

3184.

APPROVAL, BOND FOR THE FAITHFUL PERFORMANCE OF HIS DUTIES AS RESIDENT DISTRICT DEPUTY DIRECTOR, GALLIA COUNTY—G. M. GEBHART.

COLUMBUS, OHIO, April 25, 1931.

HON. O. W. MERRELL, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—You have submitted a bond in the penal sum of \$5,000.00, with surety as indicated, to cover the faithful performance of the duties of the official hereinafter named:

G. M. Gebhart—Resident District Deputy Director, Gallia County
—The Fidelity and Casualty Company of New York.

Finding said bond to have been properly executed, I have accordingly approved the same as to form, and return it herewith.

Respectfully,

GILBERT BETTMAN,
Attorney General.

3185.

VILLAGE AND EXEMPTED VILLAGE SCHOOL DISTRICTS—BECOMING CITY SCHOOL DISTRICTS BY REASON OF FEDERAL CENSUS—DISCUSSION OF VARIOUS LEGAL QUESTIONS ARISING FROM THE CHANGE OF STATUS—OPINION NO. 3181 FOLLOWED.

SYLLABUS:

1. *In an exempted village school district which is advanced to a city district by reason of a change in population, the superintendent of schools possesses the power and is charged with the duties of a city superintendent of schools from and after December 31, 1930.*

2. *In village school districts which are advanced to city districts on account of an increase in population as shown by the fourteenth decennial census, the so-called head of the former village school system does not become a city superintendent of schools or have the powers or duties of a city superintendent of schools upon the district becoming a city district.*

3. *County auditors, in making their February, 1931, settlement with school districts which have advanced from village districts to city districts as a result of a change in population as shown by the fourteenth decennial census, should make no deduction for the payment of the salaries of the county superintendent of schools or assistant county superintendent or contingent expenses of the county board of education as provided for in Section 4744-3, General Code.*

4. *The distribution of the proceeds of the 2.65 mills tax levy authorized by Section 7575, General Code, should be distributed to village school districts which are advanced to city school districts by reason of a change of population on the basis of their being village districts until December 31, 1930, and city districts there-*

after. The entire proceeds of the levy within the district should be paid to the district in the February, 1931, settlement and thereafter.

5. When the contract with the superintendent of schools in an exempted village school district which is advanced to a city district by reason of a change of population, expires in 1931, the acting board of education for the said district may elect a superintendent of schools for five years, as is authorized by Section 7702, of the General Code, for the election of superintendents in city school districts.

6. Village school districts which are advanced to city school districts by reason of a change of population, as shown by the fourteenth decennial census should after December 31, 1930, be regarded as city school districts and official business should be conducted in the name of the district as a city school district.

COLUMBUS, OHIO, April 27, 1931.

HON. J. L. CLIFTON, *Director of Education, Columbus, Ohio.*

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

“The changes in population by the new census advance certain municipalities to cities. The school districts which are composed of these municipalities, with or without territory attached for school purposes, were village school districts or exempted village school districts. By section 4686 they become city school districts. We understand that they are already such, as the notice of the new census population has been sent by the Ohio Secretary of State to the municipal authorities.

The boards of education of these new city school districts are asking us:

- (1) Must an entirely new board be elected in November, 1931?
- (2) Does the present board determine whether there shall be three, four or five members, per Section 4698?
- (3) If a board of five members is decided upon, are three elected for four years and two for two years, in November, 1931, per Section 4702?
- (4) Prior to next January, does the exempted village superintendent in such a district have the duties and powers of a city superintendent?
- (5) Prior to next January, does the executive head of a village school system, the village in which has been advanced to a city, have the duties and powers of a city superintendent?
- (6) In such a case as that of (5), are the payments to the county board of education fund, by Section 4744-3, to be deducted in full from the district in the February, 1931, semi-annual apportionment? Are these payments still to be deducted in the August, 1931, apportionment?
- (7) Similarly, when do the distributions of the 2.65 mills tax from such a district made by the county board cease?
- (8) If the contract with the superintendent of schools in such a district ends in 1931, may the board of education elect a superintendent for five years as in a city district?
- (9) Are such districts now city school districts, and should official business be in the name of ‘The X City School District?’”

