

**COUNTY BOARD OF SUPERVISORS:** Conduct of Meetings; Representatives.

**HOME RULE CITIES:** Mayor pro tem.

City may provide for substitution of representation on county board of supervisors by designating mayor pro tempore, who may exercise all powers of supervisor, while acting in such capacity. Under facts stated, designee was effectively designated and acting. Clerk of county, acting as temporary chairman, may adjourn meeting of county board of supervisors from time to time until deadlock in proceedings to elect permanent chairman is broken.

No. 4121

February 11, 1963.

Oswald G. Casanova  
Prosecuting Attorney  
Iron County  
Crystal Falls, Michigan

You have requested opinion regarding the legality of proceedings taken by a county board of supervisors under the following facts:

At the regular organizational meeting of the Iron County Board of Supervisors in April, 1962, the Clerk of the Board opened the meeting with a call for nominations for election of a chairman. After numerous ballots, the Board of 20 members found itself hopelessly deadlocked at ten votes for each of two nominees. A motion was then made that they proceed to take care of ordinary business before the board, with the Clerk continuing as acting chairman.

At each and every monthly meeting subsequent until November, the first order of business called by the clerk, still acting as temporary chairman of the board, was the nomination and election of a chairman. Each and every meeting found the board continuously deadlocked and no chairman was elected. No committee appointments were made except by the Board acting as a committee of the whole relative to health and welfare assignments throughout the duration of the deadlock. Each of the meetings held was adjourned to a day certain in the following month, and on the 13th day of November, the Board was again convened by the Clerk acting as temporary chairman.

The City of Gaastra, a home rule city, is represented on the Board by two members, one being the supervisor elected by the people; the second being the Mayor, as provided by the City Charter. At the November meeting, the elected supervisor was present and the second representative was the purported Mayor pro-tem for the City of Gaastra, in the absence of the Mayor. The Mayor pro-tem cast his ballot for one of the two nominees for chairman of the board of county supervisors, thus breaking the deadlock on the 111th ballot cast since the April meeting. The then-elected chairman assumed the chair and conducted the balance of the meeting, signed the minute book, and appointed standing and special committees for the balance of the year.

Section 13.2 of the Charter of the City of Gaastra provides in pertinent part as follows:

"In case any representative of the city on the Board of Supervisors shall be unable to attend the meetings of the Board for any reason, the Mayor pro-tem shall serve as supervisor in his stead."

At the December meeting of the Board of County Supervisors, the Mayor for the City of Gaastra appeared in person and by counsel to question the right of the Mayor pro-tem to act in his stead at the previous meeting, also questioning the election of the chairman and the appointment of committees.

Here it is relevant to note that the Charter for the City of Gaastra provides at Section 6.1 that the City Commission shall choose one of their members who shall be Mayor pro-tem, who shall perform all duties and powers of the Mayor in the Mayor's absence, and that this action shall take place at the meeting of the Commission held on the second Tuesday in April. You state that the purported Mayor pro-tem who figures in this state of facts was not appointed at the meeting held on the second Tuesday of April, but at a regular meeting of the City Commission held in September.

It is also relevant to note that Section 5.7 of the City Charter of Gaastra prohibits any member from voting on any question concerning his own official conduct, or in which he has a financial interest, but requires all members present to vote on all other questions unless excused by the unanimous consent of other members present. You state that upon motion for appointment of Mayor pro-tem, two members voted for the appointment; the Mayor voted against the appointment; and the purported Mayor pro-tem refrained from voting. You further state that the Clerk subsequently recorded in the minutes for the City of Gaastra the election of this man as Mayor pro-tem, and the minutes were subsequently signed by the Mayor.

You have rendered Opinion to the Clerk of the County relative to the question of substitution of representation in the County Board and the question whether the purported Mayor pro-tem was properly acting as Mayor pro-tem for the City of Gaastra.

You ask this office to opionate on three questions:

1. May a city provide for a substitution of representation on a county board of supervisors?

This question is answered "Yes" on the authority of the ruling of my predecessor in O.A.G. No. 1649 rendered in April of 1953.<sup>1</sup> In this opinion it was ruled that a city charter may provide for temporary appointment of supervisor to take place of regularly appointed supervisor under the provisions of Article VIII, Section 7, of the Michigan Constitution of 1908, providing in pertinent part that "Cities shall have such representation in the boards of supervisors of the counties in which they are situated as may be provided by law."

As pointed out in this Opinion, Section 27 of the Home Rule Act for cities provides that any Home Rule City may by its charter provide for the selection by appointment or election of representatives on the county board of supervisors, the number of such representatives to be determined

<sup>1</sup> Report of the Attorney General, 1952-1954 p. 146.

by population in accordance with a schedule in said section, with certain exceptions not here pertinent.<sup>2</sup> In the same volume Opinion No. 1653 ruled that where a city charter limited the appointment of the substitute representative to serve during absence for disability of a regularly appointed representative, absence because of other work was not for disability and the board of supervisors was not obliged to seat a substitute.<sup>3</sup>

In view of the fact that the scope of the substitution is involved, it is appropriate to note that Section 13.2 of the Charter for the City of Gaastra provides as follows:

"In case any representative of the city on the Board of Supervisors shall be unable to attend the meetings of the Board for any reason, the Mayor pro-tem shall serve as supervisor in his stead."

