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VILLAGE, NEW — INCORPORATION — ELECTION OF OFFICERS: MAYOR, TREASURER, CLERK, SIX MEMBERS OF COUNCIL AND MARSHAL — PROCEDURE, CANDIDATES FOR OFFICE WHERE POPULATION TWO THOUSAND OR MORE—SECTION 4785-5 G. C.—PRIMARY ELECTION—NOMINATING PETITION—HOW COMPENSATION FIXED FOR MEMBERS OF COUNCIL — SECTION 4219 G. C. — WHERE TOTAL TAX VALUATION NOT LESS THAN FIVE HUNDRED THOUSAND DOLLARS, VILLAGE SHALL CONSTITUTE VILLAGE SCHOOL DISTRICT—PROCEDURE TO ELECT BOARD OF EDUCATION — BALLOTS — CANDIDATES, LONG AND SHORT TERM.

SYLLABUS:

1. *Upon the incorporation of a new village, its officers may be elected at a special election held at any time not exceeding six months after its incorporation. At that election there should be elected a mayor, treasurer, clerk, six members of council and a marshal.*
2. *Candidates for such offices in villages having a population of two thousand or more, may be chosen either in a primary election or by nominating petitions.*
3. *Notice of such special elections must be given at least ten days before holding the same by a proclamation either posted in a conspicuous place in the court house and city hall, or by one insertion in a newspaper published in a county. If no newspaper is published in the county, then as provided in section 4785-5, General Code.*
4. *If a primary election is held, declarations of candidacy shall be signed by at least five electors and shall be filed not later than six-thirty P. M. of the sixtieth day before the date of the primary. Candidates choosing to run by petition shall have signatures thereon not less in number than one percent of the qualified electors voting at the next preceding general election for the office of governor in such municipality, these petitions to be filed not later than six-thirty P. M. on the sixtieth day prior to the date of election.*
5. *Compensation of the members of council of villages is fixed by sec-*

tion 4219, *General Code*, at two dollars per meeting, not to exceed twenty-four meetings in any one year. The compensation of other officials in a newly incorporated village should be fixed by the council.

6. Upon the creation of a village having a total tax valuation of not less than five hundred thousand dollars, such village shall constitute a village school district, which district shall include all lands within the boundaries, excepting the territory within its corporate limits detached for school purposes, if any, and shall have attached to it for school purposes any rural school districts whose original boundaries are partly within the village boundaries, provided the territory of such rural districts lying beyond the village limits is in each instance an area less than sixteen square miles.

7. Where a village school district is thus created, a board of education should be elected by such district at the same time as the other officials of the village are elected, two members of such board to serve for a term of two years and three members for four years, their respective terms to date from the first Monday in January after the last preceding election for such offices.

8. Persons desiring to become candidates for election to the board of education of a village shall file nominating petitions bearing signatures of not less than one percent of the qualified electors voting at the next preceding election for the office of Governor in the school district, but in no case shall less than twenty-five nor more than five thousand signatures be required. Such petition shall be filed not later than six-thirty P. M. on the sixtieth day prior to the date of election.

9. The ballots at the first election for members of the board of education of a village must designate which persons are candidates for the short and which for the long term.

Columbus, Ohio, January 8, 1940.

Hon. Floyd A. Coller, Prosecuting Attorney,
Bowling Green, Ohio.

Dear Sir:

This will acknowledge receipt of your recent communications in which you have asked numerous questions relative to the election of officials of the newly incorporated village of Rossford, Ohio. I will discuss your questions in the same order you have presented them.

Your first question relates to the officers to be elected at the first election of a newly organized village. Section 3536, General Code, provides for the first election of such officers in the following language:

“The first election of officers for such corporation may be a special election held at any time not exceeding six months after the incorporation at a time to be fixed by the agent of the petitioners. Unless such special election is held, the first election of officers of such corporation shall be at the first municipal election after its creation.”

The elective officers of a village are the mayor (section 4255, General Code), treasurer (section 4293, General Code), clerk (section 4279, General Code), six members of council (section 4215, General Code), and a marshal (section 4284, General Code). When a board of trustees of public affairs is authorized under section 4357, General Code, it is provided in section 4358, General Code, that such board shall be established by the council; the mayor of the village to appoint the original members thereof. Members of the school board and their mode of election will be discussed later herein.