The Constitution of Ohio, in Article XVIII, Section 1 thereof, classifies municipal corporations into cities and villages. It further provides:

"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."

It has been held that the said section of the Constitution is not self-executing and that the transition of municipalities from one class to the other is dependent upon the results of a regular decennial federal census and the announcement thereof in the manner provided by law. *Murray v. State ex rel. Nestor*, 91 O. S., 220. It was also held in this case that Sections 3497, 3498 and 3499, of the General Code, in force at the time of the adoption of the constitutional provision referred to above, not being inconsistent with this constitutional provision, regulate the method of transition of municipal corporations from one class to the other. Said Section 3498, General Code, reads in part, as follows:

"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. * * 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."

Following the fourteenth decennial census taken in 1930, the Secretary of State of Ohio, upon being officially informed of the results of said census, issued his proclamation pursuant to said Section 3498, supra, on December 1, 1930. Thirty days thereafter, each municipal corporation shown by said proclamation to have a population of five thousand or over is a city and those with a population of less than five thousand are villages.

In so far as a change in the classification of any municipal corporation brought about by reason of an increase or decrease in population, affects the school district in which the municipal corporation is located, the same is regulated by Section 4686, General Code, which reads as follows:

"When a village is advanced to a city, the village school district shall thereby become a city school district. When a city is reduced to a village, the city school district shall thereby become a village school district. The members of the board of education in village school districts that are advanced to city school districts, and in city school districts that are reduced to village school districts shall continue in office until succeeded by the members of the board of education of the new district, who shall be elected at the next succeeding annual election for school board members."

Questions relating to the effect of a change of classification of school districts on the number of members of the board of education for each such district, and the time and manner of their election, were considered by me in Opinion 3181 the syllabus of which reads as follows:

"1. When, by reason of its attaining a population of 5,000 or more in accordance with a federal census, a village becomes a city and the vil-

lage school district is thereby advanced to a city school district, the members of the board of education which had theretofore functioned as the village board of education, continue in office until succeeded by the members of the board of education of the new city school district, who shall be elected at the next succeeding annual election for school board members and whose terms of office shall begin on the first Monday in January thereafter. See also Opinion 3126 rendered under date of April 7, 1931.

2. The number of members to constitute the new city board should be fixed by the village board a sufficient length of time before the ensuing election for school board members to permit their being elected at this said election.

3. Assuming that the number of members for a new city district which succeeds a former village district by reason of a change in population, is fixed at five prior to the coming November election, two members should be elected at that election for a term of four years and three members for a term of two years, and thereafter three members and two members alternately should be elected at each succeeding general election for members of boards of education for terms of four years."

The conclusions reached in said opinion and set forth in the syllabus, are dispositive of the first three questions submitted in your inquiry. Several of the remaining questions submitted by you turn on the proposition of whether or not a school district, which is advanced or reduced in grade by reason of an increase or decrease in population of the city or village located in the district, is to be regarded as a city or a village district, as the case may be, in the interim between the time of the effective date of the proclamation of the Secretary of State announcing the population that brings about the change and the beginning of the terms of office of the members of the board of education elected for the new district, that is between December 31, 1930, and the first Monday in January, 1932.

This question may be disposed of in my opinion by applying the reasoning of the Circuit Court of Summit County in its decision of the case of *Wise, a Taxpayer, on behalf of the City of Barberton v. City of Barberton, et al.*, 20 O. C. C., N. S., 390.

The statutes and constitutional provisions in so far as they bear on this question, have not been changed since the decision of this case. It was there held as stated in the head-note:

"Upon advancement of a village to a city as provided by law, village officers become city officers and the mayor, in such case, has the power of veto."

This case was affirmed by the Supreme Court without opinion. *Wise, a Taxpayer v. City of Barberton*, 88 O. S., 595. The holding thereof was contrary to former opinions of the Attorney General found in the Annual Report of the Attorney General for 1911 and 1912 at pages 1536 and 1538.

