

"Provided, however, that when a high school pupil shall attend a high school other than that to which such pupil has been assigned, the transportation and tuition shall be based on the cost of the transportation and tuition incident to attendance at the school to which they shall have been assigned."

In accordance with this provision of law, I am of the opinion, in specific answer to your question, that the Wells Township Board of Education, not only may, but is required under the law to pay so much of the cost of tuition and transportation for the eleven students attending Smithfield High School as it would be required to pay for those students if they had attended the Brilliant High School, to which they had been assigned.

For a further discussion of the principles of law applicable to situations of this kind, your attention is directed to the Opinions of the Attorney General for 1930, page 1464, and to Opinion No. 4223 rendered by this office under date of April 1, 1932.

I have assumed, in the preparation of this opinion, that the Brilliant High School is a high school of the first grade. If it is not, the conclusion might be somewhat different. See Sections 7747 and 7748, General Code.

Respectfully,

GILBERT BETTMAN,
Attorney General.

4351.

REFERENDUM PETITION—VILLAGE—NAMES MAY BE WITHDRAWN UNTIL PETITION CERTIFIED BY CLERK TO BOARD OF ELECTIONS—NO AFFIDAVIT REQUIRED FOR SUCH WITHDRAWALS—BOARD OF ELECTION MAY INVESTIGATE SIGNATURES AND IF INSUFFICIENT REFUSE TO SUBMIT TO ELECTORS.

SYLLABUS:

1. *Names may be withdrawn from a village referendum petition at any time until it has been certified by the clerk to the board of elections, even though such certification is made after the expiration of the ten day period during which the clerk must keep the petition open for public inspection.*
2. *Names of subscribers to a village referendum petition may be withdrawn upon the request of such subscribers, and it is not necessary that the paper bearing such requests contain any affidavit either of the signers thereof or of the circulator thereof.*
3. *A Board of elections has the right to canvass the signatures on a village referendum petition, and it is not required to submit the ordinance or other measure to the electors of the municipality for their approval or rejection if the signatures on such petition are insufficient.*
4. *While there is no express authority for the village clerk to certify withdrawals from such a petition to the board of elections where such certification has been made, such board would have the right to consider them along with the petition, and if the signatures to the petition are insufficient by reason of such withdrawals, or for any other valid reason, it would not be required to submit the ordinance or other measure to the electors of the municipality.*

5. Section 1g of article II of the Ohio Constitution and section 4785-179, General Code, apply only to state-wide legislation.

COLUMBUS, OHIO, May 23, 1932.

HON. DWIGHT CUSICK, *Prosecuting Attorney, New Lexington, Ohio.*

DEAR SIR:—I acknowledge receipt of your communication which reads in part as follows:

"This day I received from John C. Teal, Clerk of the Board of Elections for Perry County, the following letter:

"The Board of Elections of Perry County, Ohio, at their meeting on March 31, 1932, instructed me, as Clerk of said Board to submit the attached proposition to you for a written opinion on the questions raised therein.

Due to the fact that these matters are of general interest to every municipality in the state, the Board respectfully requests that they be submitted to the Attorney General of Ohio for an opinion on same.'

The proposition attached to said letter is as follows:

(HISTORY)

'The Board of Elections of Perry County, Ohio, is confronted with the following situation:

On November 9, 1931, the Council of the Village of New Lexington, Ohio, by a suspension of the rules, passed an Ordinance increasing the salary of the Mayor of said village. On December 7, 1931, (within the thirty day period allowed by law), a petition, valid in all respects and with more than the required number of signers, was filed with the Clerk of said village, asking for a referendum on said Ordinance. The Clerk of said village held said petition for referendum for a period of twenty-three (23) days after same had been filed with him. During the period in which the Clerk held this petition, and after the ten (10) day period required for public inspection, a counter-petition was circulated among the signers of the original petition, seeking to have them withdraw their signatures from said original petition. This counter-petition was filed with the Clerk of said village on December 30, 1931, and the Clerk, on the same day, certified the original petition for the referendum and the counter-petition together, to the Board of Elections of Perry County, Ohio. The counter-petition was not sworn to by the circulators thereof, nor by the signers of same; it contained sufficient names thereon to bring the original referendum petition below the required number, if said names are permitted to be withdrawn by the counter-petition filed herein.