In your second question you ask if a primary election is necessary. Article V, section 7 of the Constitution of Ohio, provides in part:

“All nominations for elective state, district, county and municipal offices shall be made at direct primary elections or *by petition* as provided by law, and provision shall be made by law for a preferential vote for United States Senator; but direct primaries shall not be held for the nomination of township officers or for the officers of municipalities of less than two thousand population, unless petitioned for by a majority of the electors of such township or municipality.” (Emphasis the writer’s).

The latter part of the section is inapplicable, since your inquiry shows that the population of Rossford is about forty-five hundred. Therefore, nominations may be either by a direct primary election or by petition. Primaries are never necessary when all candidates file by petition. (Section 4785-91, General Code.) If a special election is not held within six months as provided in section 3536, *supra*, and the election is deferred until the municipal election in 1941, section 4785-67, General Code, passed by the 93rd General Assembly, effective April 27, 1939, may become applicable. It is there provided that when there are no primary contests between candidates filing for municipal offices, the candidates who have filed shall be declared nominated and no primary election held. This section reads:

“If in any odd-numbered year, the number of candidates who have filed declarations of candidacy for offices to be voted upon at the primary election in a political subdivision, does not exceed the number of candidates to be nominated at such primary, a primary election shall not be held, and the board of elections of the county in which such political subdivision is located shall issue a certificate of nomination to each such respective candidate and the names of all such candidates shall be printed on the party column ballot to be voted at the succeeding November election.”

While you have not inquired as to whether a primary election may be held, it should be noted that provision is made for primary elections in connection with special elections when necessary, by section 4785-97, General Code, as follows:

“When a special election is found necessary to fill a vacancy, the date of the primary shall be fixed at the same time and in the same manner, as that of the election, by the authority calling such special election; which primary shall be held at least fifteen days prior to the time fixed for such special election. Declaration of candidacy and certificates for such primary shall be filed and fees shall be paid at least ten days before the date for holding such special election.”

In your third question you ask how notice of primary and general elections is given. In answer thereto, your attention is directed to section 4875-5, General Code, which is as follows:

“At least ten days before the time for holding an election the board shall give public notice by a proclamation, posted in a conspicuous place in the court house and city hall; or by one insertion in a newspaper published in the county; and if no newspaper is published in such county, then in a newspaper of general circulation therein. Such newspaper notice shall not exceed six inches in length of double column width.”

Commenting upon the applicability to special elections of the notice provided in section 4785-5, supra, the then Attorney General held in Opinions of the Attorney General, 1931, Volume II, page 1018, as follows:

“Notice of a special election of officers in a newly incorporated municipality should be published as provided in Section 4785-5, General Code.”

You state that there are two or three newspapers published in the county. If the board of elections chooses to give notice of the election or elections by

publication, it should follow the provisions of the statute, i. e. "by one insertion in a newspaper published in the county."

Your fourth question relating to the length of time required after notice until an election may be held is answered by section 4785-97, supra, as to primary elections, wherein it is provided that the "primary shall be held at least fifteen days prior to the time fixed for such special election." The time for holding the special election is fixed by section 3536, supra, wherein it is provided that the first election of officers of a newly created village shall be held "at any time not exceeding six months after the incorporation." Notice of the elections, as has been pointed out in response to your third question, is provided by section 4785-5, supra, wherein it is provided that notice shall be by a proclamation at least ten days before the election either conspicuously posted in the court house and the city hall or by one insertion in a newspaper published in the county.

Your fifth question regarding publication of notice has been covered by answers to your third and fourth questions, wherein your attention is called to section 4785-5, supra, providing that if the proclamation is published in a newspaper it should be "by one insertion" therein.

