New Jersey Corporation Business Tax Act if they fall within the non-recognition provisions of the Internal Revenue Code.

Very truly yours,

DAVID D. FURMAN
Attorney General of New Jersey

By: MURRY BROCHIN
Deputy Attorney General

FEBRUARY 29, 1960

FREDERICK M. RAUBINGER, *Commissioner*
Department of Education
175 West State Street
Trenton, New Jersey

FORMAL OPINION 1960—No. 3

DEAR DR. RAUBINGER:

You have asked for our legal opinion on two related questions: First, whether a candidate who has received the greatest number of votes in an election for member of the board of education of a local school district organized under Chapter 7 of Title 18 of the Revised Statutes is qualified to serve in that position although he will not have been a resident of the territory contained in the district for at least three years prior to the date upon which newly elected members are scheduled to take office; and, secondly, if not, then how the office for which he was a candidate should be filled.

The qualifications for members of the board of education of a local school district organized under Chapter 7 of Title 18 of the Revised Statutes are set forth in R.S. 18:7–11 as follows:

> "A member of a board shall be a citizen and resident of the territory contained in the district, and shall have been such for at least three years immediately preceding his becoming a member of the board. He shall be able to read and write. He shall not be interested directly or indirectly in any contract with or claim against the board."

The mandatory character of the quoted residence requirements are emphasized by R.S. 18:7–12 which states:

> "A member of a board shall, before entering upon the duties of his office, take and subscribe an oath, before an officer authorized to administer oaths, that he possesses the qualifications prescribed in section 18:7–11 of this Title, and the oath prescribed by section 41:1–3 of the Revised Statutes. The oaths shall be filed with the secretary."

A person who does not have the qualifications set forth in R.S. 18:7–11 cannot take the necessary oath and is therefore disqualified from "entering upon the duties of his office." *Cf. Waldor* v. *Untermann,* 7 N.J. Super. 605 (Law Div. 1950) aff'd 10 N.J. Super. 188 (App. Div. 1950).

In order to be elected as a member of a local board of education, a candidate for that office must have received "a plurality of the votes cast. . . ." R.S. 18:7–41.

Unless the votes cast for the candidate who received the highest number of votes can be disregarded because he is disqualified, no candidate can be considered to have received the necessary plurality. The general rule, supported by the great majority of the decisions throughout the United States, is: "that votes cast for a deceased, disqualified or ineligible person although ineffective to elect such person to office, are not to be treated as void or thrown away, but are to be counted in determining the result of the election as regards the other candidates." *Annotation*, "Result of election as affected by votes cast for deceased or disqualified person," 133 A.L.R. 319, 320 (1941). The same *Annotation* further states, "The cases have usually made no distinction on the basis of the nature of the disqualification, in applying the general rule—that votes cast for a deceased, disqualified, or ineligible person are not to be treated as void or thrown away, but are to be counted in determining the result of the election as regards the other candidates—so as to prevent the election of the person receiving the next highest number of votes, where the person receiving the highest number was disqualified." Id. at pp. 333-334.

This rule was adopted in New Jersey in *Chandler* v. *Wartman*, 6 N.J.L.J. 301 (Camden Cir. Ct. 1883) (not officially reported), a case involving a contested election for the office of chosen freeholder in the City of Camden. The petitioner in that case, Chandler, had received 379 votes; his opponent, Wartman, 418. The petitioner contended that Chandler did not have the necessary qualifications for office because he was not at the time of the election a "citizen of the United States, resident in the State of New Jersey and had not been resident in New Jersey one year immediately preceding the election." The petitioner argued that since he was the only qualified candidate who had received votes at the election, he was entitled to the office. The Court rejected petitioner's contention in the following terms *Id.* at pp. 302-303):

> "* * *Chandler received a minority of the votes cast for the office, and a minority candidate is not elected, whether his opponent be eligible or not. *This is the general rule established by numerous decisions.* The Supreme Court of Wisconsin, in several cases, has held that where the candidate who receives a majority of the votes cast for an office is proved not to be eligible, the candidate who received the next highest vote is not elected. *State* v. *Smith*, 14 Wis. 497. *State* v. *Giles*, 1 Chandler (Wis.) 112.
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> "The New York Court of Appeals, in *People* v. *Clute*, 50 New York (5 Sickles) p. 451, affirms this doctrine. Judge Folger, in delivering the opinion of the court, said: 'It is the theory and general practice of our government that the candidate who has but a minority of the legal votes cast does not become a duly elected officer.' In Missouri the same doctrine prevails. In one case in that State the Court remarked as follows: 'To declare a candidate for an elective office elected who has received but few votes, on the ground that his competitor, who received perhaps twice as many, was disqualified, would not accomplish the will of the electors, the object of an election being to ascertain the will of the majority. In *Commonwealth* v. *Churley*, 56 Pa. 270, the candidate who received the most votes for sheriff was disqualified, and the court held that the next highest candidate was not elected. The Judge, in delivering the opinion, said, 'The votes cast at an election for a person who is disqualified from holding an office are not nullities. They cannot be rejected by the inspector or thrown out of the account by the return Judges. The disqualified person is a person still, and every vote thrown for him is formal.'" (Emphasis added.)

