1037.

HEALTH DISTRICTS UNDER GRISWOLD ACT—METHOD OF RAISING FUNDS FOR GENERAL HEALTH DISTRICTS—NOT NECESSARY TO REAPPOINT GENERAL DISTRICT HEALTH BOARDS APPOINTED UNDER HUGHES ACT—EXCEPTION—DISTRICT BOARD MAY LEGALLY ENTER INTO CONTRACT WITH HEALTH COMMISSIONER BEFORE FUNDS AVAILABLE—IN CASE OF EPIDEMIC BOARD MAY ENFORCE QUARANTINE REGULATIONS BEFORE EMPLOYMENT OF HEALTH COMMISSIONER—EMPLOYMENT OF APPOINTEES OF MUMICIPAL HEALTH BOARDS ABOLISHED.

1. *The proper method of raising funds for general heath districts is:* (1) *a levy by proper municipal and township authorities made as other levies under sections existing at the time of, and unaffected by, the enactment of the Hughes and Griswold act;* (2) *by submission of apportioning estimate as provided in section* 1261-40; (3) *by apportionment to and retention from general funds or health funds of the municipalities and townships constituting a general health district;* (4) *the procedure for raising funds in case of epidemics is provided in section* 1261-14; (5) *the procedure of apportionment and retention as to the year* 1920 *is provided in section* 2 *of the Griswold act in connection with section* 1261-40.

2. *It is not necessary to reappoint general health district health boards appointed under the Hughes act. The members of such board shall continue as such unless, after the redistricting resulting from the Griswold amendments, they are no longer residents in the townships or villages composing the district. Section* 2 *of the latter act provides for filling vacancies.*

3. *The district health board may legally enter into a contract with a health commissioner before the funds thereof are at their disposal. Sections* 3608 *and* 5660 *are not applicable.*

4. *In case of epidemic the district board of health may make and enforce quarantine regulations before the employment of a health commissioner.*

5. *The employment of appointees of municipal health boards abolished by the Hughes and Griswold acts is by such abolition terminated. By section* 486-16 (106 *O. L.* 411) *such appointees must be placed at the head of an eligible list for employees in like positions under the new act.*

COLUMBUS, OHIO, February 27, 1920.

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

GENTLEMEN:—In a recent opinion to your department, No. 966, relating to the status of municipal health boards, under the Hughes and Griswold acts, it was held by this department that the effect of the passage of those acts was to abolish the old municipal health boards established under authority of section 4004 G. C., but the question of the status of the appointees and employees of such boards for the reasons therein stated was reserved for consideration in a separate opinion.

Since the receipt of your request, this department has received numerous requests for advice upon various features of the Griswold act and as a practical method of disposing of such questions it is deemed advisable to consider them in this opinion to your department.

Hon. Mervin Day, prosecuting attorney of Paulding county, in a recent letter requests the opinion of this department upon these five questions:

> 1. Our first inquiry is what is the proper method to pursue to create a fund whereby the district health board may employ a health commissioner, and pay the necessary expenses connected with the administration of the

present health law? Does section 1261-41 apply now in regard to raising the first money that is needed?

2. Should the district advisory council make up a budget to cover expenses for the ensuing year, transmit the same to the auditor, and should the auditor then certify the proportion to each municipality and township, to be paid over to the county, and should those municipalities and townships which have no fund then proceed to borrow the money in order that they may turn it over to the county?

3. Is it necessary for the advisory council to re-appoint a board of health for this district under the Griswold Act; or is the board that they have already appointed under the Hughes law before the amendment the proper health board to continue?

4. Can the district health board legally enter into a contract employing a district health commissioner, and fix a compensation therefor before they have the money at their disposal, with which to pay the compensation?

5. In case an epidemic should require a quarantine prior to the time when the district health board has employed a district health commissioner, who has the authority to declare a quarantine and enforce it?"

Your remaining question may be restated and numbered as follows:

"6. What effect does the abolition of the municipal boards of health have upon the appointees and employes of such boards?"

