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INCORPORATION OF CITY — MUNICIPAL CORPORATION MAY NOT ADVANCE FROM STATUS OF VILLAGE TO THAT OF CITY—BASIS, POPULATION INCREASES—INTERIM CENSUS OF MUNICIPALITY—CONDUCTED PRIOR TO REGULAR DECENNIAL CENSUS—USC TITLE 13, FEDERAL BUREAU OF CENSUS—EXPENSE—REQUEST OF MUNICIPALITY.

SYLLABUS:

A municipal corporation may not advance from the status of a village to that of a city on the basis of population increases disclosed by an interim census of that municipality conducted prior to the regular decennial census as provided for in Title 13, United States Code, notwithstanding such interim census is or may be conducted by or under the authority of the Federal Bureau of the Census, and at the expense and request of the municipality.

Columbus, Ohio, March 17, 1954

Hon. Ted W. Brown, Secretary of State
Columbus, Ohio

Dear Sir:

I have before me your request for my opinion, which reads as follows:

"This office is in receipt of a letter from the City Solicitor of the Village of Kettering, in which it is asked if the village procured the services of the Federal Bureau of Census in conducting a census of the Village of Kettering, would the Secretary of State then, pursuant to such census proclaim Kettering a city even though the census was not a decennial one.

"There was no municipality of Kettering at the time the 1950 census was taken. Since that time the Township of Van Buren in Montgomery County incorporated as a municipality of Kettering. The Township of Van Buren had a population of 22,200 persons according to the 1950 census. When the entire township incorporated it was necessary to incorporate as a village for the reason that the statutes make no provision for the incorporation of a city.

"In October 1951 we discussed with your office the possibility of changing the status of the municipality of Mingo Junction. Mingo Junction was proclaimed a village pursuant to the 1950

census, and thereafter desired to annex territory in order to become a city; and they anticipated taking an enumeration to do so. It was our mutual thought that they could not become a city in this manner after the official proclamation.

"However, to my knowledge, we have not handled this particular question at hand, that is, where the Federal Government itself comes in and takes a later census. The City Solicitor stated that they have made arrangements with the Federal Bureau of Census to conduct such census at the cost of the municipality, and it is their contention that R. C. Section 703.06, contemplates this since it reads in part:

> 'When the result of *any* federal census or an enumeration as provided in Sections 703.02 to 703.05, inclusive, of the Revised Code, is officially made known to the Secretary of State, he forthwith shall issue a proclamation, * * *.' "

Antecedent to consideration of your precise inquiry, it may be observed that I have had occasion to hold in Opinion No. 3606, Opinions of the Attorney General for 1954, issued under date of March 17, 1954, to the Hon. Jackson Bosch, Prosecuting Attorney of Butler County, that an area does not acquire the status of a city upon incorporation notwithstanding the fact that such area prior to incorporation had a population in excess of 5,000 as disclosed by the last federal census. As I stated in that opinion, Section 703.01, Revised Code, clearly contemplates, for the purpose of classification, that the municipal corporation shall have been a municipal corporation at the time of the previous federal census.

In addition, the answer to the question which was the basis of our discussion of October, 1951, with respect to the municipality of Mingo Junction, and, which was referred to in your letter of inquiry, has been the subject of consideration and decision by our Supreme Court in the case of Murray v. State, ex rel Nestor, 91 Ohio St., 220, the third branch of the syllabus of which states as follows:

> "A municipal corporation which had a population of less than five thousand at the last federal census did not advance to a city when it was made to appear by an official census taken by the municipal corporation subsequently thereto that it had a population of more than five thousand."

Given the basic propositions that (1) there is no provision for the original incorporation of a city, and that a municipal corporation may only become such upon advancement from the status of a village, see 28

Ohio Jurisprudence, pp 46, 47 and (2) that a village may not advance to the status of a city prior to a federal census, notwithstanding that its population may be shown to be over 5,000, as disclosed by an enumeration conducted by or under the authority of such municipality, it is then necessary to determine whether the holding of the court in the case of Murray v. State, etc., supra, is in any way changed or modified where the census or enumeration is conducted by the Federal Bureau of the Census, at the behest and expense of the municipality itself. Section 703.06, Revised Code, provides as follows:

> "When the result of any federal census or an enumeration as provided in sections 703.02 to 703.05, inclusive, of the Revised Code, is officially made known to the secretary of state, he forthwith shall issue a proclamation, stating the names of all municipal corporations having a population of five thousand or more, and the names of all municipal corporations having a population of less than five thousand, together with the population of all such municipal corporations. A copy of the proclamation shall forthwith be sent to the mayor of each such municipal corporation, which copy shall forthwith be transmitted to the legislative authority of such municipal corporation, read therein, and made a part of the records thereof. Thirty days after the issuance of such proclamation each municipal corporation shall be a city or village as the case may be."

