No. 402

SCHOOL DISTRICTS—CLASSIFICATION—BOARD OF SCHOOL TRUSTEES—ELECTIONS—CANVASSING ELECTIONS—LEGISLATURE

Held: A board of school trustees has no authority or power by statute to change the classification of a school district; a school district must retain its classification until the legislature prescribes the procedure and method of changing the classification; the resolution of the board noted herein is without warrant of law and the board is directed by Section 996, Revised Codes of Montana, 1935, to proceed to canvass the return of the election of April 4, 1942, as provided therein.

April 17, 1942.

Mr. D. Gordon Rognlien
County Attorney
Flathead County
Kalispell, Montana

Dear Mr. Rognlien:

You have submitted for my opinion the following factual situation:

School District No. 5, Flathead County, Montana, was created and has been operating for many years as a school district of the second class; that the regular duly called and conducted school election was held April 4, 1942, at which election duly filed candidates for trustees of such school district were voted for.

On Tuesday, April 7, 1942, the Board of Trustees of said School District No. 5 duly met to canvass the returns of said election so held April 4, 1942; that at said meeting, instead of canvassing the votes and declaring the trustees found to be elected, and causing the clerk to issue a certificate of election to the person or persons elected, the board of trustees passed the following resolution:

"Whereas it appearing that the School District No. 5 is now a District of the first class, and that the election of school trustees held on April 4, 1942, was held pursuant to the laws governing Districts of the second class by which A. E. Ilgen and Forrest C. Rockwood received the highest number of votes and it appears that such election was therefore invalid, be it therefore resolved that the Board declares no one elected, and hereby refers the matter to the Superintendent of Flathead County for appointsments to fill the existing vacancies."

Your question is: Was the action of the Board proper and lawful?

In answering your question, I call attention to Section 1021, Revised Codes of Montana, 1935, which provides:

"All districts having a population of eight thousand or more are, and hereafter shall be districts of the first class. **All districts having a population of one thousand or more, and less than eight thousand, are, and hereafter shall be, districts of the second class,** and all districts having a population of less than one thousand are, and hereafter shall be, districts of the third class. In districts of the first class the number of trustees shall be seven; in districts of the second class the number of trustees shall be five, and in districts of the third class the number of trustees shall be three." (Emphasis mine.)

It is to be noted the declaration of the legislature is plain that

"All districts having a population of one thousand or more, and less than eight thousand, are, and hereafter shall be, districts of the second class."

Did the legislature intend by this mandate all school districts existing at the time of the approval of this act should take and thereafter retain such classification? The statutory declaration justifies this conclusion.

There is no statute authorizing the board of school trustees to determine or change the school district classification.

A school district is merely a subdivision of the state for specific governmental purposes, and—as such—is subject to legislative regulation and control.

Where an officer, board or commission acts, he or it must be able to point to the statutory authority granting such power or authority.

As was well stated by Chief Justice Brantley, in speaking of the board of school trustees:

> "When put to the choice between acting without authority and pursuing the proper method to obtain it, **they must refrain** from acting until authority is obtained. **The power to act without authority does not exist.**" (Emphasis mine.)
>
> State ex rel. Bean v. Lyons, et al., 37 Mont. 354, 96 Pac. 922.

And again our Supreme Court, in considering the authority of the board of county commissioners, held:

> "The fact that the contemplated action may be in the best interests of the county is not an admissable argument. The doctrine of expediency does not enter into the construction of statutes."
>
> Franzke v. Fergus County, 76 Mont. 150, 156, 245 Pac. 962.

The Supreme Court of New Jersey had the question under consideration as to the classification of cities, where no provision had been made by the legislature as to the ascertainment of the population, and held it was a matter for legislative action.

> In re Assessment for Construction of Sewer in City of Passaic, N. J., 23 Atl. 517.

It is pertinent to note the legislature has provided for the classification of cities, towns and counties. The method of determining population, as well as the declaration of the result, has been provided.

It is also worthy of note a former attorney general issued an official opinion on this question, Volume 10, page 85, holding a school district retains its classification until the legislature prescribes the manner of changing it; and several legislative sessions have been held since the said opinion was rendered without any action being taken by the legislature.

It is therefore my opinion School District No. 5 retains its classification as a school district of the second class and will retain such classification until the legislature prescribes the procedure and manner of changing the same. It is my opinion the Board of School Trustees of District No. 5 has no authority or power by statute to change the classification of the school district until such authority is granted by the legislature. It is my further opinion the resolution above quoted—as passed by the said board of trustees—is without warrant of law and the said board of trustees should proceed to canvass the returns of the school district election of April 4 as provided by law.

Sincerely yours,

JOHN W. BONNER
Attorney General