SCHOOLS: Filling vacancies in the [illegible] director school district -- What constitutes a quorum?

September 27, 1934.

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Hon. Chas. A. Lee
State Superintendent
Department of Public Schools
Jefferson City, Missouri

Attention: Mr. Geo. B. John

Dear Mr. John:

This is to acknowledge your letter of September 14th, 1934, as follows:

> "This Department has received inquiry from W. F. Frame, President of the Consolidated School District No. 1 (Bagnell), Miller County, concerning the validity of the recent acts of the school board in filling vacancies and transacting other business.
>
> Will you please advise this Department concerning the legality of the board's acts, particularly as to the question of what really constitutes a legal quorum for the transacting of business. The facts in this case as presented to this Department are as follows:
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> On August 29, a meeting of the board was called by Mr. Robertson, Vice-President of the Board, and at that meeting four members of the Board were present; that immediately upon the meeting having been called to order Dr. Parrish, one of the Board members, submitted his written resignation and it was immediately accepted by a vote. I am not advised whether Dr. Parrish voted as a board member to accept his own resignation or

whether the vote was simply of the three remaining directors. I understand further that upon this purported action the remaining three board members appointed Mr. Moore as director and that thereupon Mr. Diederiech submitted his resignation; that this purported to be accepted and the three remaining board members appointed Mr. Jordan to fill that vacancy; that thereafter the purported Board proceeded to transact further business.

The action of the board has created a dispute between the four members who were present at the meeting and the two remaining members who were absent. The one contends their acts were legal because Section 9329 provides a majority of their board shall constitute a quorum for the transaction of business and that Section 9290 provides that the remaining directors shall appoint some qualified person to fill the vacancy. The other contends that four members constitute a quorum and in no event could three members appoint to fill a vacancy and that the law does not say the majority of the remaining members shall constitute a quorum.

It appears that Section 9329 is a little indefinite concerning what really constitutes a quorum by the statement 'A majority of the board shall constitute a quorum for the transacting of business'. If this statement had said 'A majority of the whole board or a majority of the remaining members of the board shall constitute a quorum', then there could have been no dispute. However, in Section 9329 the phrase 'A majority of the board shall constitute a quorum .....' is used in the same sentence with the phrase 'A majority of the whole board shall vote therefor'. It appears that a quorum shall consist of a majority of the total number constituting the membership as provided by law, namely six members.

"Please advise as follows:

1. (a) Does three school board members constitute a quorum for the purpose of filling a vacancy when there are only five members remaining on the board?

(b) Or, on the other had, does the quorum constitute a majority of the total membership of the board as provided by law?

2. Were the acts of the three board members in appointing persons to fill vacancies, legal?"

As we view the situation here involved, the determination of such depends upon the interpretation to be given Section 9329, Laws of Missouri, 1931, page 333, in particular this part thereof:

"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."

Consolidated School District No. 1 (Bagnell), Miller County, is a six-director school district. The facts presented in your inquiry show that four of the directors (who constituted a majority of said board) regularly met and the first order of business was the presenting of a resignation by one of said four members, and presumably in pursuance to Section 9290, R. S. Mo. 1929, the three members present proceeded to fill the vacancy. Said section, in part, 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; * * * * *."

It is to be borne in mind that Section 9290, supra, primarily pertains to a three-director school board and by reference applies to a six-director school board. Section 9327, R. S. 1929. In a three-director school board, two is a majority and if one resigns the remaining members, namely, two, would fill the vacancy. However, in a six-director school board, four constitutes a quorum or a majority for the transaction of business, and if the remaining members, as provided by Section 9290, supra, fill the vacancy, then does it take all five remaining directors to be present when they vote, or does it take a majority of the entire membership of six members or a majority of the remaining members? We are of the opinion that Section 9329, supra, governs, namely: That whenever a vacancy is filled, it takes at least a majority of the six members, to-wit, four, to be present. That is to say, that if five of the members met and one resigned, that the remaining four could fill the vacancy, or if six members were present and one resigned, then the five members could fill the vacancy; and a majority vote of those present, in either case, would constitute an election. In any event, we are of the opinion that four members must, at all times, be present in order to fill vacancies or transact other business. We are mindful, however, of the persuasiveness of the case of Bauer v. School District, 78 Mo. App. 442, wherein the Kansas City Court of Appeals used the following language (l. c. 445):

> "In our opinion a failure on the part of the directors to fill the vacancy as they are required to do by this statute, does not invalidate any official action taken by the board. The command of the statute is addressed to the remaining members of the board and no intention seems to be disclosed to make void any act done while the vacancy exists. If such had been the intention of the lawmakers on a matter so important, they would undoubtedly have expressed the intention in direct terms. The directors should obey the statute before performing any other official act. It may be that they could, by proper proceedings, taken in time, be compelled to do so. But if the board engages in its duties while the vacancy exists, the business transacted, if otherwise regularly done, will not be void."