Much of what has been said in the former opinion referred to is applicable in a general way to most if not all of the questions above stated and your attention is especially directed to that opinion in connection with the consideration of these questions.

The first question relates to the proper method of creating a fund for the payment of the necessary expense incidental to the administration of the present health law.

It is noted that it also inquires if section 1261-41 applies "in regard to raising the first money that is needed?"

This last question may be disposed of by directing attention to the fact that section 1261-41 (section 26 in the Griswold act) applies only, as stated in the first sentence of the section, "in case of epidemic or threatened epidemic or the unusual prevalence of a dangerous communicable disease," and does not apply to the method of raising the usual and ordinary funds of the health district.

Sections 1261-40 is the section of the new act which provides for the making of an estimate of the amounts needed for the current expenses for the fiscal year beginning January 1, 1921.

With the exception that this estimate shall be submitted to the budget commissioner instead of being submitted to the district health council and apportioned on the basis of taxable property instead of population, as provided in the corresponding section in the Hughes bill, the procedure here outlined is the same as that outlined in section 25 of the Hughes act. Section 25 of the Hughes act was numbered section 1261-40 and, as such, was amended by the Griswold act.

In opinion No. 610, dated September 9, 1919, directed to Hon. John L. Cable, prosecuting attorney of Allen county, this section was considered at length and it was pointed out in that opinion that it contained no direct authority to levy, nor was there any such authority given in any other section of the act. It was also pointed out that no change was made in the method of making the levy and that section 25 presupposed the making of such levies under existing laws and that after receiving the itemized statement of the amount needed for the current expenses of the health district, as finally approved by the district advisory council, the auditor was not authorized to levy such an amount, but his duties from that point were rather those of apportioning

to and collecting from each taxing subdivision its share of the total estimate on the basis of population resulting in an appropriation and segregation of the subdivision's share.

Present section 1261-40 changes that section only in these two particulars: (1) That the estimate is submitted to the budget commission as pointed out, and (2) that the apportionment is based on taxable valuations instead of population in such subdivisions. So that what was said concerning the effect of section 25 is equally applicable in this respect to the present section. A copy of this opinion is enclosed herewith for consideration in connection with the present opinion. So that the first step in creating this fund (except for the year 1920, which will be later considered), is by the proper levy by township and municipal officers in the same manner as provided and practiced before the enactment of the Hughes-Griswold acts.

Much confusion may be avoided by keeping in mind that this part of the law does not relate to or affect directly the initial process of making health levies. The levying power, as found in pre-existing laws, starts with the township trustees and municipal councils coming up through the budget commission and reaches the tax duplicate in the method of other levies. The estimate referred to in the later acts comes from the district board of health and is certified to the county auditor, who submits it to the budget commission, which has power to decrease, but not to increase it. From the budget commission it does not go on the duplicate as a levy, but is then turned back to the auditor, to be apportioned among the townships and municipalities on the basis of taxable property. Nor are these sums then evaluated in terms of rates and levied against these subdivisions, but are debited against their accounts in semi-annual settlements with the auditor, in the nature of a preferred charge against their health or general funds. The auditor may retain from such funds one-half of such apportionment at each settlement. The office of this estimate would seem to be to insure the availablity of required health funds by giving health purposes a preference over other township or municipal purposes in the general health district. The levying authority and the budget commission determine the amount of the levy; then the district board of health and the budget commission fix another kind of a budget for apportionment and retention by the county auditor.

While not specifically stated in the questions quoted, obviously the most urgent question confronting officials charged with the enforcement of this law is the matter of raising the necessary funds for the present year. Sections 1261-40, by its terms, does not apply to the present year.