The issues involved in the above case related to the status and powers of the village officers who held over until the city officers elected for the administration of the new city government took office, in accordance with Section 3499, General Code. Said Section 3499, General Code, reads as follows:

"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."

Because of the analogy between the holding over of village officers and of village school district officers until the officers of the new corporation take office, I am of the opinion that the doctrine of the Barberton case, *supra*, is dispositive of the question as to the status and powers of village school district officers who hold over upon the advancement of a village school district to a city school district by reason of an increase in population. In the course of the opinion in the Barberton case, the court, after quoting the pertinent provisions of Sections 3498 and 3499, *supra*, said:

"This meager legislation on the subject produces difficulties and inconsistencies which can not be escaped.

Barberton became a city in February, 1911; its officers, originally elected as village officers, continued in office until January, 1912; from February, 1911, to January, 1912, were they village officers or city officers, and were their powers and duties prescribed by the statutes governing village officers or by the statutes governing city officers? The powers and duties of village and city officers are quite different.

Since the statutes themselves do not answer the question the court is required to answer it in a manner which will produce the least confusion, and as seems most conducive to good government.

In examining the question here involved, the facts of this case alone have been considered, and it has not been deemed necessary to lay down any general rules governing all questions which might arise under the sections quoted.

The only things that are made absolutely certain by these two sections are that Barberton was a city, from and after February 17, 1911, and the only officers it had until January, 1912, were the individuals who originally had been elected as village officers. December 11, 1911, the council of the city of Barberton, composed of the individuals who had been elected as members of the council of the village of Barberton, passed an ordinance fixing the salaries of the city officials recently elected, who would come into office the following January.

This they had a right to do, but the mayor vetoed it, and said ordinance was never passed over his veto.

Did he have a right to veto this ordinance? If he did not it is still in force and the prayer of the petition should be granted. If the mayor had a right to veto the ordinance of December 11, 1911, a second question arises: Did the new council on January 3, 1912, have a right to fix the salaries of city officials whose terms began before said date?

The mayor of a city can veto an ordinance; the mayor of a village can not.

Though the learned Attorney-General of the state has given it as his opinion that in a situation like this the mayor would not be vested with the veto power, he does not sustain his opinion with argument, and we see no good reasons why the mayor should not have and exercise the powers of a mayor of a city. Was Barberton a city in name only, until

January, 1912, or was it a city in fact? That it was a city in fact is to be deduced from language used in Section 3499—'the ordinances thereof (of the village) not inconsistent with the laws relating to the new corporation, shall continue in force until changed or repealed.'

What is meant by the expression 'laws relating to the new corporation'? It means that part of the municipal code which lays down the rules governing cities, if the new corporation is a city, as in this case.

The laws governing cities, then, apply here, and we hold that the law vesting the veto power in the mayor of a city applies and the mayor had a right to veto the ordinance of December 11, 1911, and it never went into effect, because it was not passed over his veto."

It is true the court in its opinion referred to, had apparently based its conclusion to some extent, on that portion of Section 3499, General Code, which provides that the ordinances of the former corporation not inconsistent with the laws relating to the new corporation shall continue in force until changed or repealed. The court's conclusions, however, were not based entirely on this provision. I have no doubt the court's conclusion would have been the same had the statute not contained that language. I am not impressed with the significance of this language in determining the question before the court. The effect of this language is merely to continue in force existing municipal legislation not inconsistent with the laws relating to the new corporation. The court merely deduced from this fact a further reason for holding the corporation to be a city in fact from and after thirty days subsequent to the proclamation of the Secretary of State announcing the increase in population.

Section 4686, General Code, does not contain a similar provision with respect to continuing in force prior regulations or enactments of a board of education when a district is advanced or reduced in rank by reason of a change in population. The language of this statute however is clear, to the effect that when a village is advanced to a city the village school district becomes a city school district, and vice versa, and I am of the opinion that it becomes a city school district, or a village school district, as the case may be, in fact as well as in name and its governing board, to wit, the former village board or city board which holds over until the new board takes office is a city board or a village board, as the case may be, during this interim.