In the above case the court was dealing with a three-board-director district, one of the members having resigned and the remaining two transacted business prior to filling the vacancy.

We are also mindful of the case of La Monte Cowles, Appellant, v. Independent School District of Rome, Appellee, 204 Iowa (Sup.) 689, which is practically an analogous case, but we, for reasons hereinafter shown, are unable to agree with the opinion in that case so far as our statute is concerned. In the Iowa case the following occurred (l. c. 691):

> "At a meeting held August 27, 1914, the minutes show: Present, John Sammons, J. J. O'Laughlin, J. M. Baston. Absent, William Wehrle, F. D. Swailes."

And further,

> "'The president called for nominations to fill the vacancy of John Sammons. Motion to prepare ballots "to fill vacancy of John Sammons" was carried. C. O'Grady was nominated, and according to the minutes, "received two votes," or a majority of the quorum, and was elected to fill vacancy of John Sammons, and was duly qualified by the president. Moved by O'Laughlin and seconded by O'Grady that the resignation of F. D. Swailes be accepted.'
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> R. W. Swailes was nominated 'to fill vacancy of F. D. Swailes. R. W. Swailes received the majority of the votes of the quorum, electing him to fill the vacancy occasioned by the resignation of F. D. Swailes, and duly qualified by the president.'"

Thus, we have the facts that five members constituted the board, and at a meeting when three were present and two absent, one of present members resigned and his resignation accepted at said meeting and at the same time a new member was elected to fill the vacancy. The court, in discussing such a

procedure, said this (l. c. 696):

> "Section 1268, Code of 1897, provides how resignations of sundry civil officers--not including, however, school directors--may be made. The resignation involves the intent on the part of the resigning official whether to make a present immediate resignation or to make one to take effect when accepted, or on some other event. His intent to resign with immediate effect involves the question of public interests,--whether the necessary performance of the duties of the office which he holds and the interests of the public will permit an immediately effective resignation. The resignation involves also the understanding and intent of the officer or board to whom it is made, whether they are advised of it, whether they accept it, and upon what condition as to time of taking effect. ing effect."

And further (page 698):

> "It seems to be clear, on this record, that neither Sammons nor his colleagues on the board understood or intended that his resignation took effect prior to O'Grady's election and qualification. The record of the meeting of August 27, 1914, is that the 'house' was called to order by the president, J. M. Baston. On the roll call, Sammons, O'Laughlin, and Baston were noted as present; Wehrle and F. D. Swailes, absent. The minutes of the last meeting were read and approved. On the election by the board to fill vacancy, it is recorded, O'Grady 'received two votes, or a majority of the quorum.' The members of the board, therefore, including Sammons, counted a quorum as present. John Sammons's presence was necessary to the quorum. The intent of Sammons, as well as of the two other members present, plainly was that Sammons's resignation had not taken effect,

> and he was still a member. The board, therefore, was legally constituted, and had the power to elect a successor to Sammons. When O'Grady qualified, the board was competent to accept the resignation of F. D. Swailes and to elect R. W. Swailes in his place. On this record, the new members were such de jure. But if, as defendant argues, they were not members de jure, they were such de facto, with authority as to third parties, including plaintiff and Miss Talbot, to transact the business of the district. In the first place, we are cited to no statute which requires, to fill a vacancy, a majority of all the members elected. In the absence of such a provision, the action of the body is determined by a majority of the quorum."

The statute in Missouri on filling vacancies, Section 9290, supra, says, "the remaining directors shall, before transacting any official business," and read in conjunction with the 1931 Law --"A majority of the board shall constitute a quorum for the transaction of business," means, in our opinion, the remaining (5) directors, or a majority of the whole board, to-wit, four members, be present when a vacancy is to be filled. Consequently, if four members meet and one resigns, then there is not a majority of the board of six present to fill the vacancy. So, when Dr. Parrish's resignation was accepted, he being one of the four, a majority of the board was destroyed and the meeting should have been adjourned until at least one of the two remaining members not present would have an opportunity to be there. Seemingly, it would follow that all acts done by the three members of the board were void. However, we are not passing on that question at this time. We are only passing on the question of the filling of the vacancy, that is to say, that if a quo warranto suit were brought against the director elected to fill the vacancy, would the court oust him from office? We are of the opinion that he would be subject to ouster. Thus, we are holding in this opinion that he is not legally elected to the directorship he now holds.