It is noted that the revision, inter alia, eliminated the word "future" as modifying "federal census" in the first sentence of Section 703.06, supra, but such change clearly does not affect the substantive meaning of that section. See Section 1.24, Revised Code. In further consideration of this question, we can eliminate the "enumeration" mentioned in Section 703.06, supra, since it clearly refers to an enumeration taken by or under the authority of a municipality, for the purpose of saving its status as a city, when a preliminary federal census report discloses that its population has so decreased as to require its reversion to the status of a village, Section 703.02, Revised Code. Consequently, the answer to your inquiry is confined to a consideration of what the legislature intended in providing for a proclamation upon the "result of any federal census" being made known to the Secretary of State.

Presumably the legislature enacted Section 703.06, supra, having in mind the provisions of Article I, Section 2, Constitution of the United States, providing in pertinent part as follows:

> "* * * The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such manner as they shall by Law *direct*. * * *" (Emphasis added.)

Whether or not the words "within every subsequent term of ten years," as set forth in the above constitutional provision, may be so construed as to permit Congress to direct a census of population at intervals of less than ten years, the fact remains that the Congress has not seen fit to do so, and the decennial census is the only enumeration of population directed in Title 13, United States Code, by the Federal Congress, although provision has been made for the collection of other data at other than ten year intervals. See, for example, Title 13, U.S.C.A., Sections 81, 94, 101, 113, 121, 251.

Thus, the procedure suggested and contemplated by the Village of Kettering for an enumeration of population, even though it be conducted under the aegis of the Bureau of the Census and at the expense of the village, is not a "federal census," in the sense that it is an enumeration directed by Congress, in obedience to the constitutional mandate of Article I, Section 2, of the Constitution of the United States. At the most it may be said that such procedure may be authorized by the Congress or by administrative interpretation of the federal statutes; but I find no provision of the federal law which is susceptible of the construction that such a special census must be taken by reason of Congressional direction or mandate. See 13 U.S.C.A. 121(b); 15 U.S.C.A. 189(a).

Scrutiny of the terminology of section 703.06, supra, is even more revealing for purposes of determining what the legislative intent was in this connection. It is clear that a census of at least state-wide coverage was the only census within the contemplation of the legislature. The proclamation of the secretary of state must contain the names of "* * * *all* municipal corporations having a population of five thousand or more and the names of *all* municipal corporations having a population of less than five thousand, together with the population of all such municipal corporations. * * *" In brief, every municipal corporation in the state of Ohio is comprehended within these two statutorily enumerated categories; and it is apparent that, in no sense, was it envisioned that a proclamation be issued relative to a single municipality, as a result of a special census thereof by whomsoever conducted.

I appreciate that the question of what constitutes a "federal" census and the related question of what constitutes a "state" census as applied to a single municipality or other political subdivision has been the subject of decisions in other jurisdictions. But inasmuch as they involved the interpretation of statutes peculiar to that state, and in view of the lack of a general unanimity of opinion, their authority is something less than compelling; In re Cleveland, 180 Pac. 852 (Okla., 1919); City of Compton v. Adams, 203 Pac. (2nd), 745, (Calif., 1949); Rhode v. Seavy, 29 Pac. 768, (Wash., 1892); Sproul v. State, 16 So. (2nd), 109 (Fla., 1944).

The meaning of the word "any" as used in Section 703.06, supra, becomes clear when viewed in the context in which it is used and in pari materia with the sections preceding. Obviously, the word "any" only serves to indicate any census, directed by Congress and having at least state-wide operation, conducted subsequent in point of time to that census whereby the status of the municipal corporation was originally established. What the legislature was intending to provide for, in my opinion, was that no municipal corporation acquiring status of a city or village on the basis of a previous federal census, has guaranteed or perpetual status as such, but it could and would change from one classification to another based on population factors disclosed by subsequent censuses whether conducted ten years or fifty years after the municipality had acquired such status.

Recognizing that interim population increases may render administration of government difficult or cumbersome, it should be noted that a village, as any municipal corporation, is empowered to frame and adopt a charter under Article XVIII, Section 7, Constitution of Ohio, thereby determining that it will exercise thereunder the powers of local self-government. It may also for administrative purposes adopt any of the three alternative plans of government provided for in Chapter 705, Revised Code.

Accordingly, and in specific answer to your inquiry, I am of the opinion that a municipal corporation may not advance from the status of a village to that of a city on the basis of population increases disclosed by an interim census of that municipality conducted prior to the regular decennial census as provided for in Title 13, United States Code, notwithstanding such interim census is or may be conducted by or under the

authority of the Federal Bureau of the Census, and at the expense and request of the municipality.

Respectfully,
C. WILLIAM O'NEILL
Attorney General