

Opinion No. 15-1524

May 13, 1915

BY: FRANK W. CLANCY, Attorney General

TO: Mrs. Harriett L. Henderson, East Vaughn, New Mexico.

As to the holding of a local option election and the canvass of the returns thereof in the village of East Vaughn.

OPINION

{*109} I have today received your letter of the 11th instant, which I have read with much interest.

That my letter may be perfectly intelligible to anyone who may see it I will, as briefly as possible, repeat the substance of your letter as I understand it, so that one may have a clear idea of the situation.

It seems that East Vaughn is an incorporated village with a mayor and board of trustees, a clerk and treasurer; that some months ago two trustees resigned and their places were filled by appointment by the mayor; that a local option election has been regularly ordered by the board of trustees, calling the election for June 7, and appointing the election officers. In this state of affairs, on May 8, at a called meeting of the board of trustees the clerk, treasurer and the trustees, with one exception, resigned, leaving only the mayor and one trustee. Although you do not say so, or intimate anything of the kind, yet this presents somewhat the appearance of a sort of conspiracy entered into because of a fear that the town will vote itself dry. You do, however, mention the fact that these men say they have orders from the Santa Fe Railway Company to resign. Unless you have heard the men say so, and base your statement upon information from others, I would think that this must be impossible, and if the men do say anything of the kind I do not believe it is true, as it never has been the policy of the Santa Fe Railway Company to interfere in political affairs generally, nor in such local matters as the government of a town.

Your difficulty, as you state it, is that, expecting to win the local option election, you want to know how you are to get an ordinance to make prohibition effective, or how you are going to get another board of trustees. This is evidently because the statute requires, when a majority of the votes cast is in favor of prohibition that the municipality shall pass an ordinance necessary to carry the prohibition into effect.

In the first place, I do not believe that the mayor has any power whatever to fill vacancies in the board of trustees by appointment. The statutory authority for filling such vacancies is to be found in the 87th sub-division of Section 2402 of the Compiled Laws of 1897, which provides that all vacancies in any board of trustees of any incorporated

town or village may be filled by appointment of such board. If, however, the appointments made some months ago by the mayor to fill two vacancies were acquiesced in by the remainder of the board of trustees, of which board the mayor himself is a member, they would be held to be rightfully acting as trustees. It is a general rule of law that a resignation is not effective to create a vacancy until it is accepted by some lawful authority. In the absence {*110} of any designation as to who has the power to accept a resignation, there is a doctrine that it may be accepted by the person or board authorized to make an appointment to fill the vacancy. In this case it would be the board of trustees itself. The board of trustees consists of five members, and when, on the 8th of May, three trustees resigned, simultaneously I assume, there was not left any authority to accept their resignations, as there would be less than a quorum left when those three went out. I believe that they are still members of the board, and until their resignations are properly accepted and appointments made to fill the vacancies thus created, they can be compelled to act in their official capacity. Their proper course of proceeding was for them to resign one at a time so that there would be a quorum in existence to fill the vacancy, and after that vacancy should be filled, then another of the three could resign and the vacancy be filled in the same way.

You need a board of trustees, not only to pass the necessary ordinance to make prohibition effective, but also to make a canvass of the returns of your election. In order to bring about the desired result it would seem proper for citizens interested in the government of the village to institute proceedings in the district court, by way of mandamus, directed to the three resigning trustees, and to the clerk and treasurer, to compel them to continue in the discharge of their duties, from which they have not been relieved as yet by any proceeding in accordance with law. This would necessitate some expense, as you would be compelled to employ counsel, who could not be expected to give time and services without any compensation.

I will send you, under another cover, a copy of the last published report and opinions of this office, in which, at page 175, you will find a letter on the subject of resignations from office.