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CLERK-TREASURER, VILLAGE—COMBINED OFFICES AND DUTIES IN VILLAGES HAVING LESS THAN TWO THOUSAND PERSONS; §733.261 RC — CERTIFICATION OF SUCH LEGISLATIVE COMBINATION TO COUNTY BOARD OF ELECTIONS 105 DAYS BEFORE DATE FOR MUNICIPAL PRIMARY ELECTION PRECEDING THE REGULAR ELECTION OF SUCH CLERK-TREASURER.

SYLLABUS:

Where the legislative authority of a village of a population of less than two thousand persons, holding no primary election, determines, by a majority vote, to combine the duties of clerk and treasurer into one office to be known as clerk-treasurer, under authority of Section 733.261, Revised Code, such legislative authority shall file certification of such action with the board of elections of the county in which such municipal corporation is located not less than one hundred five days before the second Tuesday of May preceding the regular municipal election at which such clerk-treasurer shall be elected.

Columbus, Ohio, June 7, 1957

Hon. Garver Oxley, Prosecuting Attorney
Hancock County, Findlay, Ohio

Dear Sir:

I have before me your request for my opinion reading in part as follows:

“I have been asked by the Village of McComb to secure an opinion with respect to a problem confronting the Council of that Village. They desire to combine the offices of Clerk and Treasurer under authority of Section 733.26.1, Ohio Revised Code, which requires the legislative authority of the Village taking such action to file with the Board of Elections not less than one hundred five days before the day of the next succeeding municipal primary election, notice of such action taken. However, under authority of Section 3513.01, Ohio Revised Code, the Village of McComb does not hold a municipal primary election, but selects its candidates at a party caucus held in the month of August.

They raised the following two questions

1. Must they file with the Board of Elections notice of action one hundred five days before a municipal primary election which is not held?
2. If the one hundred five day requirement for filing is necessary, could it not be related to the date of the party caucus in August instead of to the date of the ordinary primary election, which would be held in May? . . .

Section 3513.01, Revised Code, reads as follows:

“On the first Tuesday after the first Monday in May of each year, primary elections shall be held for the purpose of nominating persons as candidates of political parties for election to offices to be voted for at the next succeeding general election. *Primary elections shall not be held for the nomination of candidates for election of officers of any township, or any municipal corporation having a population of less than two thousand persons, as ascertained by the next preceding federal census, unless a majority of the electors of any such township or municipal corporation, as determined by the total number of votes cast in such township or municipal corporation for the office of governor at the next preceding regular state election, files with the board of elections of the county within which such township or municipal corporation is located, or within which the major portion of the population thereof as ascertained by the next preceding federal census, is located, if the municipal corporation is situated in more than one county, not later than one hundred five days before the day of a primary election, a petition signed by such electors asking that candidates for election as officers of such township or municipal corporation be nominated as candidates of political parties,* in which event primary elections shall be held in such township or municipal corporation for the purpose of nominating persons as candidates of political parties for election as officers of such

township or municipal corporation to be voted for at the next succeeding regular municipal election.” (Emphasis added.)

Your request states that the Village of McComb under authority of Section 3513.01, Revised Code, holds no primary election. I, therefore, assume and predicate my opinion upon the premise that the Village population is less than two thousand persons as ascertained by the last federal census. I further assume, with respect to the general election of municipal officials for the year 1957, that no petition has been filed as provided in Section 3513.01, *supra*, asking that candidates be nominated as candidates of political parties.

The village officials desiring as you suggest to combine the duties of the clerk and the treasurer of the village into one office to be known as clerk-treasurer rely upon the authority contained in Section 733.261, Revised Code, which provides, in part, as follows:

“The legislative authority of a village may, by a majority vote, combine the duties of the clerk and the treasurer into one office, to be known as the clerk-treasurer. Such combination shall be effective on the first day of January following the next regular municipal election, provided that a clerk-treasurer shall be elected at such election pursuant to the provisions of this section. *The legislative authority of the village shall file certification of such action with the board of elections not less than one hundred five days before the day of the next succeeding municipal primary election.*” (Emphasis added.)

The words “next succeeding municipal primary election” refer to the primary election held, if such be held, next following the certification by the legislative authority to the board of elections, and the statute provides that such certification shall be made not less than one hundred five days prior thereto.

If, however, in accordance with the provisions of Section 733.261, *supra*, no municipal primary election is held, there exists, on the face of it, and at first glance, no point in time with respect to which the certification to the board of elections may refer. Research reveals an absence of judicial interpretation of the Section, dealing with the subject of your inquiry.

Section 3513.01, Revised Code, was enacted effective October 1, 1953, the recodification date. It incorporated the substance of former Section 4785-67, General Code, which was in 1947, amended adding

language which for the first time did away with the requirement that municipal primary elections be held in villages of less than 2,000 population. See 122 Ohio Laws, 1947.

On October 2, 1953, the Legislature enacted Section 733.266, Revised Code, being specific legislation with respect to the office of Clerk-Treasurer. It must be assumed that the Legislature acted advisedly in full knowledge of its prior change in the somewhat more general election statute respecting municipal primary elections. The Legislature is presumed to have known that it had, prior to 1953, done away with the requirement of holding municipal primary elections in cases and under circumstances therein set forth. It nonetheless in the later statute provided that certification of the action combining the office be filed with the Board of Elections not less than 105 days before the date of the primary election, the first Tuesday in May.

I am brought then to the obvious conclusion that the Legislature intended that the certification required in Section 733.261, Revised Code, be filed with reference, not to the primary election itself which in this case is not in fact held, but rather with respect to the calendar date, the first Tuesday in May, upon which under law such elections are held.

In arriving at this conclusion I am not unmindful of the provisions of Section 3513.251, Revised Code, wherein it is to be noted that in villages having a population of less than two thousand and in which no primary election is held, nomination of candidates shall be made only by nominating petition. The Legislature has authorized nomination by petition, under certain prescribed circumstances in the place and stead of municipal primary elections. I am also aware that the procedure for nomination by petition was adopted by the Legislature under authority and in furtherance of Article V, Section 7, of the Constitution of the State of Ohio which recognized the petition procedure in lieu of the direct primary.

Suffice it to say, I do not regard the procedure there outlined nor the date therein set forth for the filing of nominating petitions to be a date in substitution of the second Tuesday in May for the purposes here under discussion. I think it clear in view of the positive and unequivocal language of Section 733.261, Revised Code, and in further view of the Legislature's prior enactment of Section 3513.01, Revised Code, that

the reference to the "day of the next succeeding primary election" can but mean the second Tuesday of May, whether in a given community such primary election be, in fact, held or not.

Accordingly it is my opinion, and you are so advised, that where the legislative authority of a village of a population of less than two thousand persons, holding no primary election, determines, by a majority vote, to combine the duties of clerk and treasurer into one office to be known as clerk-treasurer, under authority of Section 733.261, Revised Code, such legislative authority shall file certification of such action with the board of elections of the county in which such municipal corporation is located not less than one hundred five days before the second Tuesday of May preceding the regular municipal election at which such clerk-treasurer shall be elected.

Respectfully,
WILLIAM SAXBE
Attorney General