does not prohibit or affect powers given to officers by virtue of their office.

Thus, inasmuch as Chapter 65 of the Acts of 1909 has not been amended or repealed, it is in full force and effect and a member of the legislature upon meeting the requirements of that act, may administer oaths and take acknowledgments.

OFFICIAL OPINION NO. 28

March 26, 1951.

Honorable Edwin K. Steers, Sr.,
Member, State Election Board,
108 E. Washington Street,
Indianapolis, Indiana.

Dear Sir:

I have your request for an official opinion concerning problems confronting cities in the coming primary and general city elections due to the 1950 census which has, as yet not become effective. You draw particular attention to the possibility that the census may become effective after the expiration of the period provided for filing declarations of candidacy and before the general election whether before or after the primary election.

The first question to be considered is when a United States decennial census is effective. Official Opinion No. 12 of February 12, 1951, examines the authorities on this point and concludes that such a census is effective when officially announced as of the first of April in the year taken. Thus, if the results of the 1950 decennial census were announced on April 1, 1951, they would be effective on that date as of April 1, 1950.

It is to be noted that the classification of cities is on the basis of population according to "the last preceding United States census." Acts 1933, Chap. 233, Sec. 1, as amended, same being Burns 1950 Replacement, Sec. 48-1201.

Changes in classification of cities are automatic; that is, no affirmative act is required for the change to take place, but it follows as a direct result of the official pronouncement

of the census results. Acts 1933, Chap. 233, Sec. 3, same being Burns 1950 Replacement, Sec. 48-1203.

For the purpose of illustrating the difficulties, I will take the example of a city which will be changed from a city of the third class under the 1940 census to a city of the second class under the 1950 census. As you point out in your letter, cities of different classes have different elective officers. In the example I have chosen, the only difference in officers is in the number and manner of choosing the city councilmen. Acts 1943, Chap. 99, Sec. 1, same being Burns 48-1215; Acts 1945, Chap. 232, Sec. 1, same being Burns 48-1216.

Acts 1933, Chap. 233, Sec. 9, as amended, same being Burns 1950 Replacement, Sec. 48-1220, provides that cities of the third class shall have seven (7) councilmen to be elected by the city as a whole and the cities of the second class shall have nine (9) councilmen, six (6) of whom are to be elected by councilmanic districts and three (3) councilmen at large. This section goes on to provide:

> "On or before March 27, 1934, the common council of cities of the second, third, fourth and fifth classes, shall, by ordinance, establish councilmanic districts as herein provided and the nomination of candidate and the election of members of the common council in the year 1934 and each election thereafter shall be in accordance with the provisions of this act and the laws governing primary and general elections."

It is important to note in this regard that it has been held that in third, fourth and fifth class cities candidates must declare themselves to be candidates from the particular councilmanic districts or as a councilman at large. 1947 O. A. G. 42, 1938 O. A. G. 144.

Section 86 of the Chapter 208 of the Acts of 1945, same being Burns 29-3604, provides what candidates shall be subject to primary elections as follows:

> "On the first Tuesday after the first Monday in May of each year in which a general election is held, at which state, county, city or township officers are to be elected, a primary election shall be held under the provisions of this act in each and every precinct in the state of Indiana. At such primary election,

> there shall be nominated the candidates of all the political parties coming under the provisions of this article and article ten (10) (Secs. 29-3701—29-3705) which are to be voted for at such general election, other than candidates for presidential electors, and other than officers to be voted for by all of the electors of the state. * * *"

Acts 1945, Chap. 208, Sec. 187, same being Burns 29-4801, provides that there shall be a general election at which "all existing vacancies in office, and all offices the terms of which shall have expired or which will expire before the next general election thereafter, shall be filled, unless otherwise provided by law."

Acts 1945, Chap. 208, Sec. 150, same being Burns 29-4301, which concerns the holding of general city elections, provides in part as follows:

> "The time of holding an election for all the elective officers of all cities in this state, * * * shall be and the same is hereby fixed as and shall be held on the first Tuesday after the first Monday of November of every fourth year in the even-numbered year preceding the expiration of the term of such officers, unless otherwise provided by law."