Carrying the court's holding in the Barberton case, to the effect that the mayor of a village possesses the power of veto during the period of transition of a village to a city brought about by reason of an increase in population, to its logical conclusion, it must be said that those officers of the former corporation who by force of the statute, hold office until the newly elected officials for the new corporation are inducted into office, possess during that time the same powers as are fixed by law for like officers and employes in the new corporation. Your fourth and ninth questions will therefore be answered in the affirmative.

In your fifth question you inquire with reference to the right of the executive head of the village school system in a village school district which is advanced to a city school district, to continue with the powers and duties of a city superintendent until the board of education elected for the city district is inducted into office.

Since the enactment of the school code of 1914, providing for county supervision of schools there has existed no authority for a village school district to provide for the local supervision of its schools. See Opinions of the Attorney General for 1929, page 1205. Village school districts being a part of the county

system, are to be supervised by the county superintendent of schools and his assistants under the direction of the county board of education. The schools of a village district must be regarded as a unit in the county system and supervised as such. A so-called executive head of the schools in a village school district possesses no more than administrative power, and while it is difficult to draw the line between administration and supervision of schools, it is well settled that such an employe must be regarded as somewhat less than a superintendent and the scope of his duties, whatever they may be, do not include superintending. The schools of the district must submit to county supervision. For that reason such an employe can not be said to possess the powers of a city superintendent of schools in the interim between December 31, 1930, and the first Monday in January, 1932.

This leads us to the question of how the schools of the district are to be supervised during this transition period. Either they continue under the supervision of the county superintendent or supervision must be supplied by the employment of a superintendent as for city schools. Certainly it would not be contended that they should operate without any supervision, as supervision of schools by some method is the settled policy of all existing legislation relating to public schools.

The statutes do not cover this question. The mere fact that provision is made by statute for boards of education to continue in office until succeeded by a board elected for the new district does not indicate, in my opinion, that county supervision shall continue, especially in view of the holding of the court in the Barberton case.

The substantial legal question is whether or not the village board of education which holds over possesses the power to elect a superintendent of schools. It was held by a former Attorney General that the board under these circumstances has "the powers only of a village board of education." See Annual Report of the Attorney General for 1911-1912, page 563. This opinion, however, was rendered prior to the decision of the Barberton case, *supra*. By analogy, it is my opinion that the doctrine of the Barberton case is applicable to school district as well as municipal matters and that if the mayor of a village holding over during the transition period of the village to a city is the mayor of a city and possesses veto power as do mayors of cities, and the municipality is during that time a city in fact, as well as in name, it clearly follows in my opinion, that the board of education of the village school district under like circumstances possesses the powers of a city board of education and the district is a city district in fact as well as name.

To paraphrase the language of the court in the Barberton case, the statutes being indefinite with respect to this as well as many other questions which arise in this connection, we are required to work them out in a manner which will produce the least confusion and as seems most conducive to good government. By authority of Section 7742, General Code, a city board of education may appoint a superintendent of schools and provide for filling the vacancies if any exist. I am of the opinion that the board of education of a former village school district which advances to a city district by reason of an increase in population, holding over until a board is elected for the new district, is fully empowered to provide for the supervision of the schools of the district in the same manner as is provided by law for city supervision of schools.

Coming now to the sixth question, Section 4744-3, General Code, referred to by you relates to the deduction by the county auditor, in making his semi-annual settlements with rural and village school districts, of a proportionate amount for

the district to pay the salaries of the county superintendent and assistant county superintendent of schools and for contingent expenses of the county board of education. As the districts here under consideration are supervised by the county board of education up to and including December 30, 1930, and the proportionate share of the cost of that supervision has already been deducted from the district's share of tax revenues in the previous February and August settlements, no deduction should be made for that purpose in the February, 1931, settlement or thereafter.