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(QUESTIONS)

QUESTION NO. 1. May names be withdrawn from a village referendum petition after the expiration of the ten (10) day period during which the Clerk must keep the petition open for public inspection?

QUESTION NO. 2. May names be withdrawn from a village referendum petition in the manner used herein, viz: By counter-petitions circulated among the signers of the original petition, which said counter-petitions were not sworn to by the circulators thereof, or anyone else?

QUESTION NO. 3. Is there any authority in law for a village Clerk to certify a counter-petition, such as was filed in this case, to the Board of Elections?

QUESTION NO. 4. (a) What, if any, are the duties of the Board of Elections in connection with said counter-petition after same has been certified to the Board by the Village Clerk?

(b) What, if any, are the duties of the Board of Elections in connection with said referendum petition after same has been certified to the Board by the Village Clerk?

QUESTION NO. 5. There are certain constitutional and statutory provisions (Article II, Section 1g, of the Constitution of Ohio, and Section 4785-179, G. C.) requiring that petitioners be given ten (10) days to secure additional signatures, where a referendum petition is declared insufficient for lack of the required number of signers. Do these provisions merely apply to state referendums, or should the same procedure be followed in connection with a municipal referendum, where the petition is held to be insufficient for lack of the required number of signers?

QUESTION NO. 6. What effect, if any, did the enactment of Section 4785-185 G. C. (113 O. L. 394) and the subsequent repeals of said Section (114 O. L. 715) have on the statutory provisions relating to referendum in municipalities?

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Since it is the desire of the Board of Elections of Perry County that these questions be answered by your office, I respectfully submit the same to you."

Your inquiries will be considered in the order in which they are stated in your letter.

1. Section 4227-2, General Code, reads in part as follows:

"When a petition signed by ten per cent. of the electors of any municipal corporation shall have been filed with the city auditor or village clerk in such municipal corporation, within thirty days after any ordinance, or other measure shall have been filed with the mayor, or passed by the council of a village, ordering that such ordinance or measure be submitted to the electors of such municipal corporation for their approval or rejection, such city auditor or village clerk shall, after ten days, certify the petition to the board of deputy supervisors of elections of the county wherein such municipality is situated and said board shall cause to be submitted to the electors of such municipal corporation for their approval or rejection, such ordinance, or measure at the next succeeding regular or general election, in any year, occurring subsequent to forty days after the filing of such petition."

The right of signers to petitions to withdraw their names therefrom, in the absence of statutory provisions to the contrary, has been recognized in this state in several cases. See *Hays, et al., vs. Jones*, 27 O. S. 218; *McGonnigle, et al., vs. Arthur, et al.*, 27 O. S. 251; *Dulten vs. Hanover*, 42 O. S. 215; *State, ex rel., vs. Rupert*, 99 O. S. 17; *County Board of Education vs. Board of Education*, 112 O. S. 108; *Neiswander, et al., vs. Brickner, et al.*, 116 O. S. 249.

There is no provision authorizing the filing of additional parts containing

more signatures after thirty days after an ordinance or other measure is filed with the mayor or passed by the village council where a petition is found insufficient. The holding that signatures may be withdrawn after this thirty day period may lead to abuses, as opponents of the referendum might sign the petition with the intention of withdrawing their signatures after the thirty day period has elapsed, when additional names could not be supplied, and thus possibly defeat the right to a referendum. It would also seem that upon lapse of the thirty day period a public right has been affected in that the petition has then operated to suspend the taking effect of the ordinance. However, the case of *State, ex rel., vs. Rupert, supra*, clearly holds that names may be withdrawn from such petition until it has been certified by the auditor or clerk to the board of elections. In this case the court says:

"The general assembly of Ohio, in the enactment of Section 4227-2, General Code, evidently recognized this right, and afforded the signers of a referendum petition an opportunity for its exercise by providing in this section that the clerk or city auditor shall not certify such petition to the board of deputy supervisors of elections until after the expiration of ten days from the date of filing the same.

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He cannot arbitrarily withhold certifying such petition to the board of deputy supervisors of elections for the purpose of permitting the withdrawal of further signatures; but until official action is taken by him, or an action in mandamus is brought, any person signing a petition has the right to withdraw his name therefrom."

