

In answer to your fourth question, I am of the opinion that the employes appointed by the auditor under section 5366 G. C. (that is, when prescribed by the tax commission) can only be paid out of the general county fund as provided in said section, which is as follows:

"The compensation of such experts, deputies, clerks and employes shall be fixed by the county auditor subject to the approval of the tax commission of Ohio, and shall be paid monthly out of the general county fund upon warrant of the county auditor."

This is very specific as to how they shall be paid, and they cannot be paid out of the amount allowed by the county commissioners under section 2980 G. C. when appointed under the provisions of section 5366 G. C.

Respectfully,
C. C. CRABBE,
Attorney General.

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SCHOOLS—COUNTY BOARD OF EDUCATION MAY CREATE SCHOOL DISTRICT FROM ONE OR MORE DISTRICTS—DISTRICTS MAY BE LESS THAN SIXTEEN SQUARE MILES—SECTION 4687 G. C. CONSTRUED.

1. *A county board of education may create a school district from one or more school districts or parts thereof, but to parcel out of a school district a part thereof exempt by law from taxation which has no school facilities for the children of compulsory school age living therein and for which children no school privileges are provided by the board at the time it so parcels out said area from the district to which it previously belonged, such act is illegal and void unless and until educational privileges are furnished to such children.*

2. *County boards of education do not create villages. The creation of a new village and of a village school district are, by law, simultaneous acts. The area of a rural district of less than sixteen square miles outside of a newly erected village by force of section 4687 G. C., at once becomes a part of the village school district. Rural school districts of less area than sixteen square miles by favor of section 4736 G. C., may be created by a county board of education.*

3. *A village created within the area of another village school district which area, as provided in section 4678 G. C., was attached to an earlier created village, becomes a village school district whose limits or boundaries are identical with those of the later created village, and the area outside of the later created village remains a part of the first village school district subject to any action under authority of section 4736 G. C. the county board of education may take concerning it.*

COLUMBUS, OHIO, March 19, 1923.

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

GENTLEMEN:—Recently you wrote this department as follows:

“We respectfully request you to furnish this department with your written opinion upon the following questions:

Question 1. May a county board of education legally create a new school district from a part of a school district, leaving the remainder of the original school district without school houses or any tax valuation but with children of school age to be educated?

This question arises out of the action of the county board of education of Cuyahoga county in establishing the North Randall School District, taking all of the territory of Warrensville township school district except approximately twenty-five hundred acres of land owned by the City of Cleveland and used as a correctional farm, leaving this territory without a board of education, school house, or other school facilities and providing for no school privileges for the children of the employes of the City of Cleveland residing in such territory.

Question 2. May a county board of education create a new school district from part of a rural or village school district and leave less than 16 square miles in the original school district?

Question 3. If a village is incorporated within a township such that less than 16 square miles remain in the rural school district outside the incorporated portion, the portion outside automatically becomes a part of the new village school district. If immediately after this, one or more villages are incorporated in the unincorporated part of the township, will these newly incorporated villages become separate village school districts or will this territory remain as a part of the village school district which was first incorporated?”

With your request are some letters and other matters of record relating to your inquiry. The paragraph from a letter from the Cleveland City Board of Education to your examiner says:

“The City of Cleveland owns a cemetery and a correctional farm outside of the city limits. The city employes who supervise and operate the cemetery and the farm live at their places of employment but maintain voting residences within the city. A question has arisen as to the responsibility of the board of education of the school district of the City of Cleveland for the education of the children of the above employes.”

Excerpts of the records show that on August 26th, 1922, the Cuyahoga County Board of Education passed a resolution by unanimous vote to create out of the Warrensville Rural School District a new district to be known as the North Randall Rural School District. The resolution describes the area of the new school district fully by lot numbers and by metes and bounds, excepting by its terms, the Warrensville Correction Farm, from the area of the new district.

Two clauses of the resolution of August 26th, 1922, read as follows:

"Whereas, in the opinion of this, the Cuyahoga County Board of Education, it is possible to provide proper public school educational facilities only for the pupils in the present Warrensville Rural School District, exclusive of those pupils located on land owned by the city of Cleveland."

"Whereas, the ends of justice would seem to be best served by making it necessary for the city of Cleveland to provide for the education of those pupils on land owned by the city, therefore * * * ."

It is also resolved to make an equitable division of funds and of indebtedness between the Warrensville and North Randall Rural School Districts.

In the second resolution of the County Board of Education, passed according to the letter of your examiner, on November 9th, 1922, it is stated that, the County Board of Education, on August 26th, 1922, created the North Randall Rural School District; that no remonstrance of the majority of the electors "residing in the newly created district" had been filed within thirty days; and that "all of the funds now in the treasury of the Warrensville Rural Board of Education or in process of collection to the credit of said board had been levied against property now included in the North Randall Rural School District."

The resolution appoints a board of education for North Randall Rural School District and gives all the money, property, books, records, houses and lands and all indebtedness of the Warrensville District to said North Randall Rural School District. Nothing is said about or done for the area excluded from the new district by way of organizing it as a school district or making it capable of functioning as a separate school area.

