

5943.

APPROVAL—BONDS OF CITY OF CLEVELAND, CUYAHOGA  
COUNTY, OHIO, \$1,000.00.

COLUMBUS, OHIO, August 10, 1936.

*State Employes Retirement Board, Columbus, Ohio.*

5944.

APPROVAL—BONDS OF TOLEDO CITY SCHOOL DISTRICT,  
LUCAS COUNTY, OHIO, \$15,000.00.

COLUMBUS, OHIO, August 10, 1936.

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

5945.

APPROVAL. — BONDS OF CITY OF NILES, TRUMBULL  
COUNTY, OHIO, \$16,000.00.

COLUMBUS, OHIO, August 10, 1936.

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

5946.

CONTRACTS—TO BE FULLY PERFORMED DURING TERMS  
OF SUCCESSORS—CANNOT BE MADE BY OLD SCHOOL  
BOARD—WHEN NEW DISTRICT IS CREATED UNDER  
SECTION 4736, G. C.—NEW DISTRICT BECOMES BODY  
POLITIC, WHEN—POWERS OF OLD AND NEW BOARD  
DISCUSSED.

**SYLLABUS:**

1. *When a new school district is created by authority of Section 4736, General Code, and a proper remonstrance is not filed within the period fixed by the statute, the new distrcit does not become a body politic*

*or a separate, independent political subdivision of the state until the expiration of thirty days after the adoption of the resolution of the county board of education creating the new district.*

2. *When a new school district is created by authority of Section 4736, General Code, and a board of education is appointed for the new district, the board should organize on the second Monday after appointment as provided by the statute, but has no power of administration within the territory of the new district until the new district comes into existence as a separate, independent political subdivision of the state.*

3. *When a new school district is created in pursuance of Section 4736, General Code, a limited interregnum is created within the territory comprising the new district for a period of thirty days after the adoption of the resolution of the county board of education creating the district, during which time local district boards of education have jurisdiction to administer the affairs of the schools and school patronage within the said territory to the extent only of providing for immediate necessary needs, but cannot lawfully create liabilities against the new district by the making of contracts to be fully performed during the terms of their possible successors, so as to prejudice or forestall the action of those successors in the administration of school affairs for the new district, in the event the district becomes a separate, independent political subdivision at the end of the period of thirty days after the county board of education adopted the resolution creating the district.*

COLUMBUS, OHIO, August 10, 1936.

HON. MANNING D. WEBSTER, *Prosecuting Attorney, Pomeroy, Ohio.*

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

“I will appreciate you rendering this office your opinion on the following:

The County Board of Education met in regular session on May 1, 1936, and created a new school district, which I shall designate as ‘X’ Rural School District, by virtue of Section 4736 of the Ohio General Code, by combining all the territory of three rural school districts, which I shall designate as ‘A’, ‘B’ and ‘C’. At the same meeting the county board appointed a board of education for the newly created district, which board qualified and organized on the 11th day of May, 1936.

There was no remonstrance, as provided in G. C. 4736 filed against the action of the county board.

On May 2nd, 1936, the board of education for ‘A’ Rural

School District met in regular session and selected teachers and janitors to serve for the coming year. However, the contracts for such employment were not signed until May 13, 1936.

Were the contracts of employment valid legal obligations of the newly created district?"

Assuming that the contracts were properly executed on May 2nd, 1936, would such contracts be obligations of the board of the newly created district?"

Section 4736, General Code, reads as follows:

"The county board of education may create a school district from one or more school districts or parts thereof, and in so doing shall make an equitable division of the funds or indebtedness between the newly created district and any districts from which any portion of such newly created district is taken. Such action of the county board of education shall not take effect if a majority of the qualified electors residing in the territory affected by such order shall within thirty days from the time such action is taken file with the county board of education a written remonstrance against it.

Members of the board of education of the newly created district shall be appointed by the county board of education and shall hold their office until the first election for members of a board of education held in such district after such appointment, at which said first election two members shall be elected for two years and three members shall be elected for four years, and thereafter their successors shall be elected in the same manner and for the term as is provided by Section 4712 of the General Code. The board so appointed by the county board of education shall organize on the second Monday after their appointment."

For years there has been more or less contention as to where the power to administer the laws pertaining to the control and management of schools in territory incorporated in a new district by authority of Section 4736, General Code, reposes from the time of the passage of the resolution of a county board of education creating the new district and the expiration of the thirty day period within which a remonstrance may be filed, the effect of which, if a proper remonstrance is so filed, is to render the action of the county board in creating the district ineffective. The question is particularly troublesome when an entire district is incorporated in a new district. The terms of the statute itself leave much to be desired so far as clarity is concerned and in fact are more confusing

than helpful. There are no court decisions in this state or formal opinions of this office that are dispositive of the question.

The statute, among other things, provides that on the creation of a new school district, an equitable division of funds shall be made and a board of education appointed for the new district. It does not provide when these things shall be done. As to the equitable division of funds and indebtedness, it is said in the case of *State, ex rel. Maxwell v. Schneider*, 103 O. S., 492, at page 499:

“A mere delay in taking such action cannot invalidate the proceeding creating the district.”