In the first branch of your sixth question you inquire how candidates declare themselves for the various offices. Two methods are provided by the statutes, the first by declaration if a primary is held; provision therefor is found in section 4785-70, General Code, which so far as pertinent to your several inquiries, is as follows:

"Each person desiring to become a party candidate by the method of declaration shall, not later than 6:30 p. m. of the sixtieth day before the date of the primary at which such nominations are to be made, file a declaration of candidacy and shall pay the fee required by law. * * * in the case of a candidate for office in a subdivision less than a county, such petition shall be signed by at least five electors of such subdivision. * * * In the case of candidates for county, municipal, district or any other elective offices of a district or political subdivision within the county, such declaration shall be filed with the board in such county. * * *"

If there be no primary, nomination is by petition as provided in section 4785-91, General Code, the pertinent portions of which are as follows:

"Nominations of candidates for offices, in addition to the nominations made at party primaries, may be made by petitions signed for each candidate by qualified electors of the state or the

district or county for which such candidates are nominated, not less in number than one per cent of the qualified electors voting at the next preceding general election for the office of governor in any such county, district, municipality or in the state.”

The second branch of your sixth question relates to the filing time of declarations and nominating petitions. Section 4785-70, *supra*, provides that the declaration of candidacy shall be filed not later than six-thirty P. M. of the sixtieth day before the date of the primary at which such nominations are to be made. Section 4785-92, General Code, referring to the filing of nominating petitions, provides in part:

“All separate petition papers comprising the nominating petition of a candidate shall be assembled and filed with the election authorities as one instrument; and shall be accompanied by the acceptance of such person whose name has been submitted as a candidate. In the absence of such acceptance, signed in person by the candidate, his name shall not appear on the ballot. Such nominating petitions of candidates shall be filed with the same election authorities as is provided for the filing of declaration of candidacy not later than 6:30 p. m. on the sixtieth day prior to the date of election.”

In your seventh question you ask how many signatures are required on the declarations of candidacy and nominating petitions. Section 4785-70, *supra*, referring to declarations of candidacy provides “in case of a candidate for office in a subdivision less than a county, such petition shall be signed by at least five electors of such subdivision.” If the nomination is by petition, section 4785-91, *supra*, provides that the petition shall contain signatures of “not less in number than one percent of the qualified electors voting at the next preceding general election for the office of governor in any such county, district, municipality or in the state.”

Your eighth question is more involved and reads as follows:

“The territory which was incorporated was largely made up of the Rossford Rural School District. Of course, the Rossford Rural School District includes other territory outside the corporation limits. However, inside the corporation limits there is a small territory that belonged to the Glenwood Rural School District, and another small territory, or piece of territory that belonged to the Ross Township Rural School District.

* * *

Did these two small pieces of territory, the one belonging to Glenwood Rural School District, and the other belonging to Ross Township School District, automatically become a part of the

newly created Rossford Village School District, they being inside the corporate limits?"

Your inquiry does not disclose the total tax valuation of the village of Rossford. Without this information it is impossible to fully answer your eighth question. Section 4679, General Code, provides:

"The school districts of the state shall be styled, respectively, city school districts, exempted village school districts, village school districts, rural school districts and county school districts."

Village school districts are defined by section 4681, General Code, as follows:

"Each village, together with the territory attached to it for school purposes, and excluding the territory within its corporate limits detached for school purposes, and having in the district thus formed a total tax valuation of not less than five hundred thousand dollars, shall constitute a village school district."

In the event that the total tax valuation of the village of Rossford is less than five hundred thousand dollars, section 4682, General Code, is pertinent thereto, which provides:

"A village, together with the territory attached to it for school purposes, and excluding the territory within its corporate limits detached for school purposes, with a tax valuation of less than five hundred thousand dollars, shall not constitute a village school district, but the proposition to organize the territory thus formed into a village school district may be submitted by the board of education, and shall be submitted by the board of education upon the presentation to it of a written petition for such purpose signed by 25 per cent. of the electors of the territory thus formed at any general or special election called for that purpose, and be so determined by a majority vote of such electors."

Assuming for the purpose of this discussion that the village of Rossford does have a total tax valuation of five hundred thousand dollars or more, and that a village school district has been created by its recent incorporation, to determine whether or not the Glenwood Rural School District and Ross Township Rural School District or any parts of either shall constitute a part of Rossford Village School District, reference should be made to section 4687, General Code, which is as follows:

"Upon the creation of a village, it shall thereby become a village school district, as herein provided, and, if the territory of

such village previous to its creation was included within the boundaries of a rural school district and such rural school district included more territory than is included within the village, such territory shall thereby be attached to such village school district for school purposes, provided such territory has an area of less than 16 square miles. The legal title to school property for school purposes in such newly created village school districts shall be vested in the board of education of the newly created village school district. Provided, however, if there be any indebtedness on the school property located within the newly created village school district, the board of education of the newly created village school district shall assume such indebtedness and shall levy a tax annually sufficient to pay such indebtedness and shall pay to the board of education of the district or districts from which it acquired the school property, the amount of money collected from such levy as it becomes due."