The equitable division of funds and indebtedness declared for in the resolution of August 26th, 1922, is not made or mentioned in the later resolution except that the second resolution states that all funds in possession or in process of collection in the Warrensville District were levied against or are to be collected from the property of the new district.

These resolutions support your statement that the county board of education omit from the North Randall Rural School District the twenty-five hundred acres known as the Correctional Farm, leaving this farm without schools, school property, and with no tax valuation, "but with children of school age to be educated."

From the foregoing it is apparent the pupils of school age thus left without school privileges are the children of parents employed and housed at the correctional farm, which parents have no voting residence at the farm although all are housed there and maintain their families at that place. It is also evident that the correctional farm is all that is left of the Warrensville Rural School District, an area exempt from taxation without any school property or school facilities or any of the elements of the school district except mere extent of space but with youth of compulsory school age, actual school residents at the farm for whom it is resolved and intended no school privileges shall be provided by this action of the county board of education.

These children then are not any of those sent to the correctional institutions at the farm as inmates of such institution but "are children, wards, or apprentices of school residents of the district," (or area) at the time it was excluded from the district to which it formerly belonged by the action of the county board of education concerning which you are inquiring.

In an opinion, No. 2817, of this department issued in January, 1922, it was held:

"1. The phrase 'actual residents of the district' occurring within the provisions of section 7681 G. C. requires an actual residence in fact, or the physical presence and dwelling of the parent or person standing in *loco parentis* to the pupil, for the time being at least, within the school district.

2. The school residence required by section 7681 G. C. and the voting residence required by section 4866 G. C. are not identical."

It seems unnecessary to cite statutes or quote court decisions to support the assertion that the paramount policy and intention of our school system is, that boards of education shall maintain schools for all youth of the state so that all may be given at least an elementary education by the state. Many sections of the law and the constitution itself support such an assertion.

Section 4736 G. C. provides:

"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 the 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. * * *"

The third part of the syllabus in *County Board of Education v. Boehm*, 102 O. S., 292, reads:

"Section 4736, General Code, vests in the county board of education the power to create a new school district from an existing district and a part of another existing district, and, in the absence of fraud, bad faith, or the taking of such arbitrary, whimsical and unreasonable action by the board as amounts to an abuse of discretion, the only limitation upon such power and discretion is the limitation contained in that section providing for a remonstrance by a majority of the qualified electors residing in the territory affected by such order."

The fact is the county board of education has set off this area, which is without taxable property, and in so doing has not created a school district. A school district without taxable property, school houses, etc., could not exist and is not within the purview of the statutes, because its main function, education of its youth, is absent and nil. Such action seems to be well within the language of the above cited case being "such arbitrary, whimsical and unreasonable action by the board as amounts to abuse of discretion," when no arrangement to take care of the resident youth is made.

While it may not be illegal for a county board of education to create a new school district it may safely be said it is illegal for it to parcel out of a school district a certain given area containing resident school youth of compulsory school age leaving them none of the school privileges afforded by the law to all youth of the state. In other words if the converse of your inquiry be stated, to-wit: May a county board of education by setting off a given area from an existing school district deny the children of parents living in the excluded area all school privileges, the illegality of the act of the county board of education is at once apparent. It has no such authority.

It is therefore the opinion of this department that in excluding the children of school age living upon the Warrensville Farm from the advantages of the schools of the district to which this farm formerly belonged, the county board of education acted in such arbitrary or whimsical or unreasonable way as to amount to abuse of discretion and such act is *ultra vires*.

So far as your second question relates to the village school district leaving less than sixteen square miles of the rural district out of which it is erected, it is answered in the negative by section 4687 G. C., the first sentence of which reads:

"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 sixteen square miles."

In so far as your second question relates to the creation of a new rural school district by the division of an existing rural district it is answered by the Supreme Court of Ohio in the case of *County Board of Education v. Boehm*, *supra*.

In discussing section 4736 G. C., as it existed in 106 O. L., page 397, before and since the amendment thereof in 108 O. L., Part 1, page 707, Robinson, J., at page 299 of the opinion says:

"Before the creation of the county board of education, provision was made for township boards, special district boards, and the various other varieties of school boards then by law existing, to agree among themselves upon the distribution of territory, and provision was made for an appeal to the probate court. The operation of that system resulted in much litigation, for it was early discovered that each district was ambitious to hold all the taxable territory it had, and seldom were the boards able to agree upon the transfer of the territory from a large and well-financed district to a small and poorly-financed district. In consequence the jurisdiction of the probate court was constantly invoked with often unsatisfactory results, and it was, in part at least, to obviate the constant contention between adjoining districts for possession of taxable territory that the present system of a county board of education was adopted. The legislature, with a view primarily to furnishing better, and, as near as might be possible, equal, school facilities and advantages to all the pupils of the state, provided that each county board upon its organization should make a survey of its county district and arrange the school districts according to topography and population in order that each school might be most easily accessible to the pupils. The county board was authorized to change the boundary lines of districts without regard to township lines, provision was made for equalizing the property valuation of adjoining rural districts, a minimum area for each rural school district was prescribed, and provision was made for an equitable division of funds and indebtedness among the new districts. As thus adopted the provision was applicable to all the county school districts of the state; and, presumably, the various county boards of education complied with the provision and each rearranged and established its various school districts according to topography and population with a view to establishing in rural districts as nearly an equal property valuation as could be obtained, and none containing less than fifteen square miles.