I am of the opinion therefore that names may be withdrawn from a village referendum petition at any time until it has been certified by the clerk to the board of elections, even though such certification be made after the expiration of the ten day period during which the clerk must keep the petition open for public inspection.

2. There is no statutory provision for the filing of counter-petitions. However, if these so-called counter-petitions contained the request that the names of the signers thereof be withdrawn from the petition, I think they are sufficient to constitute a withdrawal of their names. In the case of *Hays, et al., vs. Jones, et al., supra*, a petition for a road improvement was involved. Thereafter some of the signers of the petition filed a remonstrance with the commissioners. This was claimed to be insufficient because it was in the nature of a counter-prayer, but the court said:

"As held on the first proposition, this jurisdictional majority must be found in the attitude of asking for the improvement at the time the proposed final order is to be made; and one who has subscribed the petition may, at any time before the board makes the final order, by remonstrance or other unmistakable sign, signify his change of purpose.

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The form or manner in which his dissent is made known is immaterial."

Certain formalities are required with respect to initiative and referendum petitions. Section 4227-4, General Code, reads in part as follows:

"Each signer of any such initiative or referendum petition must be an elector of the municipal corporation in which the election, upon the ordinance or measure proposed by such initiative petition or the ordinance or measure referred by such referendum petition, is to be held, and shall place on such petition, after his name, the date of signing, his place of residence, including street and number, if any, and the ward and precinct. Each part of such petition shall contain the affidavit of the person soliciting the signatures to the same, which affidavits shall contain a statement of the number of signers of such part of such petition and shall state that to the best of his knowledge and belief each of the signatures contained on such part is the genuine signature of the person whose name it purports to be, and believes that such persons are electors of the municipal corporation and that they signed such petition with knowledge of the contents thereof."

There is some force to the claim that withdrawals should be equally as formal. The requirements as to these petitions were made for the purpose of obviating fraud, and it could be argued that to permit withdrawals without any affidavits as to the genuineness of the signatures to the request for such withdrawals, would open the door to fraud upon the part of those opposed to the referendum. In fact, this view has been taken in the case of *State, ex rel., vs. Sullivan*, 283 Mo. 546. However, the law in Ohio is otherwise. In the case of *State, ex rel., vs. Rupert, supra*, the record shows that the withdrawals were made by the filing of numerous slips of paper with the auditor, containing the signatures of certain of the signers of the petition with the request that the names of the subscribers thereto be withdrawn from the petition. The court must have found these withdrawals valid because it affirmed the judgment of the court of appeals which denied a writ of mandamus compelling the clerk to certify the petitions to the board of elections

3 and 4. As section 4227-2, General Code, requires only the petition to be certified to the board of elections, there is no statutory requirement that a village clerk certify a counter-petition. Such clerk has the right to canvass the signatures on a referendum petition, and if they are insufficient, by reason of withdrawals or otherwise, he is not required to certify anything to the board of elections. As stated in *State, ex rel., vs. Rupert, supra*:

"Every officer of this state or any subdivision thereof not only has the authority but is required to exercise an intelligent discretion in the performance of his official duty. A city auditor is not required to certify to the board of deputy supervisors of elections a petition for referendum that does not comply with the provisions of Section 4227-2, General Code. However, the conclusion he may reach as to whether such petition does or does not conform to the provisions of that section is not final. That is a question to be adjudicated by the court in an action either to restrain the auditor from certifying the same or to compel him to do so."

The same conclusion was reached in the case of *State, ex rel. vs. Carrel*, 105 O. S. 351, for the court denied a writ of mandamus compelling the auditor to certify a referendum petition to the board of elections on the ground of the insufficiency of the signatures on such petition.

Formerly the law provided that the city auditor or village clerk certify to the board of elections, not the petition, but simply the fact that a referendum

petition has been filed with him. 102 O. L. 521. Under the law as it then stood, clearly the board would have no right to canvass the signatures to such a petition. See Opinions of Attorney General for 1912, Vol. II, page 1670. However, since the law now provides that the petition itself is certified to the board, I am of the view that the board has the same right to canvass the signatures thereon as the city auditor or village clerk has, and that such board likewise would not be required to submit the ordinance or other measure to the electors for their approval or rejection if the signatures were insufficient. (It is possible that the law was so amended for the reason that the board of elections has more facilities to determine the sufficiency of the signatures.) Therefore, while the law does not expressly authorize the village clerk to certify withdrawals to the board of elections, I can see no objection to such certification; and where such withdrawals have been so certified, I am of the opinion that the board of elections can consider them along with the petition, and if the signatures to the petition are insufficient by reason of withdrawals, or for any other valid reason, such board would not be required to submit the ordinance or other measure to the electors of the municipality.

