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DISTRICT BOARD OF HEALTH—DISTRICT ADVISORY COUNCIL AUTHORIZED TO APPOINT WHEN—WHEN TWO APPOINTED FROM MUNICIPALITY ENTITLED TO ONLY ONE—DE JURE OFFICER DISCUSSED.

SYLLABUS:

1. *Under section 1261-18 of the General Code, the district advisory council is authorized to appoint only one member of the district board of health from a municipality forming part of the health district, the population of which municipality comprises less than one-fifth of the total population of the district.*

2. *Where two members of a district board of health are appointed from a municipality entitled to only one member, only the one first appointed is a de jure officer entitled to continue in office.*

COLUMBUS, OHIO, May 11, 1933.

HON. HARRY I. KAYLOR, *Prosecuting Attorney, Kenton, Ohio.*

DEAR SIR:—I have your inquiry concerning the validity of the appointment of two members of your district board of health which comprises all of Hardin County outside the city of Kenton. You state that the population of the health district is 18,067. The two members in question reside in the village of Ada, which has a population of 2,499, or less than one-fifth of the total population of the health district. One of these members was appointed in 1930 to fill an unexpired term, while the other was appointed prior thereto for a full term.

Section 1261-17, General Code, provides for a district board of health consisting of five members to be appointed as provided in section 3406, that is, for a term of five years, one member to be appointed each year. The manner of making appointments is set forth in section 1261-18, General Code.

Section 1261-18, in so far as it is material, provides:

*"Within sixty days after this act (G. C. §§1261-16 et seq.) shall take effect the mayor of each municipality not constituting a city health district and the chairman of the trustees of each township in a general health district shall meet at the county seat and shall organize by selecting a chairman and a secretary. Such organization shall be known as the district advisory council. The district advisory council shall proceed to select and appoint a district board of health as hereinabove provided, having due regard to the equal representation of all parts of the district. Where the population of any municipality represented on such district advisory council exceeds one-fifth of the total population of the district, as determined by the last preceding federal census such municipality shall be entitled to one representative on the district board of health for each fifth of the population of such municipality. Of the members of the district board of health, one shall be a physician." * * **
(Italics the writer's.)

Your first question is whether the district advisory council has complied with the law in selecting two members of the board of health from the municipality

of Ada. If my answer should be in the negative, you desire to know which of the two members should continue to hold office.

The difficulty arises because of the language in section 1261-18, italicized above. I find no court decisions or opinions of this office which are helpful in interpreting this language. It is stated in Throop on Public Officers, section 556, that:

"A ministerial officer or board of officers has only such powers as are conferred on him or it by statute, either expressly or by necessary implication; and he or it must comply strictly with the provisions of the statute, regulating the exercise of those powers, otherwise the act or decision will be a nullity."

The statute in question provides that the district advisory board "shall" appoint the district board of health "having due regard to the equal representation of all parts of the district." The word "shall" appearing in statutes is generally mandatory, and I understand it to be so used here. In my opinion it refers not only to the action of appointing but also to the prescribed manner of making the appointment, viz., "having due regard to equal representation."

The question then is whether the appointment of two members of the board of five from a village having 2,499 people, leaving three members to represent 15,568 people in the district, violates the "due regard" provision. The municipality of Ada thus has one member for every 1249.5 residents, while the other "parts" of the district have one member for every 5,189 residents. By the express provision of section 1261-18, if Ada had two-fifths of the population, or 7,227 residents, it would be entitled to a member on the board for each one-fifth, or two members. As the board is now constituted, it has the same number of members for a population of about one-third of that number.

While the statute does not require that the district advisory council use mathematical precision in determining the distribution of the members of the board of health, I am of the opinion that under section 1261-18, only one member of the board can be appointed from the municipality of Ada, which has less than one-fifth of the total population of the health district. I am informed that this interpretation of section 1261-18 conforms with that given by the state board of health.

You state in your letter that one of the members of the board from Ada was appointed for his present term before the other received the appointment under which he now purports to act. Obviously, when the first member was appointed, Ada was entitled to be represented on the board. This member's appointment was therefore valid and he is entitled to continue to hold office. The second member subsequently appointed was ineligible. He therefore did not become a *de jure* officer and his office may be vacated by proper proceedings.

Section 1261-17 provides that vacancies on the district board of health shall be filled in like manner as original appointments.

Respectfully,

JOHN W. BRICKER,
Attorney General.