SCHOOLS: If board members withdraw their resignations before the county superintendent accepts or fills the same, the withdrawals are legal and no vacancies exist.

June 15, 1938

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Honorable Lloyd W. King
State Superintendent
Department of Public Schools
Jefferson City, Missouri

Attention: Geo. B. John
Director of Finance

Dear Sir:

This Department is in receipt of your letter of June 13th, as follows:

> "The attached letters from Mr. Charles Higgins are self-explanatory. Also, attached to Mr. Higgins' letters are replies from this Department.
>
> "Mr. Higgins has requested that the opinion of the Attorney-General be secured in answer to the following questions based on the information given in his letters:
>
> "1. If a board member resigns, is a subsequent withdrawal of his resignation legal, if done before the county superintendent fills the vacancy by appointment?
>
> "2. What constitutes proper notice of resignation; also, proper notice of withdrawal of resignation?"

In connection with the questions submitted we have read the correspondence which you have attached relative to the controversy, but it appears that the matter finally resolves itself into the legal questions which you present.

Section 9290, R. S. Mo. 1929, refers to the tenure of board members and the filling of vacancies, and 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 9288, and shall serve until the next annual school meeting."

The procedure as to a vacancy or vacancies, caused by resignation, should be as follows:

> "upon notice of such vacancy or vacancies being filed with him in writing, immediately fill the same by appointment."

The general principles with reference to vacancies and the effect of a withdrawal or attempted withdrawal of a resignation is discussed in the decision of State ex rel. Kirtley v. Augustine, 113 Mo. l. c. 24, as follows:

"'It is well established law, that, in the absence of express statutory enactment, the authority to accept the resignation of a public officer rests with the power to appoint a successor to fill the vacancy. The right to accept a resignation is said to be incidental to the power of appointment. 1 Dillon on Municipal Corporations (3 Ed.) sec. 224; Mechem on Public Offices, sec. 413; Van Orsdall v. Hazard, 3 Hill (N. Y.), 243; State ex rel. v. Boecker, 56 Mo. 17.

"'By section 11, article 5, Constitution of Missouri, it is provided that: "when any office shall become vacant, the governor, unless otherwise provided by law, shall appoint a person to fill such vacancy," etc. It seems that no provision exists in our statutes for filling the vacancy of county treasurer. Hence it follows that the power of appointment remains, as directed by the constitution, with the governor. And the authority to fill the vacancy being with the governor, here likewise rests the power to accept the resignation. In order then to create a vacancy in the office held by Augustine his resignation must have been lodged with the governor, and by the governor accepted. There being no particular mode pointed out by statute or by the Constitution, this resignation may be in writing or by parol. No particular form is required. It is only necessary that the incumbent evince a purpose to relinquish the office--that this purpose be communicated to the proper authority, and that this resignation be accepted either in terms, or something tantamount thereto, such as appointing a successor, etc. Edwards v. United States, 103

U. S. 471-474; The People v. Board of Police, 26 Barb. 502; Mechem on Public Offices and Officers, sec. 414, et seq.

"'When this resignation shall have been communicated to the proper authority and the same shall be accepted--whether formally or by the appointment of a successor--it is beyond recall, it cannot then be withdrawn. Mimmack's case, 97 U. S. 426.

"'In view then of these principles it would seem that defendant Augustine had accomplished a complete resignation of the office to which he was elected. It is clear that he and the members of the county court assumed the law to require his resignation to be presented to the county court. In this they were clearly mistaken, since as already shown the governor of the state, the appointing power, was the proper party to whom the resignation should have been tendered. However defendant's resignation was, by his knowledge and consent, forwarded to the governor, and he acted thereon by designating a successor, and this too before defendant made any effort to withdraw such resignation. This conduct on the part of Augustine signified a complete renunciation of the office-a resignation--and there was by the governor such an acceptance as constituted a vacancy. The naming a successor (though a formal commission had not been made out) committed the governor to, and at law constituted, an acceptance of Augustine's resignation. Mimmack's Case, supra; Mechem's Public Offices and Officers, sec. 415."

In the decision quoted above it appears that the matter had reached a further step in the procedure than in the instant case. The successor had been named but had not received the commission. But as stated above, the above principles are fundamental in considering the question. School directors are considered public officers. State ex inf. McKittrick v. Whittle, 333 Mo. 705.

Quite analogous to the situation is the decision of Rockingham County v. Luten Bridge Co., 35 S. W. (2d) l. c. 306, as follows:

> "The North Carolina statutes make no provision for resignations by members of the boards of county commissioners. A public officer, however, has at common law the right to resign his office, provided his resignation is accepted by the proper authority. Hoke v. Henderson, 15 N. C. 1, 25 Am. Dec. 677; * * * * * * * * * * * * * * * * And, in the absence of statute regulating the matter, his resignation should be tendered to the tribunal or officer having power to appoint his successor. 22 R. C. L. 558; * * * * * * * * * * * * * * * State v. Augustine, 113 Mo. 21, 20 S. W. 651, 35 Am. St. Rep. 696. In the case last cited it is said:
>
> "'It is well-established law that, in the absence of express statutory enactment, the authority to accept the resignation of a public officer rests with the power to appoint a successor to fill the vacancy. The right to accept a resignation is said to be incidental to the power of appointment. 1 Dillon on Municipal Corporations (3d Ed.) Sec. 224; * * * * * * * * * * * *'

"In North Carolina, the officer having power to appoint the successor of a member of the board of county commissioners is the clerk of the superior court of the county. Consolidated Statutes of North Carolina, Section 1294. It is clear, therefore, that, when Pruitt tendered his resignation to the clerk of the superior court, he tendered it to the proper authority.

"The mere filing of the resignation with the clerk of the superior court did not of itself vacate the office of Pruitt, it was necessary that his resignation be accepted. Hoke v. Henderson, supra; Edwards v. U. S. 103 U. S. 471, 26 L. Ed. 314. But, after its acceptance, he had no power to withdraw it. Mimmack v. U. S., 97 U. S. 426, 24 L. Ed. 1067; * * * * * * * If, as the offer of proof seems to indicate, the resignation of Pruitt was accepted by the clerk prior to his attempt to withdraw it, the appointment of Hampton was unquestionably valid, and the latter, with Martin and Barber, constituted a quorum of the board of commissioners, with the result that action taken by them in meetings of the board regularly held was action by the county."

Conclusion.

It does not appear by the correspondence that the County Superintendent ever accepted the resignation of the directors. It does appear that the two directors in question handed their resignation to the remaining third director.

He in turn transmitted the same to the County Superintendent. By the terms of the statute it was necessary for the two members of the board in question to give their resignation to the County Superintendent. It does not appear that they instructed, acquiesced or directed the third member to transmit the resignations as was done in the Kirtley v. Augustine case, quoted from supra.

There is a question of fact which the correspondence does not clearly indicate and that is as to whether or not the County Superintendent ever accepted the resignations of the two members, but we must assume that he did not from the mere fact that he made no appointments as to their successors. The mere fact that the two members of the board gave their resignations to the other member of the board did not of itself vacate the offices.

For the reasons mentioned above and for the further reason that the record does not show that written resignations of the two directors were forwarded to the County Superintendent by the third member of the board (the letters show that he telephoned the County Superintendent) and for the reason that the resignations were not accepted before the two members withdrew the same, we are of the opinion that the two vacancies do not exist on the board of directors of the school. As to your second question, it appears that the answer to the first has also embodied the answer to it.

Yours very truly

OLLIVER W. NOLEN
Assistant Attorney-General

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APPROVED:

J. E. TAYLOR
(Acting) Attorney-General