1607.

DISAPPROVAL, BONDS OF CONCORD TOWNSHIP RURAL SCHOOL DISTRICT, HIGHLAND COUNTY—$10,000.00.

COLUMBUS, OHIO, March 12, 1930.

Re: Bonds of Concord Township Rural School District, Highland County, Ohio, $10,000.00.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

GENTLEMEN: An examination of the transcript pertaining to the above issue of bonds discloses that the notice of election was published for four consecutive weeks beginning on October 9, 1929, which was twenty-seven days before the election.

This notice was published pursuant to the provisions of Section 2293-21 of the General Code, requiring that such notices of election shall be published in one or more newspapers of general circulation in the subdivision once a week for four consecutive weeks prior thereto.

Following the decision of the Supreme Court of Ohio in the case of *State* vs. *Kuhner and King,* 107 O. S., 406, this office has repeatedly held that in the absence of a decision by a proper court to the contrary, publication of the notice of election for a period less than twenty-eight days is not a sufficient compliance with Section 2293-21 of the General Code. Opinion No. 309, rendered under date of April 15, 1929; Opinions of Attorney General, 1928, Vol. I, p. 23.

In view of the foregoing, I am compelled to advise you not to purchase the above issue of bonds.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1608.

CITY BOARD OF HEALTH—MEMBER MAY BE INTERESTED IN FIRM WHICH SELLS SUPPLIES TO CITY.

SYLLABUS:

A firm in which a member of a city board of health has an interest, may legally sell supplies to the city in which such board is established, when such supplies are for departments other than the board of health and if such purchase is in an amount less than fifty dollars.

COLUMBUS, OHIO, March 12, 1930.

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

GENTLEMEN:—I am in receipt of your recent communication as follows:

> "In a letter dated March 18, 1924, the Attorney General advised the bureau that a member of a city board of health could legally be appointed and serve as superintendent of the city hospital at the same time. The concluding paragraph of the letter reads:

'It would seem that under the above statute a member of the city board of health is not a municipal officer, but is a state officer, as the municipal health district is a part of the state health district, and for this reason it is believed that Sections 12910, 12911, 12912, and Section 3808, would not apply in the situation presented by your communication.'

Section 3808, G. C., prohibits an officer of a municipal corporation from having any interest in the expenditure of money on the part of the corporation, other than his fixed compensation.

Section 12910, G. C., reads:

'Whoever, holding an office of trust or profit by election or appointment, or as agent, servant or employe of such officer or of a board of such officers, is interested in a contract for the purchase of property, supplies or fire insurance for the use of the county, township, city, village, board of education or a public institution with which he is connected, shall be imprisoned in the penitentiary not less than one year nor more than ten years.'

Question: May a firm in which a member of the city board of health has an interest, legally sell supplies to the city with which such member is connected, when such supplies are for departments other than the board of health, and if such purchase is in an amount less than $50.00?"

Since you have quoted Section 12910 in your communication, it is unnecessary to recopy it here. Sections 3808, 12911 and 12912, General Code, mentioned in your letter, read as follows:

Sec. 3808. "No member of the council, board, officer or commissioner of the corporation, shall have any interest in the expenditure of money on the part of the corporation other than his fixed compensation. A violation of any provision of this or the preceding two sections shall disqualify the party violating it from holding any office of trust or profit in the corporation, and shall render him liable to the corporation for all sums of money or other thing he may receive contrary to the provisions of such sections, and if in office he shall be dismissed therefrom."

Sec. 12911. "Whoever, holding an office of trust or profit, by election or appointment, or as agent, servant or employe of such officer or of a board of such officers, is interested in a contract for the purchase of property, supplies or fire insurance for the use of the county, township, city, village, board of education or a public institution with which he is not connected, and the amount of such contract exceeds the sum of fifty dollars, unless such contract is let on bids duly advertised as provided by law, shall be imprisoned in the penitentiary not less than one year nor more than ten years."

Sec. 12912. "Whoever, being an officer of a municipal corporation or member of the council thereof or the trustee of a township, is interested in the profits of a contract, job, work or services for such corporation or township, or acts as commissioner, architect, superintendent or engineer, in work undertaken or prosecuted by such corporation or township during the term for which he was elected or appointed, or for one year thereafter, or become the employe of the contractor of such contract, job, work, or services while in office, shall be fined not less than fifty dollars nor more than one thousand dollars or imprisoned not less than thirty days nor more than six months, or both, and forfeit his office."

