

Schools, School Districts. Trustees, Qualifications of in New Counties.

There is no exact time provided by the new county act and the school law within which school trustees must requalify, this question being within the discretion of the superintendent of schools of the new county. The mere failure to requalify before notice of a requirement to do so would not of itself work a forfeiture of the office, but a refusal after notice would constitute a forfeiture of the office.

February 20th, 1914.

Hon. H. A. Davee,
Superintendent of Public Instruction,
Helena, Montana.

Dear Sir:

I am in receipt of your communication under date of February

19th, submitting for my opinion as to the proper interpretation of Sec. 3 and Sec. 5 of Chap. 133, Session Laws of the Thirteenth Legislative Assembly, having to do with the tenure of school trustees within new counties, and specifically the following three questions:

"1. Is there any time limit prior to the expiration of which school trustees in a new county must qualify?

"2. In case of the failure of any school trustee to so requalify, does he forfeit the office in the apparent absence of any specific provision to that effect in the act quoted?

"3. What duty, if any, devolves upon the county superintendent by failure of the trustee to requalify?"

Sec. 3 of Chap. 133 of the Session Laws of the Thirteenth Legislative Assembly, provides in part as follows:

"The board of county commissioners shall divide the proposed new county into a convenient number of townships, road and school districts, and define their boundaries, and designate the names of such districts and each of them."

This is to be done at the time of the determining by the board of county commissioners, as to the sufficiency of the facts set up in the petition for county division, and previous to the proclamation and notice of election to be held to determine the question of county division, which occurs not less than ninety nor more than one hundred and twenty days previous to the election. Sec. 5 of this act, providing for the choosing of officers for the new county is in part as follows:

"That all duly elected, qualified and acting school trustees, residing within the proposed new county at the time of the division of such county into school districts, as hereinbefore in Sec. 3 hereof provided, shall hold office as school trustee in said new county for the remainder of the term for which they were elected, on qualifying as school trustee for the respective districts in which they reside, as said districts are organized as provided by this act."

The term of office of school trustees, and the manner of qualifying are prescribed by Paragraph 5 of Sec. 502 of Chap. 76, Session Laws of the Thirteenth Legislative Assembly.

"Every trustee shall file his oath of office with the county superintendent of schools. Any trustee who shall fail to qualify within fifteen days after being elected, shall forfeit all rights to office, and the county superintendent of schools shall appoint to fill the vacancy in the office of such trustee."

The apparent intention of the legislature shown by the language from Chap. 133, above quoted was that there should be no vacancy caused by county division in the office of school trustees. This is in accordance with the general policy of the law, which is against vacancies in office. The public is interested in having someone in the office to perform the duties thereof; therefore, there has grown up the doctrine of the law that the omission of a person entitled to an office to do that which will make him de jure an officer does

not ipso facto effect a vacation of the office. Some act on the part of the government having power to vacate offices in cases where such offices do not become vacant by operation of law, upon the happening of some event, is necessary before the office becomes vacant. A somewhat similar question arose in the State of New York in connection with the office of overseer of the poor. The electee to that office was required by statute to take the oath of office within a specified time, and before entering upon the duties of the office. It was also provided that if he neglected to do so, such neglect should be deemed a refusal to serve. Another provision of the law specified that in case of a refusal to serve, a special election should be held to fill the vacancy. The plaintiff in this action was the successor of a former holder and had taken the oath prescribed at the time he entered upon the office. Subsequently the required oath was changed in some respects and the claimant had not taken this oath, nor had any election been had to fill the office, and in passing upon the right of the claimant to the office the supreme court of that state used the following language:

“The statute does not in terms declare that the office shall be vacant on the failure to take the oath of office; but merely provides for an election arising out of what is treated by it, as a refusal to serve, to supply a vacancy the cause for which is furnished and provided for by the statute there mentioned.”

Horton v. Parsons, 37 Hun. (N. Y.) 42.

Under the state of law, as it is shown by the two enactments above quoted, the question of county division cannot be determined until an election is had and the votes canvassed. Consequently there is no one with whom school trustees, holding office at the time of the election, can qualify until it is determined who the superintendent of schools of the new county is. Nowhere, under the law, is any definite time prescribed within which trustees already in office shall requalify with the new county superintendent, the intimation being merely that they must requalify.

I am, therefore, of the opinion that this question is one which is to be determined by the new county superintendent of schools, and that the failure to so requalify after notice from the superintendent of schools of the county would be an indication of a refusal to act further as such trustee. This, I think, answers question No. 1.

From what has been said above it follows that the mere failure to qualify before notice of requirement to do so would not of itself forfeit the office. A refusal to requalify, however, after notice from the county superintendent, would constitute a forfeiture of the office, and the county superintendent would then have power to appoint some person to fill the vacancy. Sec. 502 of Chap. 76 of the Laws of 1913, I think, makes it the duty of the county superintendent to fill the office of school trustee upon the occurrence of a vacancy, and in as much as a refusal to qualify would effect a vacancy in the

office, it would then become incumbent upon the county superintendent, in the event of such refusal, to fill the office by appointment.

Yours very truly,

D. M. KELLY,

Attorney General.