We take the liberty at this time to quote from a brief prepared on this subject, which accompanied your letter, and which, in our opinion, clearly declares the law under our statutes:

> "In 56 Corpus Juris, page 326, paragraph 196, the law is stated as follows:
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> > 'When a statute gives a board the right to fill all vacancies in the board this is not a power conferred upon the remaining members but it presupposes the presence of a quorum as a condition to valid action. Hence such a power can be exercised only when the vacancies are not sufficient in number to destroy the required quorum and if a majority of the board is necessary to constitute a quorum this means a majority of the whole board authorized, so that when half or more of the offices of the board become vacant the power cannot be exercised by the remaining members, or if more than half of the original board remains the power can be exercised only when there is present a number which would have constituted a majority of the original board.'
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> "There is no case in Missouri deciding this question. I find however that in the case of Glass et al vs. City of Hopkinsville, (Ky.) 9. S. W. (2d) 117, the principles asserted above are fully considered and sanctioned. In that case the school board consisted of nine members and the statute provided that 'A majority elect of said board constitutes a quorum for the transaction of business.' It appears from the report that the terms of five members of the board were expiring. The four remaining members of the board together with the five whose terms were expiring elected five additional directors. The governor under

an enabling statute appointed five others, and the contest was between these two groups. The court said, in part:

> 'It is insisted on behalf of the appellees that the case is controlled by Section 3463 Kentucky Statutes, which empowers the board of education "to fill until the next general election all vacancies in said board." It will be noted that the power is conferred upon the board of education and not upon its remaining members. Ky. Stat. Sec. 4465, as amended by Act March 7, 1922, p. 35 c. 8. When a power is delegated to a board or body consisting of several members is presupposes the presence of a quorum as a condition to valid action and the power may not be asserted effectively by a less number. 43 Corpus Juris page 503; Hopkins vs. Dickens, 188 Ky. 368, 222 S. W. 101; Short vs. Langston, 125 Ky. 816, 102 S. W. 236; Scott vs. Pendley, 114 Ky. 606, 71 S. W. 647; Pierce vs. Sullivan, 189 Ky. 193, 224 S. W. 872.
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> 'In cities of the third class, to which Hopkinsville belongs, the board of education consists of nine members and a majority elect of said board constitutes a quorum for the transaction of business Ky. Stat. paragraph 3462. It is apparent therefore that five vacancies left the board without a legal quorum and disabled it from the transaction of any business.'

"The court in a further discussion of the case said:

> 'Appellees present a theory that the authority to appoint members to fill vacancies is vested in the board of education, a corporation which was then in being and would continue in being when the vacancies occurred and when the appointments were to be made, which consideration is supposed to bring this case within the reasoning and strict letter of the authorities last cited. The theory is confounded by the fact that the board of education as a corporate entity

cannot function with less than a quorum of its members, and five of those whose terms were expiring were disqualified to vote on their own successors. The corporation can act only by its members, and when a majority of them are disqualified on a given subject the board itself is powerless to act thereon, but the appellees further argue that the four members remaining in office constituted all of the board of education legally in office and as such had a right to carry on the business and fill the vacancies. This contention is predicated upon a definition of "majority elect of said board" as used in Section 3462 Ky. Stats. as meaning a majority of those constituting the actual as distinguished from the authorized membership thereof. State vs. Orr 61 Ohio St. 384, 56 N. E. 14; State ex rel Wilson vs. Willis, 47 Mont. 548, 133 Pac. 962. The contention is unsound and utterly untenable. In our state the legislature has sometimes provided that the remaining members of a board were empowered to fill vacancies and in many other instances has bestowed the power upon a board or body in which only a quorum could act, requiring a quorum to consist of a majority of all the members elect. The plain import of such provision is that a majority of all members that could in any event be elected to the board must be considered in office and counted to comprise a quorum. 43 Corpus Juris 503.'

"In the case of <u>In Re Wells Township School District Directors</u>, (Pa.) 146 Atl. 601, the statute provided for a five member board. Two directors resigned and thereafter two of the remaining three qualified directors after notifying the third, who refused to attend, met and elected a successor to one of the members. The three members at a later date then met and elected Ayres as the fifth member, the fourth member still declining to attend. Section 308 of the Pennsylvania Code provided 'A

majority of the members of a board of school directors shall be a quorum. If less than a majority is present at any meeting no business shall be transacted at such meeting but the members present may adjourn to some stated time.' Section 214 of their law provided: 'In case any vacancy shall occur in any board of school directors in any school district of this commonwealth by reason of death, resignation, removal from the district or otherwise * * * in a school district of the second, third and fourth classes the remaining members of the board of school directors shall by a majority vote thereof fill such vacancy within thirty days thereafter.' The court in holding that the two members elected as above were not properly elected said:

