

Opinion No. 23

SCHOOLS AND SCHOOL DISTRICTS; High Schools; boards of trustees; additional trustees—SCHOOLS AND SCHOOL DISTRICTS; High Schools; trustees; qualifications of additional trustee—Section 75-4601, Revised Codes of Montana, 1947

Held: An additional trustee on the board of trustees of a high school district, who has ceased to be a member of the board of trustees of the common school district where he resides is not eligible to continue in office as additional trustee and there is a vacancy in such office.

August 14, 1959

Mr. Gene B. Daly
County Attorney
Cascade County
Great Falls, Montana

Dear Mr. Daly:

You requested my opinion concerning the eligibility to hold office of a trustee of a common school district elected as an additional trustee to the board of district maintaining a high school who has ceased to be a member of the board of trustees of the district in which he resides.

Section 75-4601, RCM, 1947, provides for the election of additional members to the board of trustees of districts maintaining high schools from the common school district included within the boundaries of the high school districts. This section states in part:

"The additional trustees elected shall be elected from the trustees of the common school districts included within the high school district with the exception of the membership of the board of trustees of the school districts maintaining high schools."

The above quoted portion of the statute requires that an additional trustee also be a member of the board of trustees of a common school district. To be eligible to be elected, he must be a trustee at the time of his election and the question is whether the termination of his membership in the common school district board of trustees will create a vacancy in his office as a member of the board of trustees of the high school district.

In *LaBoarde vs. McGrath*, 116 Mont. 283, 149 Pac. 2d. 913, our Supreme Court considered the meaning of the word "vacancy" and said:

"Accordingly, an office is not vacant so long as it is supplied in the manner provided by the Constitution or law with an incumbent who is legally qualified to exercise the powers and perform the duties which pertain to it; and, conversely, it is vacant in the eye of the law whenever it is unoccupied by a legally qualified incumbent who has a lawful right to continue therein until the happening of some future event."

If membership in the board of trustees of a common school district is continuing qualification for eligibility to hold office as an additional trustee of the high school district, then a vacancy occurs in such office when membership in the board of the common school district is terminated.

The text in 42 American Jurisprudence 912 reads as follows:

"Eligibility to public office is of a continuing nature and must exist at the commencement of the term and during the occupancy of the office. The fact that the candidate may have been qualified at the time of his election is not sufficient to entitle him to hold the office, if at the time of the commencement of the term or during the continuance of the incumbency he ceases to be qualified."

In the case of *State ex rel. Fugina vs. Pierce*, 191 Wis. 1, 209 N.W. 693, the court held that a statute which required that a person be an attorney before he would be eligible to the office of judge was a continuing requirement and the revocation of his license to practice law created a vacancy in the office.

The above rules would apply to the statute in question as it is reasonable to assume the legislature intended to have the additional

trustee also a member of a board of trustees of the district of his residence so that there would be a working relationship between the two boards of trustees and the additional member, the link between the two.

The situation here is to be distinguished from that of a member of the board of county commissioners, who must reside in the district from which he is elected at the time of the election, but may continue to hold office, even though he changes his residence to another district, so long as he resides within the county. County commissioners are elected by all voters of the county and outside trustees are elected by the trustees of the outside common school districts from their membership. When a person ceases to be a trustee of a common school district, he ceases to represent the voters who elected him to office, but such is not true of a county commissioner.

Any vacancy in the office of trustee must be filled by the county superintendent making an appointment as provided in Section 75-1614, RCM, 1947.

It is therefore my opinion that an additional trustee on the board of trustees of a high school district, who has ceased to be a member of the board of trustees of the common school district where he resides is not eligible to continue in office as additional trustee and there is a vacancy in such office.

Very truly yours,
FORREST H. ANDERSON
Attorney General