Looking at the above statutes it would seem that Section 3808 refers solely to municipal officers. Sections 12910 and 12911 are general, applying to officers, agents or employes of various subdivisions. Section 12912 pertains only to municipal and township officers.

It is evident that your inquiry involves the following question, viz.: Is a member of a city board of health a municipal officer within the meaning of Sections 3808, 12910, 12911 and 12912, General Code? If the question is answered in the affirmative, Sections 3808, 12910 and 12912, supra, would clearly prohibit such officer from being interested in a contract with any department of the municipality with which he is connected.

At the outset it should be kept in mind that these statutes are penal statutes and therefore should be strictly constructed. However, there is no doubt but that the interest of the city health officer, should it be concluded that he is a municipal officer, in the firm which intends to sell supplies to such municipality, would give him an interest in the contract within the meaning of the words "interested in a contract," or "interested in the profits of a contract" as used in Sections 12910, 12911 and 12912, supra.

This is borne out by the case of *Doll* vs. *State,* 45 O. S. 445, which had under consideration the interpretation of similar statutes to those now presented. The first two paragraphs of the syllabus of that case read as follows:

> "1. A person duly elected to, and holding the office of member of the board of public works of the city of Cincinnati, is 'an officer elected to an office of trust or profit in this state,' within the meaning of Section 6969 of the Revised Statutes, (now Sections 12910, 12911, General Code) which makes it a crime for such officer to become 'directly or indirectly interested in any contract for the purchase of any property or fire insurance, for the use of the state, county, township, city, town or village,' and is amenable to the provisions of that section, if, while acting as such officer, he becomes interested in a contract for the purchase of property for the use of the city.
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> 2. To become so interested in the contract, it is not necessary that he make profits on the same. But it is sufficient, if while acting as such officer, he sell the property to the city for its use, or is personally interested in the proceeds of the contract of sale, and receives the same or part thereof, or has some pecuniary interest or share in the contract."
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> (Words in parenthesis mine)

To determine the answer to the question I propounded above, it is necessary to consider the act of the Legislature, enacted on April 17, 1919 (108 O. L. Pt. I, page 236, codified as Sections 1261-16 et seq., 4404 et seq., and several other odd sections, and amended on December 18, 1919 (108 O. L. Pt. II, page 1085). These acts are known as the Hughes and Griswold acts respectively.

With respect to these acts, my predecessor in an opinion to be found in Opinions of the Attorney General for 1927, Vol. II, page 969, said at pages 970 and 971:

> "The Hughes and Griswold acts abolished municipal boards of health established under Section 4404, General Code, prior to its amendment in such acts and, as stated in an opinion of this department, rendered January 28, 1920, and appearing in Opinions of the Attorney General for that year, volume 1, page 130, on page 133:
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> 'What might be termed a new quasi-political subdivision was created somewhat analogous to school districts, or, so far as a city of the required

population was concerned, it might be said that it then had a dual interlocking capacity. It constituted a municipal health district and its city council was empowered to establish a municipal health district board of health, while the duty and method of raising the necessary funds for this health district was not changed by the act, showing the interdependent character of the district and the municipality. The idea of separate identity is further indicated by the fact that by Section 1261-38 the treasurer and auditor of the city are specifically designated as the treasurer and auditor of the health district.

Section 4404, as contained in the Hughes act, reads:

"The council of each municipality constituting a municipal health district, shall establish a board of health, composed of five members to be appointed by the mayor and confirmed by the council who shall serve without compensation and a majority of whom shall be a quorum. The mayor shall be president by virtue of his office. Provided that nothing in this act contained shall be construed as interfering with the authority of a municipality constituting a municipal health district, making provisions by charter for health administration other than as in this section provided."

It must be noted here that the subject of the first sentence of this section is changed from "the council of each municipality," as it was before, to "the council of each municipality *constituting a municipal health district,*" but the rest of the statute is the same excepting the provision for charter municipalities making different provisions for health administration. Original Section 4404 was repealed and there was no saving clause with reference to existing municipal boards of health. The effect of the repeal of a statute in the absence of constitutional limitations or saving provisions, is, as stated in 36 Cyc., 1234, "as if it had never existed and of putting an end to all proceedings under it." However, where the effect is practically that of amending the original section repealed, the matter of the old statute carried into the new statute suffers no break in its continuity, so there is no magic in the name which the Legislature may give to the new act, whether it is termed an amendment or repeal that will defeat an otherwise evident intention. The question then is, was it the intention to abolish the municipal boards of health? Technically it would seem that such was the intention. The new board is not a municipal board, but a municipal district board. There can now be no such body known as the municipal board of health.'