Since your inquiry does not disclose the areas of any of the school districts in question, you should be guided by the provisions of the above section and the holding in an opinion of a former Attorney General (Opinions of the Attorney General, 1927, Volume II, page 1180), the first and third branches of the syllabus of the opinion reading as follows:

"1. Upon the incorporation of a new village from territory lying within the territorial boundaries of a rural school district, the territory within the new village thereby becomes a separate village school district if the tax valuation of the property lying within such territory is \$500,000.00 or more.

* * *

3. When the territory remaining in a rural school district, after the incorporation of a village consisting of territory which was formerly contained in the rural school district, contains more than sixteen square miles, it remains a separate rural district and its board of education continues to function as before the detachment of the territory which was incorporated as a village."

In the first branch of your ninth question you ask if the election of the members of a board of education should be held at the same time as village officials are elected. This question seems to be answered by section 4708, General Code, which provides:

"In exempted village school districts and in village school districts, each board of education shall consist of five members elected at large *at the same time as municipal officers are elected* and in the manner provided by law." (Emphasis the writer's.)

In answer to the second and third branches of your ninth question wherein you ask how candidates declare their candidacy and how many signatures are required upon their petitions, your attention is directed to section 4785-90, supra, wherein it is provided that:

“Nominations of candidates for members of boards of education * * * shall be made by petitions signed in the aggregate for each candidate by not less than one per cent of the qualified electors voting at the next preceding election for the office of governor in the school district, township, village or municipality; provided that no such nominating petition shall require more than five thousand nor less than twenty-five signatures.”

The answer to the fourth branch of your ninth question is found in section 4785-92, supra, providing that nominating petitions shall be filed “not later than 6:30 P. M. on the sixtieth day prior to the date of election.”

In your tenth question you ask if all school board members should be elected for a term to expire January 1, 1942, or should the terms of two expire at that date and three on January 1, 1944. Section 4709, supra, says that there shall be elected “two members to serve for two years and three to serve for four years.”

Section 4710, supra, provides in villages thereafter created, a board of education shall be elected as provided in the preceding section. This section further provides:

“If the members of such board are elected at a special election held in such district the members so elected shall serve for the term indicated in the preceding section, from the first Monday in January after the preceding election for members of the board of education and the board shall organize on the second Monday after such election.”

Obviously, these two sections must be construed together. Section 4710 provides that the board of education of a newly created village, such as Rossford, shall be elected as provided in section 4709, that is, two members for two years and three members for four years to serve for terms which shall date from the first Monday in January after the preceding election for members of the boards of education.

You ask in your eleventh question if the ballots for the school board members must designate the term for which candidates seek to be elected. It being apparent, as has been pointed out, that two board members are to

be elected for terms of two years and three members for terms of four years, it would be impossible for the boards of elections to determine which of the successful candidates would be entitled to the short and which to the long terms unless the ballots so designated. The electors would likewise be confused and unable to choose which candidates they prefer for the short and which for the long term. This was the view taken by the Circuit Court in State, ex rel. O'Donnell v. Schafer, 10 O. C. D. 36, the first branch of the syllabus reading:

“Where three members are to be elected to the board of education, two of them for the full term of three years and one to fill an unexpired term of one year, and the names of six candidates appear on the ballots, but with nothing to indicate which are candidates for the long terms and which for the short term, there is no valid election, and the old board holds over, even though one set of candidates were regularly nominated at a party caucus as candidates for the different terms and properly certified to the board of elections.”

In 1919, Opinions of the Attorney General for 1919, Volume II, page 1603, it was held by the then Attorney General:

“Where five members of a village board of education were to be elected, two members for the term of two years and three for the term of four years, and the ballots cast did not designate who were the candidates for the long and short terms, no valid election was held, and the present incumbents will hold over until their successors are properly elected and qualified.”

