

2251.

FEDERAL CENSUS—AFFECTING CLASSIFICATION OF SCHOOL DISTRICTS—DEEMED COMPLETED THIRTY DAYS AFTER THE ISSUANCE OF A PROCLAMATION BY SECRETARY OF STATE ANNOUNCING SUCH POPULATION—REORGANIZATION OF BOARD OF EDUCATION TO CONFORM WITH LAW GOVERNING INCREASE IN POPULATION DISCUSSED.

*SYLLABUS:*

1. *The 1930 census will be completed, in so far as it affects cities and villages and the classification of school districts as to population, thirty days after the issuance of a proclamation by the Secretary of State officially announcing the population of the municipalities of the State as determined by the federal census of 1930.*

2. *When the board of education of a city school district having a population of less than 150,000 is composed in part of members elected from subdistricts, the terms of office of said subdistrict members automatically expire upon the attainment, in accordance with the federal census of 1930, of a population of 150,000 persons or more.*

COLUMBUS, OHIO, August 21, 1930.

*Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.*

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

“According to the federal census of 1920, Youngstown City School District had a population of less than 150,000 and under the provisions of Section 4698 of the General Code, such school district had a membership of seven elected at large and two from subdistricts. The term of the one subdistrict member expires January 1, 1932, and the other January 1, 1934. The federal census of 1930 will give Youngstown School District a population in excess of 150,000.

Question 1: Will the terms of the subdistrict members expire with the completion of the 1930 census, or will such subdistrict members serve until the expiration of their respective terms, January 1, 1932, and January 1, 1934?

Question 2: If the terms of such subdistrict members expire with the completion of the 1930 census, at what date can such census be said to be completed?”

The pertinent provisions of Sections 4698, 4699, 4701 and 4702, General Code, are as follows:

Sec. 4698. “ \* \* \* In city school districts containing according to the last federal census a population of 50,000 persons or more, but less than 150,000 persons, the board of education shall consist of not less than two members nor more than seven members elected at large or not less than two members nor more than seven members elected at large and not more than two members elected from subdistricts by the qualified electors of their respective subdistricts. The office of subdistrict member in boards of education in all such city school districts having more than two subdistrict members is hereby abolished and the terms of members elected from such subdistricts shall terminate on the day preceding the first Monday in January, 1920.

In city school districts containing according to the last federal census a

population of 150,000 persons or more, the board of education shall consist of not less than five nor more than seven members elected at large by the qualified electors of such district; the office of subdistrict member in boards of education in all such city school districts is hereby abolished and the terms of members elected from subdistricts shall terminate on the day preceding the first Monday in January, 1920."

Sec. 4699. "Within thirty days after this act shall take effect, the board of education of each and every city school district in which the number of members does not conform to the provisions of Section 4698 shall by resolution determine within the limits prescribed by said sections the number of members of said board of education. Said resolution shall provide for the classification of the terms of members so that they will conform to the provisions of Section 4702, General Code, taking into consideration the terms of office of the existing members whose terms do not expire or terminate on the day preceding the first Monday in January, 1920.

\* \* \* \* \*

\* \* \* Within three months after the official announcement of the result of each succeeding federal census, the board of education of each city school district which according to such census shall have a population of 50,000 persons or over and less than 150,000 persons, and shall elect to have subdistricts, shall redistrict such district into subdistricts in accordance with the provisions of this chapter. If the board of education of any such district fails to district or redistrict such city school district, as herein required then the state superintendent of public instruction shall forthwith district or redistrict such city school district, subject to the requirements of this chapter."

Sec. 4701. "Whenever the number of members of the board of education of a city school district is so fixed in the resolution provided for in Section 4699, that the number of members of said board to be elected in the year 1921 in order to comply with the provisions of Section 4702, exceeds the number of members whose terms expire on the day preceding the first Monday in January, 1922, such excess number of members of such school board shall be elected at the general school election in the year 1919 for such terms of two years necessary to comply with the provisions of Sections 4698 and 4702.

Whenever the number of members of any such board of education is so fixed as provided in this act, that the number of members of said board to be elected in the year 1921, in order to comply with the provisions of Section 4702, is less than the number of members whose terms expire or terminate on the day preceding the first Monday in January, 1922, the member or members to retire, so that there will be a compliance with Sections 4698 and 4702, shall be determined by lot from among those whose terms would expire on the day preceding the first Monday in January, 1922, the terms of office of those on whom the lot falls shall expire on the day preceding the first Monday in January, 1920."

Sec. 4702. "The term of office of all members of boards of education in city school districts, except as provided in Section 4701, shall be four years. All members in office at the time this act takes effect shall serve the unexpired portions of the terms for which they were respectively elected and until their successors are elected and qualified, unless their terms shall expire or shall have been terminated as provided by Sections 4698 and 4701.

If the number of members of a board of education of any city school district to be elected at large as fixed pursuant to Section 4699 be even, one-half thereof shall be elected in the year preceding, and the remaining half in the year following the calendar year divisible by four. If such number be

odd, one-half of the remainder after diminishing the number by one shall be elected in the year preceding, and the remaining number shall be elected in the year following the calendar year divisible by four. All members to be elected from odd numbered subdistricts shall be elected at one and the same election, and all members from even numbered subdistricts shall be elected at the alternate election."

