

62

1. CENSUS—CANDIDATES FOR OFFICE—MUNICIPALITY—PRESENTLY A VILLAGE—1950 CENSUS—POPULATION 5000 OR MORE—CANDIDATES FOR CITY OFFICES.
2. MUNICIPALITY PRESENTLY A CITY—1950 CENSUS—POPULATION LESS THAN 5000—CANDIDATES FOR OFFICE—SHOULD BECOME CANDIDATES FOR VILLAGE OFFICES.

## SYLLABUS:

1. Candidates for office in a municipality, which is presently a village but which will become a city because the 1950 census will officially disclose, prior to the November, 1951 election, that it has a population of 5,000 or more, should become candidates for city offices.

2. Candidates for office in a municipality, which is presently a city but which will become a village because the 1950 census will officially disclose, prior to the November, 1951 election, that it has a population of less than 5,000, should become candidates for village offices.

Columbus, Ohio, February 2, 1951

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

Dear Sir:

This will acknowledge receipt of your request for my opinion, which reads as follows:

“Section 3498, General Code of Ohio, provides in substance that when the result of any future federal census is officially made known to the Secretary of State, he shall forthwith issue a proclamation, stating the names of all municipal corporations having a population of 5,000 or more and the names of all municipal corporations having a population of less than 5,000, together with the population of all such corporations. It is further provided that a copy of the proclamation shall forthwith be sent to certain named officials of the municipal corporations and that from and after thirty days of the issuance of such proclamation, each municipal corporation shall be a city or village, determined by the population as aforesaid.

“The office of the Secretary of State has made every effort to secure from the Federal Bureau of Census the official results of the 1950 census in order that he may issue the proclamation

provided by law. However, written advice has been received from the Federal Census Bureau that official figures will not be made available until next July. On the other hand, the Federal Bureau of Census has made available to the press and public, unofficial figures showing the population of the various municipalities of Ohio.

“Assuming that the result of the 1950 federal census is officially made known to the Secretary of State during the month of July, 1951, and assuming the statistics therein contained disclose that a municipality presently a village is advanced to a city because its population is 5,000 or more and, in the alternative, assuming a municipality presently a city is changed to a village because its population is disclosed to be less than 5,000, I respectfully request your opinion on the following questions:

“(1) Should candidates for office in a municipality, which is presently a village but which will become a city because the 1950 census will officially disclose, prior to the November, 1951 election, that it has a population of 5,000 or more, become candidates for village offices or for city offices?

“(2) Should candidates for office in a municipality, which is presently a city but which will become a village because the 1950 census will officially disclose, prior to the November, 1951 election, that it has a population of less than 5,000, become candidates for city offices or for village offices?”

Section 1 of Article XVIII of the Constitution of Ohio, adopted September 3, 1912, is as follows:

“Municipal corporations are hereby classified into cities and villages. All such corporations having a population of five thousand or over shall be cities; all others shall be villages. The method of transition from one class to the other shall be regulated by law.”

The above provision of the Constitution relating to the classification of municipal corporations is not self-executing. Sections 3497, 3498 and 3499 of the General Code regulate the method of transition of municipal corporations from one class to the other and are not inconsistent with this provision of the Ohio Constitution. *Murray v. State, ex rel. Nestor*, 91 O. S. 220. The sections of the General Code considered by the Supreme Court in the *Murray* case, *supra*, are as follows:

Section 3497, General Code:

“Municipal corporations, which, at the last federal census, had a population of five thousand or more, shall be cities. All

other municipal corporations shall be villages. Cities which, at any future federal census, have a population of less than five thousand shall become villages. Villages which, at any future federal census, have a population of five thousand or more, shall become cities.”

Section 3498, General Code :

“When the result of any future federal census 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 corporations. A copy of the proclamation shall forthwith be sent to the mayor, of each municipal corporation, which copy shall be forthwith transmitted to council, read therein and made a part of the records thereof. From and after thirty days after the issuance of such proclamation each municipal corporation shall be a city or village, in accordance with the provisions of this title.”

Section 3499, General Code :

“Officers of a village advanced to a city, or of a city reduced to a village, shall continue in office until succeeded by the proper officers of the new corporation at the next regular election, and the ordinances thereof not inconsistent with the laws relating to the new corporation shall continue in force until changed or repealed.”

It will be noted that Section 3497, General Code, provides in part as follows :

“\* \* \* Cities which, at any future federal census, have a population of less than five thousand shall become villages. Villages which, at any future federal census, have a population of five thousand or more, shall become cities.”

Section 3498, General Code, is concerned with the mechanics of the transition of a village to a city, or vice versa. The Legislature provided that when the result of any future federal census 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 corporations. A copy of the proclamation shall forthwith be sent to the mayor of each municipal corporation, which copy shall be

forthwith transmitted to council, read therein and made a part of the records thereof. From and after thirty days after the issuance of such proclamation, each municipal corporation shall be a city or village, based on population, determined as aforesaid.

