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1. SCHOOL DISTRICT, NEW LOCAL—CREATED UNDER SECTION 4831-1 G. C.—NOT INDEPENDENT POLITICAL SUBDIVISION OF STATE UNTIL THIRTY DAY REMONSTRANCE PERIOD HAS PASSED—SECTION 4831-1 G. C.
2. NEWLY CREATED DISTRICT—MUST COME INTO EXISTENCE AS INDEPENDENT SUBDIVISION OF STATE PRIOR TO FILING OF NOMINATING PETITIONS FOR MEMBERSHIP ON BOARD OF EDUCATION—SECTION 4831-1 G. C.
3. WHEN NEWLY CREATED SCHOOL DISTRICT COMES INTO EXISTENCE AND BOARD OF EDUCATION APPOINTED LESS THAN NINETY DAYS AND MORE THAN THIRTY DAYS BEFORE NEXT GENERAL ELECTION, ODD NUMBERED YEAR, BOARD OF ELECTIONS SHOULD PROVIDE FOR ELECTION, BOARD OF EDUCATION—BLANK SPACE ON REGULAR BALLOT OR BY SUPPLYING A SPECIAL BALLOT FOR VOTERS TO WRITE IN NAMES OF NEW BOARD OF EDUCATION—SECTION 4785-104 G. C.

SYLLABUS:

1. A new local school district, created in accordance with Section 4831-1, General Code, does not become an independent political subdivision of the state until the thirty day remonstrance period provided for in said section has passed.
2. Nominating petitions for membership on the board of education for a new local school district, created in accordance with Section 4831-1, General Code, can not be filed until such newly created district actually comes into existence as an independent subdivision of the state.
3. When a new school district, created in accordance with Section 4831-1, General Code, comes into legal existence and the board of education thereof is appointed less than ninety days and more than thirty days before the next general election occurring in an odd numbered year, the board of elections concerned should provide for the election of a board of education for such district either by providing for appropriate blank spaces on the regular ballot or by supplying a special ballot under Section 4785-104 of the General Code so that voters within the district may write in their choices for the new board of education.

Columbus, Ohio, October 4, 1949

Hon. Kenneth J. Nordstrom, Prosecuting Attorney
Ashland County, Ashland, Ohio

Dear Sir:

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

"The Ashland County Board of Education on July 16, 1949 duly created a new local school district from two former local school districts under the authority of G. C. Section 4831-1 as amended. A Board of Education for the newly created district was appointed on said date of July 16. By the terms of this statute, it appears that all of this action will not become finally effective until the expiration of thirty days from the date of the creation of the new local school district, which in this case would be on or about the 15th of August, 1949.

"My questions are:

"(1) May candidates for election to the newly created school board file their petitions with the County Board of Elections before the 30-day protest period has elapsed?

"(2) If the answer to question one is yes, must petitions of candidates be filed on or before August 10, 1949, which date is the final date for all petitions of candidates to be filed.

"(3) If the answer to question two is no, what is the latest date when candidates for the newly created board must file their petitions?"

The action taken by your Board of Education in the creation of a new school district was the outgrowth of Section 4831-1, General Code, which reads as follows:

"A county board of education may create a new local school district from one or more local school districts or parts thereof, and in so doing shall make an equitable division of the funds and indebtedness between the newly created district and any districts from which any portion of such newly created district is taken. Such action of the county board of education shall not take effect if a majority of the qualified electors residing in the territory included in such newly created district voting at the last general election shall within thirty days from the time such action is taken file with the county board of education a written remonstrance against it. When a new local school district is created within a county school district, a board of education for

such newly created district shall be appointed by the county board of education. The members of such appointed board of education shall hold their office until their successors are elected and qualified. A board of education shall be elected for such newly created district at the next general election held in an odd numbered year occurring more than thirty days after the appointment of the board of education of such newly created district. At such election two members shall be elected for a term of two years and three members shall be elected for a term of four years, and, thereafter, their successors shall be elected in the same manner and for the same terms as is provided by law for the election of members of the board of education of a local school district.”

In view of this statute, our first determination depends upon when the board of education of a newly created school district comes into being.

The statute provides that no action of the county board of education in the creation of a new school district will be effective until thirty days have passed because any time within the thirty days a remonstrance may be filed against it.

It thus becomes obvious that a new school district actually comes into being only after certain contingencies have passed, and it therefore follows that no board of education may exist, as such, until the subdivision it has been chosen to serve is actually in existence.

Section 4831-1 of the General Code, in its present form, as enacted in 122 O. L. 572, became effective September 25, 1947, but it will be noted that the part of the statute allowing a thirty day remonstrance period was a holdover from the statute formerly governing such situations.

With this in mind, your attention is directed to Opinions of the Attorney General for 1928, Vol. III, at page 1988, which recites as follows:

“Manifestly, if the action of the board in creating a new district does not take effect in the event of the happening of a certain contingency it does not take effect until it has been determined whether or not that contingency will arise. The statute does not provide that the action of the board in creating a new district may be defeated by the filing of a remonstrance within thirty days, but that it shall not take effect if a remonstrance is filed. This clearly means that it does not take effect until the time for filing remonstrances has expired. * * *”

A similar situation arose in Opinions of the Attorney General for 1936, at page 1233, where the first branch of the syllabus recites:

“When a new district is created by authority of Section 4736, General Code, and a proper remonstrance is not filed within the period fixed by the statute, the new district does not become a body politic or a separate, independent political subdivision of the state until the expiration of thirty days after the adoption of the resolution of the county board of education creating the new district.”

