Opinion No. 33-595

May 2, 1933

BY: E. K. NEUMANN, Attorney General

TO: State Tax Commission, Santa Fe, New Mexico.

*{*47}* Under date of March 30, 1933, you requested an opinion upon House Bill No. 172, which is an act "Abolishing County Boards of Education, and Providing for Boards of Education of Rural School Districts; Powers and Duties of said Boards, and the manner of their Selection."

There are three pertinent questions, which must be determined, as evidenced by your letter and letters from various other officials received since your letter:

1. When does said act become effective, so that the preliminary acts required thereunder can legally be done?

2. Can the various county commissioners legally incur the expense of the election thereunder in the present year?

3. Is said act workable by reason of its terms, taking same as a whole?

In response to Question No. 1, it is our opinion, that said act, not carrying the emergency clause, can not become workable in 1933. This conclusion is arrived at for the following reasons:

Section 4 of said act, among other things, provides that on the second Tuesday in June, 1933, an election shall be held for the purpose of electing said board, the members thereof to be elected for various terms as therein specified. The concluding sentence of said section is as follows: "Said elections shall be held, conducted, returned and canvassed as in cases of election of officers in the counties, except that no registration shall be required," this latter provision is the requirement provided for the holding of such election.

The second Tuesday of June, 1933, falls upon June 13, only three days after said act becomes effective, said act, not carrying the emergency clause, becoming effective 90 days after the adjournment of the Legislature. which day falls upon June 9th, 1933. Consequently, to comply with said act, and same is the only authority under which officers have any power to perform their duties, it would become necessary for the county commissioners of each county to perform certain duties prior to the date the act will have become effective. These acts are the preliminary matters which must be completed before a legal election can be held and are the same as those provided for in the general election laws, pertaining to the election of county officers. Preliminary to the calling of an election, the following acts must be performed:

1. Under Section 41-301, 1929 Code, the Board of County Commissioners shall, at least 15 days before the election by proclamation and publication thereof, give notice of the election, the objects thereof, the officers to be voted for, the candidates for such offices as same have been certified to the county clerk, the names of the judges and counting judges of election and the place where such election is to be held in each precinct and election district.

2. The county clerks must prepare the ballots to be used and have them in hand at least 12 days before the election. See Sec. 41-305, 1929 Code.

3. On the third Monday next preceding any election, the county commissioners are required to select three judges of election for each precinct and election district and other officers of election. See Sec. 41-314 and 41-329, 1929 Code.

4. The provisions for absentee *{*48}* ballots are, under said act, applicable to the elections held thereunder, and it is obvious that some of the acts required to entitle a voter to cast an absentee ballot must have been performed prior to the effective date of said act.

Obviously therefore, the proclamation must be published, in the present case, not later than May 29th, 1933, or 11 days prior to the effective date of said act; the printed official ballots must be in the hands of the county clerk not later than June 1, 1933, or 8 days prior to the effective date of the act; and the third Monday next preceding said election, upon which date the county commissioners must select the officers of election, falls upon the 29th of May, 1933, 11 days prior to the effective date of the act in question.

In 59 Corpus Juris 1138, governing the effect of a potential statute, we find the following rule:

"While a statute may have a potential existence, although it will not go into operation until a future time, until the time arrives when it is to take effect and be in force, a statute which has been passed by both houses of the legislature and approved by the executive has no force whatever for any purpose. Before that time no rights may be acquired under it, and no one is bound to regulate his conduct according to its terms, and all acts purporting to have been done under it prior to that time are void."

This rule is supported by various court decisions, but one case in particular is worthy of quotation, for it deals so closely with the question at hand. In the case of Santa Cruz Water Company vs. Kron et al, 15 Pac. 772, an act authorizing certain towns to vote bonds for waterworks was enacted to take effect upon May 8th following. Under the act an election was held March 16th and bonds for waterworks voted, the bonds issued under authority of said act were, by the California Courts, held void and of no effect.

