

Opinion No. 17-1982

April 19, 1917

BY: MILTON J. HELMICK, Assistant Attorney General

TO: Hon. J. H. Wagner, State Supt. of Instruction, Santa Fe, New Mexico.

On the Creation of a Municipal School District the Directors of the Rural District Do Not Hold Over, but an Entire Municipal Board Must Be Elected.

Where a New Municipal District Elects Only Two Members to the Board Such Persons Are De Facto Members and May Fill the Remaining Vacancies

OPINION

My We have your inquiry of today regarding the unfortunate tangle of the board of education of the Village of Lordsburg. You state that the Village of Lordsburg was duly incorporated on April 3, 1916, and that on the same day one member of the school board was elected, but that no further action has ever been taken to choose a full board of five members. You state also that the ostensible board consists of three members, one of whom was elected on the day of incorporation, as above stated, and one who is apparently holding over from the district board, and one who was elected for a term of three years on the first Monday of April of this year, instead of on the first Tuesday of April, which is the date of the regular election provided by law. You wish to know how many members of the board of education the Lordsburg district has under the above state of facts, also what must be done in order to obtain a full board of education of five members.

In the first place it is my opinion that the member who is holding over from the old rural district board of directors must be eliminated from consideration as a legal member of the village board of education. The former rural district went out of existence on the incorporation of the Village of Lordsburg and the territory formerly covered by the rural district became automatically attached to the municipality for school purposes. The dissolution of the rural district dissolved the rural board of school directors and I do not see how any member of the rural board could continue to serve the municipal school district after his office was abolished. The office of rural school director and that of member of the board of education are entirely distinct. The duties of the offices are different. In my opinion the member who is attempting to hold over was never elected to the office of member of the board of education, is without any color of title to such office.

The other two ostensible members are, I think, de facto officers. Both of them were chosen by election for the positions they occupy and, while both elections were doubtless irregular, I think that both men are in possession of their offices under color of title and are therefore de facto officers. The general rule of law in this regard is stated in Constantineau on the De Facto Doctrine, at Section 171, as follows:

"A person in possession of an office and in the open exercise of its functions, under color of an election or appointment, will be deemed an officer de facto, though he may have been illegally or irregularly elected or appointed thereto. As expressed by one Judge, 'all that is required where there is an office, to make an officer de facto, is, that the individual claiming the office is in possession of it, performing its duties, and claiming to be such officer under color of an election or appointment, as the case may be. It is not necessary his election or appointment should be valid, for that would make him an officer de jure.' To the same effect are the words of the Supreme Court of the United States: 'Where an office exists under the law, it matters not how the appointment is made, so far as the validity of his (de facto officer's) acts are concerned. It is enough that he is clothed with the insignia of the office, and exercises its powers and functions.'"

From the foregoing it is my opinion that the Lordsburg board of education now consists of two de facto members. Neither of these members, it appears, were elected for a term of four years as is required by law. It would seem that there are now three vacancies on the board. I note from your statement that you are inclined to doubt whether the failure to elect creates a vacancy within the meaning of the term as used in Section 4880, where it is provided that the board of education shall have power to fill vacancies occurring in their body. However I find much authority to the effect that a vacancy in office exists when there has been no election to fill the office at the time appointed by law. There is also much authority to the effect that a vacancy may exist when an office is created and no one has been elected to fill it, and I think such authority might also be applied to the case we are considering for the reason that the offices of members of the board of education were created by the incorporation of Lordsburg, but no election was ever had for three of such offices. Consequently I think that the two de facto members of the board should fill the three vacancies by appointment. I will not attempt to express any opinion as to the length of the term of the two present de facto officers, or of the three additional members that they might appoint. The questions you present are difficult of solution and I am by no means positive in the views set out in this letter. As a matter of policy and practical convenience, I think it might be well to elect five members at the next regular election on the first Tuesday of April, 1919, three of the members for a term of two years and two of the members for a term of four years. If this is done the members to be chosen at elections thereafter will conform with Section 4871, that is, three members will be chosen in 1921, two members in 1923, and so on.