The practice as to the time of appointment of boards for new districts has not been uniform. In many cases the board is not appointed until thirty days or more after the resolution creating the district is adopted. In the case of *State, ex rel. Maxwell v. Schneider*, 103 O.S. 492, an examination of the files in the office of the clerk of courts discloses that the board of education for the new district involved in the case was not appointed until more than thirty days after the resolution creating the district was adopted.

Since the authorities cited are in support of the logical interpretation of Section 4831-1, General Code, we are of the opinion that the new district does not come into existence until the thirty day remonstrance period has passed, and no powers or duties are imposed upon the board of education until the new district becomes a reality. It, therefore, follows that nominating petitions can not be accepted for a position which does not exist.

If the remonstrance is not filed within the thirty days, the new district comes into being, and the board of education appointed for the new district may assume its duties and authority.

We, therefore, must determine how long the appointees to the new school district will serve and your attention is thus directed to that part of Section 4831-1, General Code, which reads as follows:

“* * * The members of such appointed board of education shall hold their office until their successors are elected and qualified. A board of education shall be elected for such newly created district at the next general election held in an odd numbered year occurring more than thirty days after the appointment of the board of education of such newly created district. At such election two members shall be elected for a term of two years and three members shall be elected for a term of four years, and, thereafter, their successors shall be elected in the same manner and for the same terms as is provided by law for the election of members of the board of education of a local school district.”

The above language is clearly mandatory in its terms. The election of the board of education for a newly created school district "*shall be * * * at the next general election held in an odd numbered year occurring more than thirty days after the appointment of the board of education of such newly created district.*" Applying this to the instant inquiry, since the board of education for the newly created school district was appointed more than thirty days prior to the general election on November 8, 1949, the board of education for said district shall be elected at that time in accordance with the provisions of Section 4831-1, *supra*.

After determining that the election for the board of education for the newly created school district must be held at the general election on November 8, 1949, it is necessary to ascertain the manner in which the legislative mandate may be carried out. It is readily seen that Section 4785-92, General Code, concerning filing of nominating petitions by candidates for election at a general election, and concerning which you inquire in your letter, can not be applicable to the present inquiry because by the express terms thereof nominating petitions must be filed "not later than 6:30 P. M. of the ninetieth day before the day of such general election," which deadline was passed before the new school district came into existence as an independent subdivision of the state of Ohio.

I am of the opinion that when a new school district comes into legal existence and the board of education thereof is appointed less than ninety days and more than thirty days before the next general election occurring in an odd numbered year, the board of elections concerned should provide for the election of members to the school board of such district either by providing for appropriate blank spaces on the regular ballot or by supplying a special ballot under Section 4785-104 of the General Code so that voters within the district may write in their choices for the new board of education. This conclusion is consistent with the opinion rendered in Opinions of the Attorney General for 1928, page 2290, Opinion No. 2683, the syllabus of which reads as follows:

"1. Where a vacancy occurs in the office of Judge of the Court of Common Pleas, a successor to fill his unexpired term should be elected at the first general election occurring in an even numbered year more than thirty days after such vacancy may have occurred.

"2. Where a Judge of the Court of Common Pleas died subsequent to the August primary and more than thirty days

prior to the November election, a party controlling committee is without authority to nominate a candidate for such office for the unexpired term, nor can such a nomination be made by petition, for the reason that Section 5004, General Code, requires a nominating petition for offices to be filled by the electors of a district lying within a county to be filed with the board of deputy state supervisors of such county 'not less than sixty days previous to the date of election.'

"3. Where a vacancy in the office of Common Pleas Judge is caused by death less than sixty and more than thirty days previous to the date of the November election in an even numbered year, a successor to such Judge for his unexpired term may be elected by writing in the name of the person desired by the voters, and a blank space for such purpose should be provided on the ballot, indicating the duration of the unexpired term for which the election is to be made."

See also: *Wilson v. Kennedy*, 151 O. S. 485, on the question of legality of votes cast by writing in the name of a candidate for public office, the syllabus of which reads as follows:

"Under Section 4785-144, General Code (122 Ohio Laws, 353), a name written on a ballot in a blank space provided therefor under the title of the office properly to be voted on at an election shall be counted as a vote for the person whose name is so written for election to the office indicated on the ballot immediately above such blank space."

It is, therefore, my opinion, in answer to the questions raised by you, that:

1. A new local school district, created in accordance with Section 4831-1, General Code, does not become an independent political subdivision of the state until the thirty day remonstrance period provided for in said section has passed.

2. Nominating petitions for membership on the board of education for a new local school district, created in accordance with Section 4831-1, General Code, can not be filed until such newly created district actually comes into existence as an independent subdivision of the state.

3. When a new school district, created in accordance with Section 4831-1, General Code, comes into legal existence and the board of education thereof is appointed less than ninety days and more than thirty days before the next general election occurring in an odd numbered year, the board of elections concerned should provide for the election of a board

of education for such district either by providing for appropriate blank spaces on the regular ballot or by supplying a special ballot under Section 4785-104 of the General Code so that voters within the district may write in their choices for the new board of education.

Respectfully,

HERBERT S. DUFFY,
Attorney General.