The rule stated in the *Annotation* and exemplified by *Chandler* v. *Wartman, supra,* was recently approved by our Appellate Division in the case of *McCarthy* v. *Reichenstein,* 50 N.J. Super. 501 (1958). Plaintiff in the latter case had been a candidate for the office of councilman in the West Ward of the City of Newark. There had been seven candidates for that office, none of whom had received a majority. Plaintiff had received the third highest number of votes. The applicable statute (N.J.S.A. 40:69A–161), provides that if none of the candidates for councilman in a given ward receives a majority, a run-off election must be held between the two candidates receiving the highest number of votes. During the period between the election and the date set for the run-off, the candidate who had received the second highest number of votes died. Plaintiff contended that he was therefore the qualified candidate for office who had received the second highest number of votes and, consequently, should be permitted to enter the run-off election. But the Court denied plaintiff's contention, basing its decision on the rule previously quoted from the *Annotation* in 133 A.L.R. 319.

The rationale of the majority rule is that under our system of government, no person should be elected to office who has not been chosen by at least a plurality of the qualified electors actually voting. In a case such as that which you have described, the candidate receiving the second highest number of votes has not received such a plurality. There is no way to know for whom the persons who cast their ballots for the disqualified candidate would have voted if they had known he was ineligible for office.

Therefore, under the majority rule which has received the approval of the Courts of this State, the candidate who has received the highest number of votes in the school district election has not been elected because he is not qualified for the office; the other candidates were not elected because none of them received a plurality of the votes cast. Therefore, there has been a failure to elect the requisite number of members of the local board of education.

R.S. 18:4–7 provides:

"A county superintendent of schools may:

* * *

"(d) Appoint members of the board of education for a new township, incorporated town, or borough school district and *for any school district under his supervision which shall fail to elect members at the regular time* or in case of a vacancy in the membership of the board of education which occurs by reason of the removal of a member for failure to have the qualifications required by section 18:7–11 of the Revised Statutes or as the result of a recount or contested election or which is not filed within sixty-five days of the occurrence of the vacancy. Such appointees shall serve only until the organization meeting of the board of education after the next election in the district for members of the board of education." (Emphasis added.)

The county superintendent should therefore appoint a qualified person to membership in the board of education.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: MURRY BROCHIN
Deputy Attorney General

February 29, 1960.

HON. FLOYD R. HOFFMAN, *Director*
Office of Milk Industry
P. O. Box 1424
Trenton, New Jersey

FORMAL OPINION 1960—No. 4

DEAR DIRECTOR:

You have asked whether you have power under the Milk Control Act to require machines vending milk to be licensed as stores and whether you have authority to fix minimum prices chargeable to purchasers from vending machines at levels different than those fixed for purchasers from conventional stores. You do have power to require ordinary vending machines to be licensed as stores. You have authority to fix prices chargeable out of vending machines at different levels than prices chargeable in conventional stores on condition that statutory standards are shown to be satisfied by evidence at a hearing justifying the difference in treatment.

Section 28 of the Milk Control Act now in effect, L. 1941, c. 274, N.J.S.A. 4:12A–28, provides that "no * * * store, as defined in this act shall * * * engage in the milk business within this State, unless duly licensed as in this act provided * * *." Section 1 of the present act, N.J.S.A. 4:12A–1, defines the term "store" as follows:

> "A grocery store, delicatessen, food market, hospital, institution, hotel, restaurant, soda fountain, dairy products store, any governmental agency, roadside stand and similar mercantile establishments."

To determine whether a vending machine was intended to be included within the statutory definition of "store" it is necessary to examine the purpose and history of the legislation. The original Milk Control Act, L. 1933, c. 169, granted the Milk Control Board the power to fix prices "to be paid to the producer and to be charged the consumer." Although the Board was thus given power to fix prices at every stage of the distribution process, licenses were required only of dealers. *Id.*, Art. V, § 1(a).

The 1933 act did not satisfy all the needs for milk control. It expired of its own force in 1935 and was succeeded by a more comprehensive act, L. 1935, c. 175. The preamble to the 1935 act stated that "demoralizing practices" (i.e., price cutting) threatened not only the production of milk but also its distribution, creating conditions inimical both to the agricultural interests of the State and to the consumers. In order more effectively to prevent destructive price cutting the 1935 act extended the licensing requirement to stores. *Id.* § 500. The act defined the term "store" as follows:

> "A grocery store, delicatessen, hospital, institution, hotel, restaurant, soda fountain, dairy products store, roadside stand and similar mercantile establishments." *Id.* § 112.

The inclusion in the definition of the word "store" in the 1935 act of all the then known means of carry-away sales to the consumer plus a more general definition to include all "similar mercantile establishments," indicates a recognition that price cutting is just as harmful, regardless of the form of the outlet. You have recognized this potential for many years by prescribing in price-fixing orders the minimum price at which milk may be sold out of vending machines.