It appears from your communication that the Secretary of State has made every effort to secure from the Federal Bureau of Census the official results of the 1950 census in order that he may issue the proclamation provided by law. However, written advice has been received by the Secretary of State from the Federal Bureau of Census that official figures will not be made available until July, 1951. On the other hand, the Federal Bureau of Census has made available to the press and the public unofficial figures showing the population of the various municipalities of Ohio.

Section 4785-3, General Code, contains, inter alia, the following definitions:

“\* \* \* b. The term ‘regular municipal election’ shall mean the election held on the first Tuesday after the first Monday in November in odd-numbered years. \* \* \*

“e. The term ‘primary’ or ‘primary election’ shall mean an election held for the purpose of nominating persons as candidates of political parties for election to offices, \* \* \*. Primary elections shall be held on the first Tuesday after the first Monday in May of each year.”

Section 4785-4, General Code, provides, inter alia, that general elections in the State of Ohio and its political subdivisions shall be as follows:

“\* \* \* d. For municipal and township officers \* \* \* in the odd numbered years.”

Section 4785-6, General Code, provides that the Secretary of State, by virtue of his office, shall be the chief election officer of the state with such powers and duties relating to the registration of voters and the conduct of elections as are prescribed in Title XIV of the General Code, Election Laws.

By virtue of the first paragraph of Section 4785-70, General Code, each person desiring to become a candidate for a party nomination or for election to an office or position to be voted for at a primary election shall, not later than 6:30 p. m. of the ninetieth day before the day of such pri-

mary election, file a declaration of candidacy and petition and pay the fee required by law, and such declaration of candidacy, petition and all part petitions shall be filed at the same time as one instrument.

Obviously, if the official result of the 1950 federal census will not be made known to the Secretary of State until July, 1951, he can not issue the proclamation contemplated by Section 3498, General Code, prior to the time when it will become necessary for candidates to file their respective declarations of candidacy for nominations for municipal offices to be filled at the primary election to be held on the first Tuesday after the first Monday of May, 1951. However, inasmuch as the status of each municipality will be established from and after thirty days after the issuance of said proclamation by the Secretary of State, it appears that prior to the regular municipal election to be held on the first Tuesday after the first Monday of November, 1951, the status of each municipality of Ohio, as to whether it is a city or a village, will have been established.

In the interim it would appear that all candidates, who will be affected by the proclamation, will have the same opportunity to obtain the unofficial figures as to the population of the municipalities of Ohio, as reflected by the findings of the Federal Bureau of Census, as will the Secretary of State. Therefore, each candidate will have to determine for himself or herself whether the municipal office to which he or she aspires will, on the first Tuesday after the first Monday in November, 1951, be a city office or a village office.

It should be noted at this point that elections belong to the political branch of the government and not to the judicial, and are not per se the subject of judicial cognizance, but are matters for political regulation. The Secretary of State, as the state supervisor of elections, and deputy state supervisors and inspectors of elections, are authorized by law, duly enacted by the Legislature of Ohio, to conduct all public elections in the manner prescribed by the provisions of Title XIV, Chapter 1, General Code, and to hear and determine all preliminary questions pertaining thereto. The state, *ex rel. Gongwer v. Graves*, Secretary of State, 90 O. S. 311.

Inasmuch as neither the Constitution nor Sections 3497, 3498 and 3499, General Code of Ohio directly answer the questions propounded by you, a realistic course should be followed, based on the purpose and intent thereof, and guided by previous interpretations thereof.

Illuminative of the solution of the problem is Opinion No. 6101, Opinions of the Attorney General for 1943, page 287, wherein the then Attorney General held:

“Unless provisions contained in a charter which may have been adopted by it provide otherwise, a city which became such in the year 1941 by reason of the proclamation of the Secretary of State based on the 1940 Federal census and issued prior to the regular municipal election held in the year 1941, was required to elect a city auditor at such election to serve for a term of four years from the first day of January, 1942.”

The logic which directs the course to be followed by prospective candidates for municipal offices in the so-called “method of transition” from village to city, or vice versa, is considered in the case of *The State, ex rel. Heffernan, et al, v. Serp, et al.*, 125 O. S. 87. While the issues before the court were not those propounded by your questions, nevertheless the reasoning of the opinion, pages 88 to 97, inclusive, readily lends itself to the consideration of the problems before us. In the interest of brevity, however, only the third branch of the syllabus of the Heffernan case, *supra*, is cited, to-wit:

“It is the true intent and meaning of Section 3499, General Code, that village officers shall continue in office, with the powers and duties only of village officers until the first regular election after the proclamation of the secretary of state has been filed with the mayor of the municipality as provided by Section 3498, General Code.”

It appears that candidates should seek nomination or election, as the case may be, to the types of municipal offices which are to be filled at the November, 1951 municipal elections. Any other course would lead to confusion and chaos.

Your questions, therefore, are answered as follows:

1. Candidates for office in a municipality, which is presently a village but which will become a city because the 1950 census will officially disclose, prior to the November, 1951 election, that it has a population of 5,000 or more, should become candidates for city offices.

2. Candidates for office in a municipality, which is presently a city but which will become a village because the 1950 census will officially

disclose, prior to the November, 1951 election, that it has a population of less than 5,000, should become candidates for village offices.

Respectfully,

C. WILLIAM O'NEILL

Attorney General