I am advised that the present existing organization of the Board of Education of the Youngstown City School District, consisting of seven members elected at large and two members elected from subdistricts as stated in your letter of inquiry, is by virtue of a resolution of the board adopted in May, 1911.

The law at that time provided in Section 4699, General Code (former Section 3897, Revised Statutes later codified as Sections 4698, 4701, 4702, 4703, 4704 and 4705, General Code, 97 O. L., 338), that in city school districts which at the last federal census contained a population of 50,000 persons or over, the board of education should consist of not less than two members nor more than seven members elected at large by the qualified electors of the school district and of not less than two members nor more than thirty members elected from subdistricts by the qualified electors of their respective subdistricts. Section 4701, General Code, at that time provided that within three months after the official announcement of the result of a federal census the board of education of each city school district should take the necessary steps to provide for a board of education for the district to conform with said Section 4699, General Code.

The result of the census of 1910 showed that the Youngstown City School District contained a population of more than 50,000 persons and the resolution of May, 1911, referred to above, was passed accordingly.

When the Jung Small School Board Law was enacted in 1913, it was provided therein that city school districts containing according to the federal census a population of more than 50,000 but less than 150,000 should have a board of education consisting of not less than two members nor more than seven members elected at large by the qualified electors of the school district and not less than two members nor more than twelve members elected from subdistricts by the qualified electors of their respective subdistricts. (103 O. L. 275).

As Youngstown City School District was of the class of districts last above mentioned at the time of the enactment of the Jung Law, no change was necessary in the organization of its board of education at that time, to conform to the law.

In 1919 the law was again amended to read as it now does, pertinent provisions of which are quoted herein. (108 O. L., Part I, page 192). As the 1920 census did not show the Youngstown City School District to have a population greater than 150,000 it was not necessary to change the organization of the then existing board, and it accordingly has continued to function to the present time, in accordance with the above mentioned resolution of the board passed in May, 1911, creating a board to consist of seven members elected at large, and two from subdistricts.

The act of the Legislature in question (108 O. L., Part I, page 192), of which present existing Sections 4698, 4699, 4701 and 4702, General Code, are a part, became effective on August 7, 1919. It made ample and specific provisions for the reorganization of the then existing boards of education in city school districts to conform to the provisions of the act.

It will be observed that specific provisions are made for increasing or decreasing the number of members of the then existing boards of education, when necessary to conform to the law. These provisions, however, obviously cannot be made to apply when changes become necessary in the organization of the board of education to conform to later federal census returns. The only reference in the act to a succeeding federal census, is that contained in Section 4699, General Code, with respect

to the redistricting of districts, which, according to a succeeding federal census have a population of more than 50,000 and less than 150,000.

The meager and indefinite provisions of these statutes with respect to the reorganization of city boards of education in conformity with the returns of a federal census produce difficulties and inconsistencies which are difficult to escape. Soon after the results of the census of 1920 were pronounced, it was held by the then Attorney General in an opinion published in the Opinions of the Attorney General for 1920, at page 879:

"In passing from one class or kind of city school district to a different one, when, after the official announcement of the census of the district, it becomes known that a change of status of the district has been produced by a change in population, city boards of education must conform to and apply the law found in Sections 4698, 4699, 4701 and 4702, G. C."

It is much easier to say that in school districts which pass from one class to another, by reason of a federal census, the board of education of the district must apply the above named sections of the law in effecting a reorganization of the board to conform to the law, than to make an actual application of these sections.

It will be observed with reference to the transition of a district from one containing a population of less than 150,000 to one with a population of more than 150,000, it is provided in Section 4698, supra, that "the office of subdistrict member in boards of education in all such city school districts is hereby abolished. It is further provided, however, after the provision that the office of subdistrict member is abolished, that "the terms of members elected from subdistricts shall terminate on the day preceding the first Monday in January, 1920."

It is fundamental that an office must exist before there can be an incumbent of the office. In other words, there cannot be a public officer without a corresponding public office. By the terms of the above statute, however, the Legislature specifically abolishes the office of subdistrict member of the board of education in any district which automatically, by virtue of the law, becomes a school district of the class containing a population of more than 150,000 and in the same section makes provision for such members to continue in office until the first Monday of the following January.

Whatever may have been the effect of such inconsistent provisions, they clearly apply only to those districts existing as such at the time of the passage of the act and cannot be extended analogically to districts later coming within the class to which they refer by reason of an increase of population as shown by a later federal census.

Applying the language of the statute to districts attaining a population of 150,000 or more by virtue of a federal census, which district formerly had a population of less than 150,000 and a board of education consisting in part of members elected from subdistricts, the pertinent provision of the statute is "the office of subdistrict member in boards of education in all such city school districts is hereby abolished," thereby in effect terminating the terms of office of the officers who are incumbents of the offices so abolished. On the other hand, it is provided in Section 4702, General Code:

"The term of office of all members of boards of education in city school districts, except as provided in Section 4701, shall be four years. All members in office at the time this act takes effect shall serve the unexpired portions of the terms for which they were respectively elected and until their successors are elected and qualified, unless their terms shall expire or shall have been terminated as provided by Sections 4698 and 4701."

