

Opinion No. 16-1777

April 10, 1916

BY: FRANK W. CLANCY, Attorney General

TO: Honorable Filadelfo Baca, Assistant Superintendent of Public Instruction, Santa Fe, New Mexico.

Validity of school election held by only one director, and as to resignation of director.

OPINION

{*348} Referring to the matter about which you talked to me on Saturday last, before attempting to state my opinion, I will, as briefly as possible state the facts as I understand them from what you told me, as it seems necessary to do this in order to make my letter intelligible.

As I understand, in a school district the notices for the annual election of a school director were posted as required by Section 4852 of the Codification, to be held on the first Monday of April, 1916. On the day of the election, which is the day fixed by the statute itself, it appears that one of the three directors was absent from the state, one director declared that he had resigned and would not, therefore, participate in the holding of the election, so that there was but one director present, who proceeded to hold the election, and who, as I assume, certified the result of the election to the county school superintendent, as the statute requires. You informed me, also, that the county school superintendent has stated that he has received no resignation from the director who said that he had resigned.

You also told me that substantially the same thing happened in the same district in 1915, at which time the county superintendent held that there had been no election, and proceeded to appoint a director to fill the vacancy which existed by the termination of the term of office of the incumbent, and it is to be expected that he will naturally pursue the same course this year.

As I understand, you desire my opinion as to the validity of the election which was held, and as to the propriety of such proceedings as hereinbefore described which, in effect, put it in the power of school directors to prevent any election or any expression of the will of the voters at the polls.

Taking the second of these matters first, I will say that there can be no possible doubt of the wrongfulness of any conduct which prevents or tends to prevent the people from holding an election fixed and required by law. I will have something further to say of this in considering the question of the validity of the election which was held.

Before coming to that, however, I must first call attention to the fact that a man cannot rid himself of a public office by simply declaring that he resigns, or by offering a resignation. The Supreme Court of the United States, in *Edwards v. United States*, 100 U.S. 471, unanimously holds that in states where the common law obtains, and in the absence of express statute, acceptance is necessary to perfect a resignation. Other authorities have held that in the absence of any specific law prescribing to what authority a resignation {*349} should be presented, the proper authority to accept a resignation is that which has power to fill the vacancy. This is directly applicable to the resignation of a school director, which should be tendered to, and accepted by, the county superintendent before it is effective, as the county superintendent is the authority to fill a vacancy in such office, as you will see by reference to Section 4854 of the Codification. It follows, therefore, that the director who said that he had resigned, without having tendered a resignation to the county superintendent and having it accepted by that officer, was not out of office, and had there been time to do so, the people of the district might have compelled him, by mandamus from the district court, to continue in the discharge of his duties. I believe, also, he may now be prosecuted criminally under the second paragraph of Section 4852 of the Codification for malfeasance in office.

As to the validity of the election, it appears to be required by Section 4852 that the election shall be held by the directors serving at that time, and that the result of the election shall be certified by said directors to the county superintendent. There is no provision as to how the election shall be held, or what record shall be made of it. The provisions of law as to the posting of the notices of the election, and as to who shall be qualified to vote, and the day and hours between which the election shall be held, are mandatory provisions of law which cannot be disregarded, while the provisions as to certifying the result of the election to the county superintendent may be considered as directory only, and as long as the election is actually held, the people given an opportunity to vote, and a record of the result transmitted to the county superintendent, the election should be held valid. In *Paine on Elections*, at Section 498, the following language may be found:

"In general, those statutory provisions which fix the day and the place of the election and the qualifications of the voters are substantial and mandatory, while those which relate to the mode of procedure in the election, and to the record and the return of the results, are formal and directory. Statutory provisions relating to elections are not rendered mandatory, as to the people, by the circumstances that the officers of the election are subjected to criminal liability for their violation. The rules prescribed by the law for conducting an election are designed chiefly to afford an opportunity for the free and fair exercise of the elective franchise, to prevent illegal votes, and to ascertain with certainty the result. Generally such rules are directory, not mandatory; and a departure from the mode prescribed will not vitiate an election if the irregularities do not deprive any legal voter of his vote, or admit an illegal vote, or cast uncertainty on the result, and have not been occasioned by the agency of a party seeking to derive a benefit from them."

There can be no doubt that the foregoing quotation expresses a correct view of the law, and in the case of *State of Nebraska v. Russell*, 34 Neb. 116, it is declared that there is not to be found in the reports any diversity of opinion on the subject. In the case of *Fowler v. the State*, 18 Tex. 30, 35, the Supreme Court of Texas states the same doctrine.

{*350} Assuming that the election was fairly conducted, that every voter had an opportunity to vote, and that the result has been correctly certified to the county superintendent, even though it may have been by only one director, the application of the doctrine above set forth necessarily leads us to the conclusion that the election was valid, and that the director elected thereat must be held entitled to the office. Any other conclusion would make it possible for designing persons, by absence, pretended resignation, or mere refusal to act, to prevent the people of a district from making their choice at the polls of the persons whom they might desire to act as their school directors. I say this without necessarily imputing any bad motives to any of the school directors in this particular matter, but as showing the possibility of evil results if we could hold that there had been no election.