The provision then having served its purpose, the school districts of the state having been arranged according to topography and population with reference to the accessibility of its schools to the pupils, adjoining rural districts having been so redistricted as to be as nearly equal as possible in property valuation, and all rural districts containing fifteen square miles or more, the legislature repealed the section in toto and adopted in its stead present section 4736, General Code, which contains no provision as to the topography and population, no provision as to accessibility of schools to pupils, no provision as to approximate equality of property valuation of adjoining districts, and no minimum area for any district.

It will not be presumed that the legislature by the repeal of an existing statute and the enactment of a different statute upon the same subject did not intend to change the effect of the law as it existed prior to the repeal, but on the contrary it will be presumed that it was the intention and purpose of the legislature by the repeal of the old and the enactment of the new to change the effect and operation of the statute to the extent of the change in the language thereof, and that, having taken out of the statute the requirement that the district should be arranged according to topography and population, the legislature no longer intended to require such arrangement, but relied upon the sound judgment of the county board of education, having in mind the improved facilities of transportation, to make such arrangement of the territory of the respective districts as would best serve the comfort, health and education of the pupils. Having left out of the new enactment the provision that adjoining rural districts should be made as nearly equal as possible in property valuation, it will be presumed that it no longer intended to require boards of education to make adjoining rural districts approximately equal in valuation, but left it to the sound discretion of the county board of education the power and obligation of so arranging the various districts with reference to valuation as would best serve the needs of the respective districts; and that having left out of the newly-enacted section the minimum area provision, it no longer intended to require the county board of education to observe such minimum area. In short, that in so far as it repealed the theretofore specific limitations upon the power and discretion of the county board it to that extent intended to and did enlarge the discretion of such board, and that in changing by various enactments under the same sectional number the language of section 4736, which as amended, in 104 Ohio Laws, 138, read, 'To this end the county board shall have power by resolution at any regular or special meeting to change school district lines and transfer territory from one rural or village school district to another,' so as to now read, 'The county board of education may create a school district from one or more school districts or parts thereof,' it is intended to vest in the county board a different and additional power than that vested by the former section.

Coming now to the consideration of the construction of section 4736, General Code, with reference to section 4692, General Code, while it is difficult to distinguish between the creation, as in the instant case, of a district from one entire district and a portion of an adjoining district, giving to such created district a new name and appointing a new board, under section 4736, General Code, and the 'transfer (of) a part * * * of a school district * * * to an adjoining district,' retaining the name and board of the adjoining district, under section 4692, General Code, yet

we know of no inhibition upon the power of the legislature in that respect; and if it in its wisdom has seen fit to make a distinction by name and board only, and has failed to indicate a difference in any other respect, that of itself does not vitiate the legislation, nor make the one section conflict with the other. If, however, such conflict did exist we would still be obliged to hold that section 4736, being the last expression of the legislature upon the subject, would control."

It seems clearly the logic of the decision in the Boehm case, *supra*, that rural school districts of less than sixteen square miles may be created by a county board of education and in view of the force of same this department so holds.

Your third question is disposed of by section 4687 G. C., which says:

"Upon the creation of a village, it thereby becomes a village school district, * * * ."

This language is plain, and seems to need no construction but worked out so as to apply to your third question amounts in substance to what follows.

Section 1, of Article XVIII of the constitution classified municipal corporations on the basis of population. Less than five thousand in population is a village. Area is not a basis of classification.

Elyria v. Vandermark, 100 O. S., 365.

When the first village is formed in the rural school district spoken of the less than sixteen square miles of area outside of it attaches to the village school district for school purposes and becomes area of a village school district. When the second village is created the area within its confines becomes a village school district, that remaining outside is already area of a village district made so by being attached to the first and it so remains until changed by the action of the county board of education under favor of section 4736 G. C. There is no doubt a county board of education has authority to transfer territory from a rural to a village district and it also has power to dissolve two village school districts and consolidate them into one, if it so desires.

Wogoman v. Board of Education, 5 App. 380.

Fisher vs. Whittus, 6 App. 415.

By the erection of a second village in the area of less than sixteen square miles attached to the village before created by force of section 4687 G. C., there is established a village school district with identical boundaries. The area outside of the second or later created village, being previously attached to the first village, remains a part of said first village school district.

This is believed to be a descriptive solution of the questions presented by your third inquiry.

Respectfully,

C. C. CRABBE,
Attorney General.