And in Section 4745, General Code, it is provided:

"The terms of office of members of each board of education shall begin

on the first Monday in January after their election and each such officer shall hold his office for four years except as may be specifically provided in chapter 2 of this title (G. C., Sections 4698 to 4707), and until his successor is elected and qualified."

The Legislature no doubt has the power to abolish an office and thereby terminate the term of office of the incumbent of the office abolished, and if by appropriate language it abolishes an office and simultaneously provides that the officer incumbent of the abolished office shall continue in office for a time, it has the effect of postponing the abolition of the office until the time to which the tenure of the incumbent is postponed. This was done with respect to the office of subdistrict members of a board of education which, automatically, upon the taking effect of Section 4698, General Code, in 1919, passed from a district with a population of less than 150,000, to a district with a greater population than 150,000, but no such provisions were made with respect to those districts that automatically passed from one class of district to the other by virtue of a future federal census.

It is said in Ruling Case Law, Volume 22, page 579:

"The power of the Legislature to control public officers was established at an early day and except when restrained by the Constitution, the legislature of a state may abolish any office even during the term for which an existing incumbent may have been elected. \* \* Whoever accepts a public office does so with this principle of constitutional law in view."

Inasmuch as the provisions of Section 4698, General Code, abolishing the office of subdistrict members in city school districts having a population of more than 150,000 contain no provision extending the term of office for such members beyond the time when the provision for the abolition of the office becomes effective, I am of the opinion that the term of office of those members expires when the office is abolished, which is immediately upon attainment by the district of the stated population of 150,000.

Although the act in question does not specifically provide that the determination of the population of districts for future classification purposes, except with respect to the redistricting of districts with a population of more than 50,000 and less than 150,000, shall be in accordance with a federal census, that implication is carried through the act by reason of the fact that no other method for determining the population is provided for and the determination for classification purposes at the time the act went into effect was to be in accordance with the "last federal census," meaning the census of 1910. A federal census is taken by states, counties, townships, cities and villages. School district lines are not considered in the taking of a federal census and there is no way of determining definitely by a federal census the population of a school district unless the school district is coterminous with a city, village or township. Most city school districts are approximately coterminous with a city and the only way of determining the population of a city school district is by consideration of the population of the city as determined by the federal census and officially announced by the Secretary of State.

It is provided by Section 3498, General Code, that when the result of a 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 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. A copy of the said proclamation is sent to the mayor of each municipal corporation, who transmits the same to council where it is read and made a part of the records of council. From and after thirty days after the issuance of such proclamation each municipal

corporation shall be a city or village in accordance with whether it has a population of 5,000 or more.

It is stated in the opinion of the Attorney General of 1920, referred to above, that :

“City school districts generally, are more extensive in area than the city, but whether coextensive with the city or larger in area, it may be said that they become legally cognizant of the population of the district so as to effect a change in class or status under the provisions of said Section 3498, G. C., and the class or status thus determined will continue until an official announcement of another federal census is made.”

I am therefore of the opinion, in specific answer to your questions :

1. In the event that the population of the Youngstown City School District shall be in excess of 150,000 upon the showing of the federal census of 1930, the terms of office of the members of the board of education of said school district who have been elected from subdistricts will automatically expire at the expiration of thirty days from the date of the proclamation of the Secretary of State officially announcing the population of the city of Youngstown.

2. The 1930 census will be completed, in so far as it affects cities and villages and the classification of school districts as to population thirty days after the issuance of a proclamation by the Secretary of State, officially announcing the population of the municipalities of the State, as determined by the federal census of 1930.

Respectfully,

GILBERT BETTMAN,

*Attorney General.*

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2252.

APPROVAL, LEASE TO RESERVOIR LAND AT EAST RESERVOIR OF  
PORTAGE LAKES—C. A. PIERCE.

COLUMBUS, OHIO, August 21, 1930.

HON. PERRY L. GREEN, *Director of Agriculture, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your recent communication over the signature of Frank G. Adams, Chief of the Bureau of Inland Lakes and Parks, submitting for my examination and approval a certain reservoir land lease in triplicate executed by the State of Ohio through the conservation commissioner, by which there is leased and demised to one C. A. Pierce, of Akron, Ohio, for a term of fifteen years, a certain parcel of state reservoir lands at the East Reservoir of Portage Lakes, said parcel of land so leased being more particularly described as follows:

“Beginning at a point in State property line that is 35 feet easterly from the easterly line of Lot No. 17, of East Reservoir Allotment; thence northerly, easterly and southerly along the outer margin of the State property to the east line of Lot No. 16, of the Crawford and Myers' East Reservoir Allotment; thence westerly, 12 feet, more or less, to the normal water line of East Reservoir; thence northwesterly across an arm of East Reservoir, 110 feet, more or less, to a point in the normal water line of said East Reservoir, which is 35 feet, easterly of the east line of Lot No. 17; thence northerly parallel to and 35 feet easterly from the said east line of Lot No. 17, 12 feet, more or