For similar reasons the proceeds of the 2.65 mills tax levy spoken of in your seventh question should be apportioned to these districts in proportion to the time they are a part of the county school system. This tax levy is the levy of 2.65 mills on all the taxable property of the state as authorized by Section 7575, General Code, the proceeds of which are to be retained in the several counties for the support of the common schools. The distribution of the proceeds of this tax is governed by the terms of Section 7600, General Code. Said Section 7600, General Code, provides in part, as follows:

"After each semi-annual settlement with the county treasurer each county auditor shall immediately apportion school funds for his county. Each city school district and each exempted village school district shall receive the full amount of the proceeds of the levy and two and sixty-five hundredths mills provided in section 7575, General Code, in the given school district. The proceeds of such levy upon property in the territory of the county outside of city and exempted village school districts shall be placed in the 'county board of education fund' and shall be known as a 'county educational equalization fund.'"

As the districts which are advanced from village to city districts function as city districts from and after December 31, 1930, they must be held to be not entitled to benefit by the county education equalization fund after that date and should be entitled to the proceeds of the 2.65 mills tax levy as other city districts from and after the said December 31, 1930. The distribution of this tax to these districts after December 31, 1930, should be made accordingly. That is, the proceeds of the tax levied as for the fiscal year 1930 should accrue to the county educational equalization fund and the proceeds of the levy made for the year 1931 on the taxable property within the district should be all paid to the district.

With reference to your eighth question, I assume that the superintendent in the district referred to is an exempted village school superintendent as village districts have not had the power to employ superintendents at all. If a contract with the superintendent of an exempted village district which has advanced to a city, expires in 1931, the acting board of education may select a superintendent for five years as in a city district.

I am therefore of the opinion, in specific answer to your fourth, fifth, sixth, seventh, eighth, and ninth questions:

Fourth, in an exempted village school district which is advanced to a city district by reason of a change in population, the superintendent of schools possesses the power and is charged with the duties of a city superintendent of schools from and after December 31, 1930.

Fifth, in village school districts which are advanced to city districts on account of an increase in population as shown by the fourteenth decennial census, the so-called head of the former village school system does not become a city superintendent of schools or have the powers or duties of a city superintendent of schools upon the district becoming a city district.

Sixth, county auditors, in making their February, 1931, settlement with school districts which have advanced from village districts to city districts as a result of a change in population as shown by the fourteenth decennial census, should make no deduction for the payment of the salaries of the county superintendent of schools or assistant county superintendent or contingent expenses of the county board of education as provided for in Section 4744-3, General Code.

Seventh, the distribution of the proceeds of the 2.65 mills tax levy authorized by Section 7575, General Code, should be distributed to village school districts which are advanced to city school districts by reason of a change of population on the basis of their being village districts until December 31, 1930, and city districts thereafter. The entire proceeds of the levy within the district should be paid to the district in the February, 1931, settlement and thereafter.

Eighth, when the contract with the superintendent of schools in an exempted village school district which is advanced to a city district by reason of a change of population, expires in 1931, the acting board of education for the said district may elect a superintendent of schools for five years, as is authorized by Section 7702, of the General Code, for the election of superintendents in city school districts.

Ninth, village school districts which are advanced to city school districts by reason of a change of population, as shown by the fourteenth decennial census, should after December 31, 1930, be regarded as city school districts and official business should be conducted in the name of the district as a city school district.

Respectfully,

GILBERT BETTMAN,
Attorney General.

3186.

COUNTY BOARD OF EDUCATION—UNAUTHORIZED TO HIRE AND
PAY CENSUS TAKERS TO DETERMINE WHETHER OR NOT
MAJORITY OF QUALIFIED ELECTORS HAVE SIGNED A REMON-
STRANCE AGAINST CREATION OF A NEW SCHOOL DISTRICT.

SYLLABUS:

An expenditure of public funds by a county board of education for the purpose of employing census takers specifically to count or enumerate the number of electors residing in any given territory, is unauthorized and beyond the power of the county board of education to make.

COLUMBUS, OHIO, April 27, 1931.

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

GENTLEMEN:—This will acknowledge receipt of your request for my opinion in answer to the following question:

“When under the provisions of section 4736 of the General Code, a written remonstrance is filed with a county board of education against its action in the creation of a school district from one or more school districts or parts thereof, purporting to contain a majority of the qualified electors residing in the territory affected, may the county board of educa-