The same is no doubt true as to the appointment of a board of education. That need not necessarily be done at the time of the passage of the resolution creating the district. The practice as to the time of appointment of boards for new districts created by authority of Section 4736, General Code, has not been uniform. In many cases the board is not appointed until thirty days or more after the resolution creating the district is adopted.

In the case of *State, ex rel. Maxwell, Prosecuting Attorney, v. Schneider*, supra, it is stated as held in the second branch of the syllabus:

“When, pursuant to the provisions of Section 4736, General Code, a new school district is created by a county board of education by proceedings in conformity with the requirements of the law, and the members of a board of education of a newly-created district are duly appointed and qualified, and such board duly organized as therein provided, the duties and authority of members of the board of education of a former school district which has been absorbed by the creation of a new district are *ipso facto* terminated.”

This syllabus, however, must be read in the light of the facts upon which it was based and interpreted with reference to the question presented and considered by the court. *Williamson Co. v. Radich*, 120 O. S., 125; *In re Poage*, 87 O. S., 72, at p. 82. An examination of the files of the *Schneider* case in the office of the clerk of the court discloses that the board of education for the new district involved in the case was not appointed until more than thirty days after the resolution creating the district was adopted. The case was an action in quo warranto brought by the new board to oust the local board of one of the districts which had been incorporated in the new district. It certainly can-

not be the intention of the law that where a board is appointed at the time of the adoption of the resolution creating the new district and it organizes on the second Monday thereafter as the statute provides, which will necessarily be within the thirty day period allowed for remonstrance, that board could incur any liability against a new district which would be effective if a remonstrance is later filed which would cause the action of the county board in creating the district to "not take effect". The appointment of a board and the organization of that board does not in and of itself clothe the board with power of administration over the territory of the district unless the district itself is at the time a body politic or a legally existing political subdivision. In *McQuillin on Municipal Corporations*, 2nd edition, Section 283, it is stated:

"It is a self evident proposition that two lawfully and fully organized public or municipal corporations cannot have jurisdiction and control at one time of the same population and territory and exercise like or similar powers in the same boundaries."

Many authorities from a number of states, as well as England, are cited in support of the text.

It becomes important, therefore, to determine when, with respect to the time of the passage of a resolution of a county board of education creating a new school district, the new district as a body politic comes into existence. In *Opinions of the Attorney General for 1928*, Vol. III, page 1980, it is said with reference to this matter:

"Manifestly, if the action of the board in creating a new district does not take effect in the event of the happening of a certain contingency it does not take effect until it has been determined whether or not that contingency will arise. The statute does not provide that the action of the board in creating a new district may be defeated by the filing of a remonstrance within thirty days, but that it shall not take effect if a remonstrance is filed. This clearly means that it does not take effect until the time for filing remonstrance has expired. It follows that no matter when the equitable division of funds and indebtedness is made, any order so made does not become effective until the expiration of thirty days after the resolution creating the new district has been passed."

It clearly follows from this that a new board appointed for the district, regardless of when it is appointed or when it organizes, has no

jurisdiction over the territory of the new district until after the expiration of thirty days from the time the resolution creating the district was adopted, and as a corollary to this it clearly follows that local boards have jurisdiction over local territory embraced within a new school district created by authority of Section 4736, General Code, until such time as the new district becomes in the full sense of the word a political subdivision of the state, as an intention will not be imputed to the Legislature, in the absence of a clear and express provision to that effect at least, that a complete suspension of government shall exist within the territory comprised in a new school district organized in pursuance of Section 4736, General Code, for a thirty day period pending the possibility of the filing of remonstrances. The nature of their jurisdiction and the extent of the powers of these local boards, is not, however, in my opinion, unlimited or as extensive as though no action had been taken toward the incorporation of the territory in a new district. These local boards are charged with knowledge of the action of the county board and with knowledge of the fact that under the law their jurisdiction will be terminated at the end of thirty days from the time of the passage of the resolution creating the district, if a proper remonstrance is not filed.

In my opinion a limited interregnum for the thirty day period pending remonstrances is created for the territory of the proposed new district, by operation of law, when the movement to create such a district is initiated by the adoption by a county board of education of a resolution to that effect, to the end that the inhabitant of the territory will have secured to them the administrative control after the thirty day period elapses, that the law provides for it, that is, the administrative control of the new board if a sufficient remonstrance to defeat the creation of the new district is not filed, or the administrative control of the existing boards if such a remonstrance is filed.

It, of course, cannot be definitely known as a matter of law, when a new district is created by resolution of a county board of education whether or not a remonstrance such as will cause the action of the county board to "not take effect," will be filed. The possibility exists that such a remonstrance will not be filed and the boards of education of local districts embraced within the new district are charged with knowledge of that fact. It is possible and probable that if the new district becomes established in pursuance of the resolution of the county board creating it, a new and different policy with respect to the administration of the schools therein will be followed by the new board. Certain schools may be suspended and pupils assigned to other schools. A different policy with respect to transportation and other matters may be thought advisable by the new board, and the clear import of the law is that if a new district is created and actually comes into existence, the inhabitants of

the territory of the district are entitled to and will be subject to the administration of the board of education appointed for the district from and after the effective date of the creation of the district, which is after the expiration of thirty days from the time of the passage of the resolution by the county board of education creating the district.