'Three is the smallest number which may form a quorum in school districts of the fourth class, and three must be present to transact business. This quorum or majority is not reduced merely because one member happens to be absent from a meeting for the transaction of business. Under the school code a quorum must always consist of a majority of the total number constituting the membership. A statutory quorum cannot be changed by a reduction of the number by vacancies. Craig vs. First Presbyterian Church, 88 Pa. 42, 32 Am. Rep. 417; United States vs. Ballin, 144 U. S. 1, 12 S. Ct. 507, 36 L. Ed. 321; 2 Dillon Municipal Corporations (5th Ed.) paragraphs 521 and 530. Section 214 provides that where there is a vacancy the remaining members of the board shall by a majority vote thereof fill such vacancy. "Remaining members" means all members in office when the vacancies occur and action by less than that number is not the action of the remaining members. "Majority vote" of the remaining members contemplates concerted action of those members. At least they

must be present in an official capacity attending a meeting at which a given action was taken. Any other construction would make this pointed language of very little weight, especially when the section immediately following is considered.'

"Our Section 9327 provides that when any vacancy occurs in our board the same '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.'

Section 9290 provides that '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.'

It might be argued from this statute that even where we have a six member board if one of the members resigns all five of the remaining members must be present at the meeting where such vacancy is filled. I do not think a court would so interpret it. I am inclined to say that under such circumstances the court would hold that a quorum could fill the existing vacancy. This would mean however four members of the board present at the meeting and would likewise mean a majority of those present must vote for the director to fill the unexpired term. If five of the directors were present then three would constitute a majority of the quorum and that would be sufficient for the transaction of any official business other than that which the statute provides must be

transacted only when all six of the members are present. I cite you further in support of the principles here set out 46 Corpus Juris, page 1378, paragraph 8:

> 'It is a well established parliamentary rule that a quorum of the body must be present in order to validate its action or to transact any business. In order to constitute a quorum it is not necessary that the entire membership of the assembly be present. In reckoning the quorum the general rule is that in the absence of a contrary provision affecting the rule the total number of all the membership of the body be taken as the basis; and ordinarily a majority of the authorized membership of a body consisting of a definite number of members constitutes a quorum for the purpose of transacting business, but it is competent for the statute or constitution creating the body to prescribe the number of members necessary to constitute a quorum or to delegate to the created body the authority so to prescribe.'

"In State ex rel Attorney General vs. Kansas City, 310 Mo. 542, 586, the court quotes from 29 Cyc 1688 as follows:

> 'Where a quorum is not fixed by the constitution or statute creating a deliberative body consisting of a definite number the general rule is that a quorum is a majority of all the members of the body.'

"This same rule is quoted by our court in State ex rel Riechmann, 239 Mo. 81, l. c. 102. In this latter case too the court said:

> 'The rule seems to be that unless there be some specific law to the contrary a majority of a given body has the right to transact all business which the entire body is authorized to do, and not only so but that a majority vote of those present and voting (there being a majority participating) can do all the

> things which could be done by the entire body. This was the common law rule and is only changed by some express provision. The theory is that the majority is the body itself for the transaction of business.'

"In the light of these authorities I have concluded that when this board meeting was called on August 22, there being four members present there was a quorum for the transaction of business. That upon the receipt of Director Parrish's resignation there was still a quorum until such time as it should be accepted. There being a quorum present the question of his resignation could be put to a vote and legally carried, and I am of the opinion that his resignation was accepted at that meeting and that he is no longer a director. I am of the further opinion that immediately upon the acceptance of his resignation, leaving only three members the only action they could take thereafter was to adjourn."

CONCLUSION.

In conclusion, it is our opinion that the remaining directors, five, or a majority of the full board, four, should now meet and fill the vacancy caused by Dr. Parrish's resignation, and when such is done other business of the board be conducted just as long as a quorum, namely, four members, are present.

It is to be noted that the other member who has submitted his resignation would be a competent member of the board until his resignation was acted upon.

In answer to your specific questions:

"1. (a) Does three school board members constitute a quorum for the purpose of filling a vacancy when there are only five members remaining on the board?" -- Our answer is "No"!

" (b) Or, on the other hand, does the quorum

constitute a majority of the total membership of the board as provided by law?" -- Our answer is "Yes".

"2. Were the acts of the three board members in appointing persons to fill vacancies, legal?" -- Our answer is "No".

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General.

JLH:EG