It therefore appears that there is no limitation in the Gaastra City Charter which would prevent the authority of the Mayor pro-tem under the Charter provision to take effect. It is my opinion that under the provision of the Charter of the City of Gaastra as set forth above, a Mayor pro-tem designated to act in the stead of the regular representative on the board of supervisors may do so without necessity of any further action of the city commission at any time that the regular representative is unable to attend for any reason. It follows that the Mayor pro-tem, acting as duly designated representative for the City of Gaastra, may exercise all the powers of a supervisor, including participation in any vote which might come before the board such as the naming of a chairman.

We note that the statement of facts you set forth indicates that the Mayor was in fact "absent". We call your attention to the *Cytacki* case,<sup>4</sup> indicating that the duties of the acting mayor during the absence of the mayor should not be construed literally as meaning "not physically present", and that the intent of the framers and that of the people in adopting the charter as set forth by consideration of all charter provisions should be consulted to determine what power is conferred on the acting mayor during the mayor's absence. My opinion on question 1 is postulated upon your statement that there was in fact a bona fide absence of the mayor.

2. Was the purported Mayor pro-tem sufficiently legally constituted so as to be able to act in the stead of the Mayor under the Charter?

This question goes to the legal effect of the action of the City Commission of Gaastra by which the purported Mayor pro-tem was designated to act in this capacity as hereinabove set forth. The first question arises because the meeting at which the Mayor pro-tem was designated was held in September rather than at the meeting on the second Tuesday in April as contemplated by Section 6.1 of the Charter. In my opinion, the action is not rendered legally void by reason of the fact that it took place at a Commission meeting subsequent in date to that contemplated by the Charter. In appointing a Mayor pro-tem, the Commission acted in September to take

<sup>2</sup> M.S.A. 1949 Rev. § 5.2106, 1961 Cum. Supp.

<sup>3</sup> Report of the Attorney General of Michigan 1952-54, O.A.G. No. 1653, May 14, 1953, p. 152.

<sup>4</sup> *Cytacki vs. Buscko*, 226 Mich. 524.

action required by the Charter which had not been taken at the earlier date prescribed.

The City Commission had the duty under the Charter to designate a Mayor pro-tem and was not relieved of this duty by its own failure to act at the time specified by the Charter. The Home Rule Act is construed as a general grant of right and power including implied power, which is to be construed liberally and in the Home Rule spirit.<sup>5</sup> Further, no question was raised at the time the action was taken.

The more serious question regarding the status of the Mayor pro-tem arises from the fact that three commissioners and the Mayor were in attendance at the September meeting, and that upon the motion for the appointment of the purported Mayor pro-tem two commissioners voted for the appointment; the Mayor voted against it; and the commissioner nominated for the office of Mayor pro-tem abstained.

With respect to the number of members necessary to take official action on behalf of the city, Section 5.4 of the Charter provides as follows:

“Three members of the Commission shall be a quorum for the transaction of business at all regular meetings of the Commission, . . .”

Your facts show that three commissioners and the Mayor were in attendance at the September 11 meeting at which the Mayor pro-tem was designated. Therefore, a quorum was present.

The Mayor pro-tem considered himself disqualified from voting by reason of the provisions of Section 5.7, which provides as follows:

“The Commission shall determine its own rules and order of business, and shall keep a journal of its proceedings in the English language, which shall be signed by the Mayor and Clerk. Provided, however, that the vote upon all ordinances and resolutions shall be taken by ‘yea’ and ‘nay’ vote and entered upon the record, except that where the vote is unanimous it shall only be necessary to so state. No member shall vote on any question in which he is financially interested (other than the common public interest) *or any question concerning his own official conduct*, but on all other questions each member who is present shall vote unless excused by the unanimous consent of the other members present. Provided, further, that any citizen or taxpayer shall have access to the minutes and record of all meetings of the Commission at all reasonable times. Provided further, that a summary of the Commission proceedings at each meeting shall be prepared by the City Clerk and published in a newspaper of local circulation in the city.” [emphasis supplied]

Subsequently, two members voted for the appointment, and the Mayor voted against it. It therefore appears that a majority of those voting voted for the designation of the Mayor pro-tem. It is also relevant to note that the clerk subsequently recorded in the minutes for the city the election of

<sup>5</sup> *City Commission of Jackson v. Hirschman*, 253 Mich. 596; *Gallup v. City of Saginaw*, 170 Mich. 195; *Conroy v. City of Battle Creek*, 314 Mich. 210 at 221, *inter alia*.

the purported Mayor pro-tem in this capacity, and that the minutes were subsequently signed by the Mayor.

