ELECTION BOARD:

Assistant election commissioner properly appointed to position when the meeting attended by four members of election board, two voted in favor of such assistant, one voted against and one did not vote.

March 29, 1950

FILED
72

Honorable David M. Proctor
City Counselor
City Hall
Kansas City 6, Missouri

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department and reading as follows:

> "I am enclosing herewith transcript of a portion of an opinion which I gave to Mr. Agard, Director of Finance, relative to certain warrants of the Election Commissioners for salaries. The opinion is dated July 15, 1949.
>
> "I should like to have at your very earliest convenience the opinion of your office regarding the appointment of Edna M. Cole. If she was lawfully appointed, the city of course will no doubt pay her the salary that has accumulated since her appointment."

The transcript of the portion of the opinion which you enclose holds that where an assistant election commissioner was purportedly appointed at a meeting of the Kansas City board of election commissioners, at which meeting two members voted in favor of such appointment, one member voted against such appointment and one member did not vote, the appoint was void.

You also state in your letter that a California case and the case of Bonsack & Pearch v. School Dist. of Marceline, 49 S.W.2d 1085, decided by the Kansas City Court of Appeals, have been cited as bearing upon the validity of such appointment

Section 12097, Revised Statutes of Missouri, 1939, which section is applicable to Kansas City, Missouri, provides in part as follows:

> "There is hereby created a board of election commissioners for each city that is governed by the provisions of this article, composed of four members.
>
> "Said board shall have the right to employ such assistants, clerks, stenographers, typists, or other employees, equally divided between the two parties to which the election commissioners belong, from time to time as may be necessary promptly and correctly to perform the duties of office under the direction of the board."

Section 12098 provides in part as follows:

> "Any two members of the board of election commissioners shall have power to appoint before or upon any day of registration or election such number of deputy commissioners, who must be qualified voters in the city, as they may deem necessary, to be divided equally between the two political parties for the purpose of taking a census of and ascertaining the facts and conditions relative to the residence and voting right of persons in any election precinct or precincts; and to attend and be present at and during any registration, revision of registration or election, to witness and report to the board of election commissioners any failure of duty or any fraud or irregularities occurring thereat; and to act as judges or clerks in any precinct in place of absent, removed, or disqualified judges or clerks; and to do and perform any and all acts which the said board or any two members thereof shall direct."

The general rule with regard to the actions of a board such as the election board in this case, is found in the case of Collins v. Janey, 249 S.W. 801, decided by the Supreme Court of Tennessee. In that case the court was ruling upon the validity of the action of a school board. The court said l.c. 803:

> "At a full meeting of the board on August 9, 1921, the contract in question was read and and discussed, and, upon a motion to adopt it, three of the members voted 'Aye,' two 'No,'

> and two did not vote. It was declared adopted, and the chairman was directed to execute same on behalf of the board, which he failed and refused to do, upon the theory, as claimed by him, that it was invalid unless assented to by a majority of the members of the board.
>
> "Was the contract lawfully entered into; that is, did it receive a sufficient number of votes to validate it? A majority of those voting approved it, but a majority of those present did not affirmatively assent to it.
>
> "By chapter 120 of the Public Acts of 1921, said board of education for Marion county was created. The act is silent as to the number of members of the board necessary to constitute a quorum, or the number of votes necessary to pass a measure.
>
> "Under the common law a majority of such a board constituted a quorum. The question here involved is how many votes are necessary to pass a measure where a quorum is present? Ordinarily it would require a majority of the quorum. But what is the rule where one or more who are present refuse to vote - is a majority of those actually voting sufficient to validate the measure under consideration?
>
> "In 28 Cyc. 339, the author says:
>
> "'As a general rule, the number of lawful votes actually cast decides the question; so that it is generally held that, if a quorum is present, an election or measure is determined by the majority of the votes actually cast, although an equal or even a greater number refuse or fail to vote.'"

Since there is no provision in Chapter 76, Article 23, Missouri Revised Statutes Annotated, stating the specific number of the election commissioners constituting a quorum or any provision requiring any certain number more than a majority of a quorum to act as a board of election commissioners, we believe the rule set forth in the Janey case to be applicable, and hold that where the Kansas City board of election commissioners had a quorum of its

members present and a majority of those voting, which number constituted a quorum, voted for the appointment of Edna M. Cole as an assistant election commissioner, that her appointment was valid.

We believe that the quoted provision of Section 12098, supra, stating that any two members of the board of election commissioners shall have power to appoint before or upon any day of registration or election such number of deputy commissioners, who must be qualified voters in the city, as they may deem necessary, is a provision giving to two individual members of the election board power to appoint deputy commissioners, and is not a statute stating what the board of election commissioners can do. Under the quoted provisions of Section 12098 any two of the commissioners may make appointments of deputy commissioners, and such appointments need not be made by the board at a board meeting, but under the provisions of Section 12097 the board must employ assistants, clerks, stenographers, typists or other employees, except deputy commissioners.

Therefore, we do not believe that Section 12098 is relevant in determining the question of whether or not a majority of the members of the quorum of the election board voting may bind such board.

The case of Bonsack & Pearce v. School Dist. of Marceline, 49 S.W. 2d 1085, holds that where members of a board are present at a meeting it is the duty of such members to vote upon all questions that may arise and that where a member fails to vote, the vote of such person is counted with the majority. The court said in that case, l.c. 1088:

> "Five of the six members of the school board were present and by their presence constituted a quorum, and it became and was the duty of each and every member to vote for or against any proposition which was presented to them. If, under such circumstances, a member does not respond when his vote is called for, but sits silently by when given an opportunity to vote, he is regarded as acquiescing in, rather than opposing, the measure, and is regarded in law as voting with the majority. Such is the rule announced in many authorities." (Citing authorities,)

However, we believe that the holding of the Kansas City Court of Appeals in this case is overruled by the holding of the Supreme Court in the case of State ex rel. v. Becker, 81 S.W. 2d 948. In that case the Supreme Court held that the appointment of a cousin of one of the judges of the St. Louis Court of Appeals did not violate the nepotism provision of the constitution so long as the related judge did not vote for his cousin. The court said l.c. 950:

> "Action, direct or indirect, not inaction is prohibited."

The court further said l.c. 951:

> "Now, in the instant proceeding, it is freely conceded that in the intended appointment there is no fact or in semblance any connivance, agreement, confederation, or conspiracy between the majority members of the Court of Appeals as between themselves or as between them, on the one hand, and the non-voting member on the other, or any common design between any two of them, that the two should accomplish in behalf of any or all a prohibited purpose." (Emphasis ours.)

We believe that the Becker case affirmatively recognizes the power of a member of a board to decline to vote and that such case, therefore, overrules the holding of the Marceline School District case insofar as non-voting members of the board are concerned.

CONCLUSION

It is the opinion of this department that an assistant election commissioner was validly appointed at a meeting of the four members of the Kansas City election board, where two members voted for the appointment of such assistant, one voted against the appointment of such assistant, and one member did not vote.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

APPROVED BY:

J. E. TAYLOR
Attorney General