SCHOOLS: Directors irregularly elected are de facto directors and if they refuse to serve, the County Superintendent may appoint directors in their place.

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Hon. Albert S. Ennis
Prosecuting Attorney
Festus, Missouri

Dear Sir:

We have your letter of recent date which reads as follows:

"May I have the opinion of your office at the earliest date possible in reference to the following situation.

Notices were given and a meeting called according to the requirements of the Statutes to vote on the establishment of a consolidated rural school district in this County. The vote was duly taken and resulted in thirty-nine (39) votes for a consolidated district and ten (10) votes against. This was done in the manner required by the Statutes. However, when they proceeded to the election of directors, they elected five (5) directors, one at a time, by the method of show of hands or voice vote. When they came to the election of the sixth director he said he didn't believe that was a legal way of electing directors and if they wanted to elect him director they would have to do so by ballot. They then proceeded to ballot in his name and he was duly elected as a director. All the directors were sworn in an have been functioning as a board since sometime in June.

It seems that some opponents to the consolidation are threatening to contest the election of the directors and consolidation of the districts. Superintendent of Schools asked me for an opinion.

There is no question but what the district was consolidated legally and will stand up. Of course, only one director was legally elected. However after the election of the directors one

director, not legally elected, resigned and the board proceeded to elect a director in his place.

One question is whether this director has been legally chosen. In view of the fact that the directors were acting as defacto. I am inclined to think this director is also a legally chosen director. The question now is whether the County Superintendent of Schools should appoint these directors upon the resignation of those who were not legally elected or whether he should call another meeting of the school districts involved to elect the required directors.

The Statute provides that the County Superintendent shall call for the election to determine whether the districts shall be consolidate but says nothing about electing directors so far as the call is concerned, but in another section provides that the second proceedure if the consolidation is voted shall be the election six directors.

I am of the opinion that the County Superintendent will have to appoint these directors as there doesn't seem to be any provision for him calling a meeting for their election.

Since it appears likely that this case will get into the Courts we would like to have the opinion of your office as to whether these directors who have been acting defacto, and all of whom are willing to resign, should be replaced by the County Superintendent or if he must call another election."

We think you are correct in your opinion that if the consolidation proceedings were regular they would not be rendered invalid by reason of the fact that directors were elected in an irregular manner at the same meeting. The case of State Ex Rel vs. Foxworthy, 301 Mo. 376, 256 S. W. 466, was a case almost parallel to the situation you describe in your letter. In that case the consolidation had been voted and then the voters elected the directors by a voice vote. In discussing the effect of the irregularity in electing directors, the Court said:

"That language implies that before the directors are to be elected organization has been completed and the result announced in a manner which must be followed in the second order of business.

> It would defeat the will of the people to hold that the district was not organized because of an irregularity in the election of directors which the voters thought was regular. Every one present, including the clerk of the meeting, who recorded and transcribed the record of the proceeding, thought the directors were regularly elected. Those so elected proceeded to organize the board and to conduct the affairs of the consolidated district for nearly two years before any question was raised. We hold, therefore, that the consolidated district was organized when the vote to organize was cast and counted.
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> The directors thus irregularly elected afterwards met in due form, without objection, proceeded to organize as a board and to conduct the business of the district, and, so far as this record shows, for nearly two years acted without objection. They were de facto officers, and their acts were valid until they were ousted. They could, in the regular way, elect directors to fill a vacancy in the board the same as if they themselves had been legally elected. 23 R. C. L. p. 808, P. 317. Each of the four directors held by the court to be legally in office was elected either at an annual election by the de facto board of directors or at some regular meeting, in accordance with the statute."

Under the above authority it will be seen that the irregularity in electing directors at a consolidation meeting will not affect the validity of the consolidation proceedings. If the consolidation proceedings were regular in the case you mentioned in your letter, then the consolidated district is validly in existence even though the directors were thereafter elected in an irregular manner.

Under the foregoing case, it is also settled that directors elected as set forth in your letter are de facto directors and their acts are valid until they are ousted. Likewise, the one director who was elected by the acting board to take the place of one who had been irregularly elected in the consolidation meeting is a de facto director. The language in the Foxworthy case might indicate that the last mentioned director is a de jure director, but in the case of State Ex Rel vs. Harper, 336 Mo. 717, 80 S. W. 2d, 849, the Court in quo warranto proceeding held that a director appointed by other directors

who had not been legally elected was not legally a director. In that case the Court said, 80 S. W. 2d, l.c. 852:

> "The appellant Wesley Harper claims to have been appointed a director by the so-called 'Harwood board' on May 5, 1934, to fill an alleged vacancy in the board. But as this so-called board never had more than one legally qualified school director, it is clear that the purported appointment of Mr. Harper was a mere nullity."

The holding in the Harper case is not inconsistent with the holding in the Foxworthy case because in the Harper case the Court was considering a direct attack upon the title of the directors in a quo warranto proceeding. Absent such a direct attack we think directors irregularly elected would be de facto directors and their actions valid.

From all of the above, we are of the opinion that all of the four directors of the consolidated district you mention who were elected by voice vote and the one who was elected by the acting board to fill a vacancy are de facto directors and their acts will be valid until they are ousted by a legal proceeding. However, such directors can be ousted in a proper proceeding. As pointed out in the Foxworthy case, supra, the law plainly requires directors to be elected by ballot. There is no question from your letter but that only one of the directors in your case was so elected.

Section 10493, R. S. Mo. 1939, after providing for the organization of a consolidated district provides that "all the laws applicable to the organization and government of town and city school districts as provided in Article 6, chapter 72, R. S. 1939, shall be applicable to districts organized under the provisions of Sections 10493 to 10500, inclusive."

Section 10468 R. S. Mo. 1939 reads 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 manner 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. Mo. 1939 reads 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."

As pointed out above, there is really only one legally elected director now on the board; and under the authority of the Harper case, supra, we do not believe that that board would legally fill vacancies even though all of the other directors resign. Furthermore, there might be a question as to whether a purported director can resign from an office to which he has never been legally elected. It will be noticed that under Section 10423, supra, vacancies may be created by "refusal to serve" by the directors. If there are more than one of such vacancies at any one time, the County Superintendent has the authority and duty, upon being notified of such vacancies in writing, to fill same by appointment. Therefore, if the five de facto directors in question should simultaneously file with the County Superintendent their written refusal to serve as directors, we think the County Superintendent would be authorized to appoint five directors to take the places of those refusing to serve. We would suggest that the refusal be worded substantially as follows:

> Due to the question existing as to the legality of our election as Directors of Consolidated District _____ of Jefferson County, Missouri, we, the undersigned, refuse to serve further as directors of such district.

CONCLUSION

It is, therefore, the opinion of this department: (1) that directors chosen in an irregular manner at a consolidation meeting of school districts but who qualify

and serve as such directors are de facto directors and their acts are valid until they are ousted from office; and (2) that if more than one of such de facto directors simultaneously file with the County Superintendent their written refusal to act as directors of such district, the County Superintendent can appoint directors to take the places of those refusing to serve.

Yours very truly,

Harry R. Kay
Assistant Attorney General

APPROVED:

J. E. Taylor
Attorney General