We must turn to section 2 of the Griswold act for the rule of action for the present. It must be borne in mind that as pointed out in the opinion last referred to, neither of the last two amendments disturbed or changed in any manner the power and method of making the levies from the proceeds of which expenses for health administration were paid, and, assuming that such levies have been made, the last two sentences of section 2 of the Griswold act are pertinent. They read:

> "Each board of health in a general health district shall meet within ten days of the taking effect of this act, and shall adopt a budget for the year 1920, which shall be immediately transmitted to the auditor of the district, who shall submit the same to the district advisory council at a meeting to be called by him at his office within five days of the receipt of such budget. The district advisory council shall review such budget in accordance with the provisions of this act, and when reviewed and approved by the district advisory council, such budget shall be apportioned among the townships and villages as provided by this act."

This effectually provides for the year 1920 by making section 1261-40 the method of apportionment, except that the budget for 1920 shall be submitted, as had been pro-

vided in section 25, supra, of the Hughes act, to the district advisory council. It is believed that careful consideration of these two sections will furnish the proper method of apportionment and application of such funds.

As pointed out in the Cable opinion and on the authority of Porter, et al vs Hopkins, et al., 91 O. S. 74, these sections authorize the auditor to retain the proper proportion of the apportionment out of general township or municipal funds.

At this point it may be observed that in the event of a township or municipality not having, at the semi-annual settlement, sufficient general funds from which such health funds may be taken, and an emergency results within the purview of section 1261-41, relating to epidemics, that section may be utilized in the manner therein provided.

It is believed that this discussion practically answers the first and second questions, except that it should be supplemented by the more specific answer to the question relating to section 1261-41 by the statement that that section does not apply except in case of epidemic, as above noted, and that the act of itself does not confer any new authority for the townships or municipalities to borrow money to be turned over to the county to discharge the apportionment against it and that the relief in such cases must be found by recourse to section 1261-41, as above indicated.

In this connection it may be observed that as suggested in your references to sections 3278 and 3279, the township trustees are not expressly divested of all powers in connection with loathsome or infectious diseases. These sections were not expressly repealed by the later acts and confer certain powers on the trustees without reference to the other township board of health statutes which were repealed. Section 3279 enables the trustees to "make and enforce all necessary health regulations to prevent the spread of smallpox or other loathsome diseases," and makes the violation of such regulations a misdemeanor. These sections, however, contain no authority to borrow money and the question of their implied repeal is not deemed necessary to the consideration of your questions.

The third question relates to the status of the district board of health appointed under the Hughes act and inquires specifically if it is "necessary for the advisory council to reappoint a board of health for this district under the Griswold act; or is the board that they have already appointed, under the Hughes law before the amendment, the proper health board to continue?"

In the previous opinion to your department, above referred to, it was held that the effect of the Hughes and Griswold acts was to abolish the municipal boards of health and the conclusion therein reached concerning such boards would be the same conclusion in answer to this question, but for the saving clause in section 2 of the Griswold act. This section in part is as follows:

> "Section 2. Members of boards of health of general health districts appointed in accordance with the provisions of sections 1261-17 and 1261-18 of the General Code, who are residents in the township or villages of the general health district for which they are appointed shall be and continue as members of the board of health of the general health districts composed of the townships and villages as provided by this act, which were contained in the general health districts for which they were appointed. Vacancies in boards of health in general health districts caused by non-residence shall be filled as provided by this act for other vacancies. * * *."

While not pointed out in the opinion as to municipal boards of health, this expression of a different legislative policy, that is, an express provision for the continuance of the old general health district board, re-enforces the conclusion reached in that opinion on the application of the maxim that "the expression of one excludes the other."

Consideration of the effect of this saving clause leads to a negative answer to ques-

tion No. 3, that is, that it is not necessary to make such appointment under the Griswold act, if the members appointed continue as residents of the townships or villages composing the district.

Your fourth question is as follows:

> "Can the district health board legally enter into a contract employing a district health commissioner, and fix a compensation therefor before they have the money at their disposal, with which to pay the compensation?"

The section containing the authority of the general health district board to contract with a health commissioner is section 1261-19. The first part of this section refers to the selection of the health commissioner as an appointment, but the section also provides that such appointee "shall devote such time to the duties of his office as may be fixed by contract with the district board of health." Another part of the section refers to such appointment in this language:

> "upon such terms and for such period of time not exceeding two years, as may be prescribed by the district board,"

thus clearly indicating the power of the board to contract in such matter.