Prior to the effective date of the creation of the district and pending the possible filing of remonstrances, it cannot be known definitely just what the administrative policy of the new board will be, if the new board should succeed to the administrative control of the new district. It cannot be known how many teachers or the class of teachers that will be required nor how many janitors will be needed, and in my opinion the local boards are without power during this period of forestalling the possible or prospective control of the schools in this territory by the new board, that the law clearly contemplates it should have.

It is the rule in most jurisdictions that where, in the absence of statute regulating the matter, a board appoints an officer or contracts for services and the duties of the officer or services to be rendered are duties delegated to the supervision of the board making the appointment or contract, such appointment or contract beyond the term of the board is not valid. See Vol. 70 A. L. R. 799, and 802, note.

The only case directly involving this question in Ohio is the case of Franklin County v. Ranck, 9 O. C. C. 301. In that case which is frequently cited by textwriters and annotators as authority for the application of the general rule in Ohio, there was involved the validity of a contract for the employment of a janitor for a county court house for a period of one year by the board of county commissioners, the contract having been made on the day preceding the expiration of the term of one of the members of the board. The court said:

“In the absence of some necessity or special circumstances showing that the public good required it, such a contract as the one under consideration, made by an expiring board, and which has the effect to forestall the action of its successor for a year, is not only evidence of unseemly conduct on the part of the members of the board, but, in its object, operation, and tendency, is calculated to be prejudicial to the public interests and against public policy and void.”

I am aware that this general rule does not ordinarily apply with respect to a school board contracting with a superintendent or a teacher for a period extending beyond the term of the board. It is generally held that school boards may contract with superintendents and teachers for a period extending beyond the term of the board, under ordinary

circumstances. See 70 A. L. R. 802, note, and 29 L. R. A. (N.S.) 657, note. However, no authority will be found for school boards to contract with teachers and superintendents where the contract is to be fully performed after the expiration of the terms of all the members of the board making the contract, nor will any authority be found for a political subdivision which is being merged with another or succeeded by another, to bind its successor by contracts to be fully performed during the life of its successor. It has been held that a city whose corporate existence is to end by statutory merger in a larger municipality, cannot make a contract to last beyond its own existence. So a ten year contract made by the officials of a town included within the limits of Greater New York, made fourteen days before the charter of Greater New York was to go into effect, was held void as a mere scheme to encumber the new municipality. *Hendrickson v. New York*, 160 N. Y. 144, 54 N. E. 680.

In the instant case, the "X" Rural School District succeeded after thirty days from May 1, 1936, to all the obligations of the "A", "B" and "C." districts. In my opinion, the action of the board of education for "A" district on May 1, 1936, purporting to employ teachers and janitors for the schools within that district for the ensuing school year, which contracts were to be fully performed after the expiration of the terms of all the members of the board of education making the contracts, did not create valid obligations so as to bind the "X" district. The fact that the contracts as authorized on May 1, 1936 were not formally executed until May 13, 1936, has nothing whatever to do with the question. The conclusion would be the same had the contracts been executed on May 2, 1936.

In conclusion, it is my opinion that:

1. When a new school district is created by authority of Section 4736, General Code, and a proper remonstrance is not filed within the period fixed by the statute, the new district does not become a body politic or a separate, independent political subdivision of the state until the expiration of thirty days after the adoption of the resolution of the county board of education creating the new district.

2. When a new school district is created by authority of Section 4736, General Code, and a board of education is appointed for the new district, the board should organize on the second Monday after appointment as provided by the statute, but has no power of administration within the territory of the new district until the new district comes into existence as a separate, independent political subdivision of the state.

3. When a new school district is created in pursuance of Section



4736, General Code, a limited interregnum is created within the territory comprising the new district for a period of thirty days after the adoption of the resolution of the county board of education creating the district, during which time local district boards of education have jurisdiction to administer the affairs of the schools and school patronage within the said territory to the extent only of providing for immediate necessary needs, but cannot lawfully create liabilities against the new district by the making of contracts to be fully performed during the terms of their possible successors, so as to prejudice or forestall the action of those successors in the administration of school affairs for the new district, in the event the district becomes a separate, independent political subdivision at the end of the period of thirty days after the county board of education adopted the resolution creating the district.

Respectfully,

JOHN W. BRICKER,

*Attorney General.*

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5947.

APPROVAL—BONDS OF IRONTON CITY SCHOOL DISTRICT,  
LAWRENCE COUNTY, OHIO, \$10,000.00.

COLUMBUS, OHIO, August 10, 1936.

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

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5948.

APPROVAL—BONDS OF CUYAHOGA COUNTY, OHIO, \$5,-  
000.00.

COLUMBUS, OHIO, August 10, 1936.

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