The effect of the Hughes and Griswold acts was, therefore, to abolish the old municipal boards of health and make health administration a matter of state rather than local concern. The duties and functions of boards of health of city health districts are defined by statute and cannot be enlarged or diminished by the cities themselves. They may be likened to city boards of education. The only power granted to cities in connection with health matters, in so far as the organization and functions of city boards of health are concerned at the present time, is that contained in Section 4404, supra, providing that 'nothing in this act contained shall be construed as interfering with the authority of a municipality constituting a municipal health district making provision by charter for health administration other than in this section provided.' This language would seem to permit charter cities to prescribe the number of members of boards of health of such cities and the manner of their selection, but in my opinion goes no further."

It may thus be noted that health administration is now a matter of state rather than local concern.

I had occasion to discuss somewhat this situation in my Opinion No. 1490, rendered February 4, 1930. In that opinion the facts disclosed that a city council had passed an ordinance providing that any employe receiving pay from the city must be a bona fide resident of said city. The question arose as to the power of the council to apply the provisions of said order to the health board appointed under Sections 4408 and 4411, General Code, and I concluded that such ordinance had no application to city health district appointees.

In the course of the opinion I said:

> "Section 1261-16, General Code, provides that each city shall constitute 'a city health district.' The said section further provides that townships and villages in each county shall be known as a 'general health district.' In Section 1261-30, it is provided that the district board of health created in said act shall exercise all the powers and perform all the duties now conferred and imposed by law upon the board of health of a municipality, etc. It will further be observed that Section 4408, to which you refer, which originally had reference to municipal boards of health, was amended so as to refer to 'any city health district.' Under Section 1261-39, a provision is made whereby the state contributes to the support of any general or city health district.
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> From the foregoing it must be concluded that a city district health board is not a municipal board in a technical sense. In other words, health districts under existing law are created by the state under its police power and when districts are created under the provisions of Section 1261-16 and its related sections, the employes thereof may not be regarded as municipal employes. Furthermore, it must be concluded that an employe of such a district can not be said to be receiving pay from the city.
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> In other words, a city health district is a separate entity from the municipal government, although of course it embraces the same territory."

The conclusions which I reached in the above opinion are decisive of the issue presented here. I am not unmindful of the case of *City of Salem* vs. *Harding*, 121 O. S. 412, the second paragraph of the syllabus of which reads:

> "The construction of sewers by a city is the exercise of a governmental function, and a board of health in the discharge of its duties acts in the exercise of the police power of the state, but in the maintenance or destruction of a sewer or any part thereof the city is nevertheless liable for the negligence of its board of health whereby a nuisance is created."

However, the facts in that case, as disclosed in the opinion of the court, showed that the public service department of the city co-operated with the health officer in said city in the plugging of a sewer, and therefore the municipality was clearly liable. The court apparently did not consider the statutes involved in the Hughes and Griswold acts, and I am of the view that there is no inconsistency in the holding of that case with the conclusion that I have reached in this opinion. Accordingly, it may be specifically stated that a member of a city board of health is not a municipal official within the inhibitions of Sections 3808, 12910, 12911 and 12912, General Code, supra.

Having determined that the official involved in the present instance is not a

municipal officer, it is unnecessary to go into the question of whether the city health district board is a "public institution" within the meaning of Section 12910, General Code, since you do not ask whether the firm involved in your communication may sell to said health district board, and you limit your question to contracts involving less than fifty dollars.

Based on the foregoing I am of the opinion that a firm in which a member of a city board of health has an interest, may legally sell supplies to the city in which such board is established, when such supplies are for departments other than the board of health and if such purchase is in an amount less than fifty dollars.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1609.

APPROVAL, BONDS OF GRANGER TOWNSHIP RURAL SCHOOL DISTRICT, MEDINA COUNTY—$80,000.00.

COLUMBUS, OHIO, March 12, 1930.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

1610.

APPROVAL, BONDS OF VILLAGE OF WILLOUGHBY, LAKE COUNTY—$133,358.85.

COLUMBUS, OHIO, March 12, 1930.

Industrial Commission of Ohio, Columbus, Ohio.

1611.

APPROVAL, ARTICLES OF INCORPORATION OF THE ST. PETRI MUTUAL FIRE INSURANCE ASSOCIATION OF TOLEDO.

COLUMBUS, OHIO, March 12, 1930.

HON. CLARENCE J. BROWN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I am returning herewith, approved, Articles of Incorporation of the St. Petri Mutual Fire Insurance Association of Toledo, Ohio.

Respectfully,
GILBERT BETTMAN,
Attorney General.