to would be the duty of the clerk since he must keep the minutes of the board meetings and other records of the district. It is our thought that the de facto

Honorable James L. Paul

secretary's action in attesting the tax levy made by the board (which levy we assume to be in accordance with the statutes authorizing such levies) to be valid. The mere fact that such duty was performed by an illegally appointed secretary is immaterial, and would not render the levy thus made illegal.

CONCLUSION

It is therefore the opinion of this department that the official action of the board of directors of a consolidated school district in levying school taxes, if made in accordance with the applicable statutes is valid, although an illegally appointed secretary of the board attested said board's action.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Paul N. Chitwood.

Yours very truly,

John M. Dalton
Attorney General

FNC:ma:hw