The Charter of the city contains no provision regarding the number of votes necessary, and no limitation of the same. There is, therefore, no legal basis for determining that the action of the Commission in designating the Mayor pro-tem was invalid.

With respect to his status after the vote described, I agree with your opinion that at worst he is a *de facto* officer inasmuch as the Clerk recorded his election in the minutes and the Mayor signed the minutes. It is also relevant that up to and including the present time, no action has been taken to challenge the validity of the election of the Mayor pro-tem. In this situation, it is my opinion that the purported Mayor pro-tem is properly acting in that capacity both *de facto* and *de jure*.<sup>6</sup>

3. What is the effect of a deadlock in the naming of a Chairman of the Board of Supervisors and the legal status of any provision after the April meeting towards electing the Chairman?

With respect to the conduct of the official business of the County Board of Supervisors, the statute, being Section 3 of Act 156 of the Public Acts of 1851, provides in pertinent part as follows:<sup>7</sup>

"A majority of the supervisors of any county shall constitute a quorum for the transaction of the ordinary business of the county, and all questions which shall arise at their meetings shall be determined by the votes of a majority of the supervisors present, except upon the final passage or adoption of any measure or resolution, or the allowance of any claim against the county, in which case a majority of all the members elect shall be necessary . . . . They shall, at their first meeting after the annual township meeting in each year, choose one of their number as chairman, who shall preside at all meetings of the board during the year, if present, but in case of his absence from any meeting, the members present shall choose one of their number as temporary chairman. . . ."

Ruling of the Michigan Supreme Court has established that county boards of supervisors have such implied powers and duties as are incident and necessary to performance of their express powers and duties.<sup>8</sup> It is the duty of the board of supervisors of the county to carry on the county business. It must, therefore, be concluded that the board of supervisors has power to do whatever it is reasonably necessary for it to do to break the deadlock which arose at the time the Board attempted unsuccessfully to carry out the behest of the statute by choosing one of its number as

<sup>6</sup> "The acts of officers *de facto* are as valid and effectual where they concern the public or the rights of third persons, until his title to the office is judged insufficient, as though he were an officer *de jure*, especially where the existence of the officer *de jure* cannot be challenged." *Case vs. Michigan Liquor Control Commission*, 314 Mich. 632.

<sup>7</sup> C.L. '48 46.3; M.S.A. (1961 Rev.) 5.323. The section was amended by Act 109, Public Acts of 1958. Act 144 of 1962, not yet in effect, changes the word "elect" to "elected".

<sup>8</sup> *Wright v. Bartz*, 339 Mich. 55, inter alia.

chairman. In my opinion, it was not improper for the Clerk to act as temporary chairman for purposes of the organization meeting. His activity in this capacity must be regarded as legally effective in the absence of successful legal challenge by adjudication.

It follows that since he was able legally to assume the position of temporary chairman in the first instance, it was not improper for him to adjourn the meeting from time to time, pending termination of the deadlock in the proceedings by which the permanent chairman would be elected and seated.

The remaining facet of the third question lies in whether the Mayor pro-tem of the City of Gaastra acted to legal effect when he participated in the meeting of the County Board of Supervisors at which the tie was broken and a permanent chairman elected.

For reasons set forth supra at Question 2, his status as Mayor pro-tem appears to this office to have been properly established and the question whether he was qualified to attend the meeting of the County Board of Supervisors depends on whether the Mayor was "absent for any reason". Since he was so absent, the Mayor pro-tem was qualified to act as a supervisor, and his activity was legally effective.<sup>9</sup>

FRANK J. KELLEY,  
*Attorney General.*

630211.2

**TAXATION:** Sales Tax.

**SCHOOLS:** School book defined as including year book.

Year books prepared by students and sold to students by schools or other educational institutions not operated for profit are exempt from the sales tax as school books, pursuant to Sec. 4a (c) of Act 167, P.A. 1933, as amended.

No. 4133

February 11, 1963.

Hon. Lynn M. Bartlett  
Superintendent of Public Instruction  
Lansing, Michigan

You have requested my opinion in answer to the following question:

"Are year books included within the exemption of school books under the Michigan Sales Tax Act?"

Act 167, P.A. 1933, as amended, being C.L.S. 1956, § 205.51 et seq.; M.S.A. 1960 Rev. Vol. § 7.521 et seq., provides for certain specific taxes, fees and charges to be paid to the state for the privilege of engaging in certain business activities.

Under Section 1 of the act persons subject to its terms include municipal or private corporations, whether organized for profit or not, as defined by the statute. The term "sale at retail" is defined by the section of the statute as any transaction by which is transferred for consideration the ownership

<sup>9</sup> *Ryan v. Van Anden*, 116 Mich. 654. See also footnote 6, supra.