In State vs. Rose, 47 NE 64, the Illinois Supreme Court, while holding the act in force under a constitutional provision, held that an act, creating new circuit judicial districts, if not in force, was inoperative to allow conventions to be held, nominations to be made

and elections to be called and held, for reason that the new circuits could have no existence until the act became effective.

In response to Question, No. 2, it is our opinion that said act cannot become operative for 1933, due to the fact that no provisions are therein contained to suspend other statutes which prohibit expenditures by county commissioners not budgeted for or for the defrayal of which there is no current income. Our conclusions are based upon the following reasons:

Article 59 of Chapter 33, 1929, relates to county budgets, provides for their preparation and approval. Special attention must be paid to Section 4 of said Article which, in part pertinent hereto, provides:

"* * * The budget as finally approved * * * shall not be altered or changed except by order of the state tax commission and then only for the correction of obvious clerical errors therein. When such * * * estimates shall have been received * * * shall be presented to the boards of county commissioners and duly recorded in the minutes of the commissioners' proceedings, and when so received and recorded * * *, said * * * budgets shall be binding upon all county officials, and the several boards of county commissioners, and all other officials having the right to allow and pay claims for the revenue to be so provided shall not allow or approve claims in excess thereof, nor shall the county treasurers pay any county or other warrants in excess thereof, and such allowances or claims or warrants so allowed or paid shall be a liability against the officials so allowing or paying such claims or warrants, and recovery for such excess *{*49}* amounts so allowed or paid may be had against the bondsmen of such officials * * *."

It is to be admitted, that the officials of our various counties did not budget for the expense of this school election, for the need thereof was not know or could not be contemplated at the time the budgets were prepared, so that, at this time, they are without power to allow or pay any claim for such purposes out of the budget for the current year, and in fact are made personally liable upon their bonds should they do so, to say nothing of the criminal liability as provided in Section 33-5907 of said Code.

In answer to Question No. 3, we are confronted with so many matters, but it is our conclusion after careful consideration, that the act is unworkable.

In the first place, we believe that the title of the act is not sufficiently broad to meet the requirements of Section 16 of Article 4 of our Constitution. The title is as follows: "An Act Abolishing County Boards of Education and providing for Boards of Education of Rural School Districts: Powers and Duties of said Boards, and the Manner of Their Selection." To the casual observer, the title would convey the idea that county boards of education are abolished and that there is a new provision to elect school boards in rural school districts as now constituted. The act goes considerably further, for it creates a new rural school district, which gives us good reason to believe this defect fatal to the validity of the entire act.

Another matter, which is of vital importance to the workability of the act, is the question of just what powers this new board is to have. The are redeemable by a certain bank in only express power given it, other than the privilege of holding office, and the drawing of per diem and mileage (Sec. 3) is, under certain restrictions, the one to employ teachers and employees for each rural district. This power is found in Section 6 of the act, and this conflicts with Section 120-804 of the Code in several respects, the only parts of the existing laws relating to powers of county boards to remain in effect after the effective date of the new act, Section 5 thereof, providing that Sections 801, 802 and 803 of Chapter 120, 1929 Code shall no longer apply after July 1, 1933.

The board created by this act is to have, with certain exceptions, the powers and duties of the existing county boards, and in addition the powers and duties of municipal boards of education. When we consider that now municipal boards have only those powers and duties, with the exception of some powers of organization and administration, that the laws confer upon county boards as they now exist, any powers conferred upon the new board is by reference to a statute which statute refers to another made inapplicable by the act under consideration. This creates an indefiniteness and uncertainty which makes the act as nearly unworkable as possible.

The double reference provisions, already pointed out offends, in our opinion, Section 18 of Article 4 of the Constitution. The reason for the existence of this provision is certainly illustrated by the double reference and the uncertainty as to the repeal of Sections 120-801, 120-802 and 120-803. See State vs. Armstrong, 31 N.M. 220.

There are several other matters which could be mentioned and discussed in this opinion, but we feel that we have covered the most vital defects in the act, almost any one of which is fatal to the validity thereof.

The matter intended to be achieved is one well within the province of the legislature, but we feel that the object has not been accomplished and cannot be without a most careful revision of House Bill No. 172.