In your last question you ask if the agents for the incorporators fix the salaries for the various elective officials and if so, must such salaries be fixed before or after election. I have carefully examined the provisions relative to the incorporation of villages and the compensation of various officials and have been unable to find any authority whatsoever for the agents of the incorporators to fix the salaries of any village officials. The compensation of members of council of villages has been determined by the Legislature (section 4219, General Code) to be two dollars per meeting, not exceeding twenty-four meetings in any one year, no ordinance therefor being necessary. See Walker v. Dillonvale, 82 O. S. 137. The compensation of all other village officials is fixed by the council, as provided in section 4219, which is as follows:

“Council shall fix the compensation and bonds of all officers,

clerks and employes in the village government, except as otherwise provided by law. All bonds shall be made with sureties subject to the approval of the mayor. The compensation so fixed shall not be increased or diminished during the term for which any officer, clerk or employe may have been elected or appointed. Members of council may receive as compensation the sum of two dollars for each meeting, not to exceed twenty-four meetings in any one year."

While the compensation "so fixed", that is, fixed by the council, may not be increased or diminished during the term for which the officer has been elected, in the case you propose, no compensation has yet been fixed and the above limitation is inapplicable. There can be no increase or diminishment of compensation until the council has first performed its duty of fixing the compensation of the village officials. See *State, ex rel. Schreiner, v. Madigan*, 31 O. C. D. 504, 506, and *Opinions of the Attorney General, 1919, Volume I*, page 618. In discussing the distinction between increasing or diminishing the compensation of an officer and originally fixing such compensation, Judge Evans said in *State v. Carlisle*, 16 O. D. 263, at page 266:

"The reason for the above holding is, that if there is no salary definitely fixed, or if no salary whatever has heretofore been provided, then there is no salary to increase or diminish by an act providing for a salary during an incumbency."

I therefore conclude that the compensation of the officials of a newly created village, other than members of its council, should be fixed by the council of the village.

In conclusion, I am of the opinion that:

1. Upon the incorporation of a new village, its officers may be elected at a special election held at any time not exceeding six months after its incorporation. At that election there should be elected a mayor, treasurer, clerk, six members of council and a marshal.
2. Candidates for such offices in villages having a population of two thousand or more, may be chosen either in a primary election or by nominating petitions.
3. Notice of such special elections must be given at least ten days before holding the same by a proclamation either posted in a conspicuous place in the court house and city hall, or by one insertion in a newspaper published in a county. If no newspaper is published in the county, then as provided in section 4785-5, General Code.
4. If a primary election is held, declarations of candidacy shall be

signed by at least five electors and shall be filed not later than six-thirty P. M. of the sixtieth day before the date of the primary. Candidates choosing to run by petition shall have signatures thereon not less in number than one percent of the qualified electors voting at the next preceding general election for the office of Governor in such municipality, these petitions to be filed not later than six-thirty P. M. on the sixtieth day prior to the date of election.

5. Compensation of the members of council of villages is fixed by section 4219, General Code, at two dollars per meeting, not to exceed twenty-four meetings in any one year. The compensation of other officials in a newly incorporated village should be fixed by the council.

6. Upon the creation of a village having a total tax valuation of not less than five hundred thousand dollars, such village shall constitute a village school district, which district shall include all lands within the boundaries, excepting the territory within its corporate limits detached for school purposes, if any, and shall have attached to it for school purposes any rural school districts whose original boundaries are partly within the village boundaries, provided the territory of such rural districts lying beyond the village limits is in each instance an area less than sixteen square miles.

7. Where a village school district is thus created, a board of education should be elected by such district at the same time as the other officials of the village are elected, two members of such board to serve for a term of two years and three members for four years, their respective terms to date from the first Monday in January after the last preceding election for such offices.

8. Persons desiring to become candidates for election to the board of education of a village shall file nominating petitions bearing signatures of not less than one percent of the qualified electors voting at the next preceding election for the office of Governor in the school district, but in no case shall less than twenty-five nor more than five thousand signatures be required. Such petitions shall be filed not later than six-thirty P. M. on the sixtieth day prior to the date of election.

9. The ballots at the first election for members of the board of education of a village must designate which persons are candidates for the short and which for the long term.

Respectfully,

THOMAS J. HERBERT,
Attorney General.