So far as the present act goes, there is no inhibition against making such a contract before they have the money at their disposal and it remains to be seen if other general sections prevent such action.

Sections 3806 and 5660, requiring what is known as the Burns law certificate, may be considered.

Section 3806 relates exclusively to contracts "by the council or by any board or officer of a municipal corporation." Section 5660 applies only to "the commissioners of a county, the trustees of a township and the board of education of a school district." The board of health is not included in or affected by these sections and they do not therefore prevent the making of the agreement referred to, and the answer to your fourth question is, therefore, an affirmative one.

Your fifth question asks who has the authority to declare a quarantine and enforce it before the district health board has employed a district health commissioner. Of course the state board of health would have authority, in case of the failure of the district board to make and enforce quarantine regulations, but it is also believed that the powers granted the district board of health may be exercised by it in such a case even though a health commissioner has not yet been appointed, while under sections 3278 and 3279 (supra) certain powers as to quarantine are granted to township trustees.

Section 1261-23, 1261-30 and 4425, et seq., relating to quarantine, in cases of dangerous communicable diseases, indicate the scope and extent of the board's powers in such matters and in the case stated in your question the answer is that the district health board has such authority.

We come now to what we have stated as question No. 6, concerning the status of appointees and employes of the old municipal health boards.

As heretofore pointed out, and this applies to this 6th question particularly, the former opinion of this department with reference to such boards must be read in connection with this opinion.

No question can be made as to the power of the state to abolish such offices or terminate such employments. As stated in 29 Cyc., 368:

> "The authority in the government * * * to create an office has, in the absence of some provision of law, passed by a higher authority, * * * the implied power to abolish the office it has created,"

and having concluded that the legislature, in the Hughes and Griswold acts, did abolish the municipal boards, it would seem that the employes of such board are by that act of abolition without an employer and their employment is by operation of law terminated.

As pointed out in the former opinion, the effect of the repeal of a statute, in the absence of saving provisions, has the effect of blotting out the repealed statute as if it had never existed and putting an end to all proceedings under it.

It is said in 29 Cyc., 1396:

> "Where an office is created by a statute, the term of which is * * * during good behavior, the officer holds only so long as the statute remains in force. (Citing 1 Dana [Ky.] 447.)"

Other authorities may be cited, but it is deemed sufficient to state that the abolition of the board, having the power of employment under statute, automatically terminates terms of employments and appointments by said board.

The recent decision in Elyria vs. Vandemark, decided by the supreme court September 9, 1919, is pertinent. Consistent with earlier decisions of that court, the supreme court in the Elyria case holds that there can be no de facto officer in Ohio without a de jure office. This principle taken in connection with the legislative policy fixed in section 486-16 as amended in 106 O. L. 411 (civil service act) where it is provided that

> "* * * whenever any permanent office or position in the classified service is abolished or made unnecessary, the person holding such office or position shall be placed by the commission at the head of an appropriate eligible list, and for a period of not to exceed one year shall be certified to an appointing officer as in the case of original appointments,"

plainly discloses the legislative intent in such cases, and the conclusion must be reached that, no saving clause existing in the Griswold act, the terms of appointees and employes of the old municipal health boards are by operation of law terminated.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1038.

APPROVAL, BONDS OF GRAND PRAIRIE TOWNSHIP RURAL SCHOOL DISTRICT, MARION COUNTY, OHIO, IN AMOUNT OF $9,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, February 27, 1920.

1039.

APPROVAL, BOND OF TRACEY S. BRINDLE, CHIEF ENGINEER, STATE HIGHWAY DEPARTMENT, IN SUM OF $5,000.00—THE AETNA CASUALTY AND SURETY COMPANY, SURETY.

COLUMBUS, OHIO, February 27, 1920.

HON. HARVEY C. SMITH, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I am transmitting herewith bond in the sum of $5,000.00 of Tracey