5. It has been definitely decided that section 1g of Article II of the Constitution applies only to state-wide legislation. The first two branches of the syllabus in the case of *Dillon vs. City of Cleveland*, 117 O. S. 256, read as follows:

"1. Sections 4227-1 to 4227-13, General Code, provide the procedure for the initiative and referendum in cities having no charter and in cities having a charter which contains no initiative and referendum provision for its own ordinances and other legislative measures.

2. Section 1g of Article II of the Ohio Constitution has application only to state-wide legislation, and general laws of the state relating to the initiative and referendum in cities and city charters containing initiative and referendum provisions are not required to conform thereto."

Sections 4785-175 to 4785-182, inclusive, clearly show that they apply only to state-wide legislation, and I am of the view therefore that the provisions of section 4785-179, General Code, providing for the allowance of ten additional days to secure more signatures where a petition has been found insufficient do not apply to municipal legislation.

6. Section 4785-183, General Code, provided as follows:

"In all municipal corporations which have not or may not provide by ordinance or charter for the manner of exercising the initiative and referendum powers reserved by the constitution to the people thereof, the duties required of the secretary of state by this act as to state legislation, shall be performed as to such municipal legislation by the clerk of the council. The provisions of this act shall apply in every municipality to the legislative acts of the council, unless otherwise provided for by the charter or legislative authority of such municipality."

The repeal of this section evidences the intention of the legislature that the sections preceding it should not apply to municipal legislation, and the statutory provisions relating to the initiative and referendum in municipalities which have no charter provisions therefor have the same force and effect as they would have, had section 4785-183 never been enacted.

"A general rule of interpretation of statutes is, that when an act of

the legislature is repealed without a saving clause, it is considered, except as to transactions past and closed, as though it never had existed."
Friend vs. Levy, 76 O. S. 26.

Respectfully,

GILBERT BETTMAN,
Attorney General.

4352.

EDUCATIONAL EQUALIZATION FUND—PARTICIPATION IN SUCH FUND WHERE SCHOOL DISTRICT TAX RATE LESS THAN NINE AND ONE-HALF MILL—MUST COMPLY WITH SECTIONS 5625-18a AND 5625-18c, G. C.

SYLLABUS:

A school district wherein the property of the district is taxed for the current year for all school purposes, at a rate less than nine and one-half mills, which rate is calculated without any reduction as authorized under some circumstances by the terms of Section 5548-2, of the General Code, is not permitted under the law to participate in the state educational equalization fund unless the electors of the district have voted affirmatively on the proposition required to be submitted to them by Sections 5625-18a to 5625-18c, inclusive, of the General Code, and the board of education of the district has levied for the current year all taxes permitted by law and under such vote of the electors.

COLUMBUS, OHIO, May 23, 1932.

HON. B. O. SKINNER, *Director of Education, Columbus, Ohio.*

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

“A school district has 8 mills for operating expenses but has only 1.35 mills for bonded interest. Is it possible for this district to participate in the Educational Equalization Fund of the State?”

Pertinent to your inquiry are the provisions of Section 7595-1, General Code, which reads in part:

“The board of education of any school district may at any time prior to July 31 of any year apply to the director of education for participation in the state educational equalization fund for the ensuing school year. Such application shall be in such form as the director of education prescribes. Such application shall not be granted unless the property of the given district is to be taxed for the current year for the current expense of school operation at a rate of at least eight mills, and is to be taxed for the current year for all school purposes at a rate of at least nine and one-half mills, provided that in a school district having a valuation of property for the preceding year of less than twenty-five hundred dollars per child enumerated the preceding year and having a sinking fund, interest and bond retirement levy in excess of three mills, the director of education may authorize the inclusion within the foregoing rate of eight mills of all or any part of the sinking fund, interest and