Acts 1945, Chap. 208, Sec. 151, same being Burns 29-4302, provides as follows:

> "Primary elections shall be held in cities in even-numbered years at four-year intervals, on the first Tuesday after the first Monday in May preceding the November in which elective offices are to be filled, unless otherwise provided by law."

Thus, the statutes provide that there shall be an election in which existing and prospective vacancies shall be filled preceded by a primary at which candidates for said offices shall be ascertained.

It is clear that no action is authorized to be taken at the coming primary election in contemplation of a change in classification of a city due to the 1950 census which is as yet not official. Now let us consider the possibility that after

the primary and before the general election the census should be made official and the city should change in classification from a city of the third class to a city of the second class. Acts of 1945, Chap. 208, Sec. 115, as amended, same being Burns 29-3810, provides for filling vacancies on tickets, the pertinent part of that section is as follows:

> "When, as a result of a withdrawal or withdrawals, *or for any other reason,* except in case of death or removal after ballots are printed and before election, there is no candidate for any office, either for nomination by the primary, or as a candidate for office at a general or special election, unless otherwise provided by law, the vacancy shall be filled at least thirty (30) days prior to a primary election and not later than September 1 before a general election and at least thirty-six (36) days prior to a special election in the manner following:
>
> "Vacancies for county and township offices or any municipal subdivisions thereof except townships shall be filled by the county central committee; * * *" (Our emphasis).

This presents the question of the status of the persons nominated under the provision for election in a third class city, in this regard the complicating factor for the determination of councilmanic district boundaries. As we have seen Section 48-1220 provides for the establishment of councilmanic districts and a candidate must declare himself from a specific district.

Thus it is my opinion that where a change in classification occurs at a time at which it is still possible from a practical standpoint to change the councilmanic district boundaries, that power is granted by the legislature to the city council and so far as possible the candidates nominated for the old councilmanic districts should be considered as having been nominated from the district in which they reside after the redistricting. However, in cases of vacancy or other conflict the county central committee under the authority of Burns 29-3810 would have authority to fill vacancies. Furthermore, inasmuch as there would be some doubt as to the status of persons nominated under the old classification it might be

well for the county central committee to confirm the nominations of all such persons. In situations other than the example that we are discussing, a change in classification of a city may cause either the dropping of an office or the adding of a new office. When a new office is added the authority of the county central committee to appoint a nominee is clear. Where the office is dropped the previous nominee would lose any right or interest he might have. 1951 O. A. G. No. 12.

Should the official announcement of the census come at such a time that from a practical matter it is impossible to designate new councilmanic districts and take other steps to bring the city general election in compliance with a new classification or if the census should become effective subsequent to the 1951 general city election, it is my opinion that the officers elected to offices which continue to exist, whether modified or not, under the new classification, would hold over until the next regular city election. In this regard see especially the case of Passaic 23 A. 517, 54 N. J. Law 156 and note 62 *Corpus Juris Secundus,* Sec. 501, p. 940, which are to the same effect. See further the case of State *ex rel.* v. Board (1925), 196 Ind. 472, which is somewhat analogous. See also City of Lebanon v. Walker (1929), 88 Ind. App. 498, 164 N. E. 637, which holds that on a change of classification of a city in which an office is abolished the officer holding that office immediately loses all authority and ceases to become an officer. C. J. S., *supra,* has a very clear statement of the general rule which is as follows:

> "* * * Where, on transition of a municipality from one class to another, there is no provision in the statute declaring a certain office vacant, and the duties under it are in each case substantially the same, the transition does not vacate the office. * * *"

For authorities on the holding over of city officials see 1948 O. A. G. 80.

Thus, in summation, it is my opinion that no action of any type can be taken in reliance on the 1950 United States decennial census until said census becomes official; that if that census becomes official a sufficient time, before the 1951 general city election from a practical standpoint to allow its

effects to be taken into consideration all necessary acts should be done in order to bring that election in compliance with the classification resulting from the 1950 census and that if it is subsequently made official that the present officers and officers nominated without consideration of the change so far as their duties are substantially the same as the new officers would hold over and that any vacancies occurring should be filled in the manner provided by law.

OFFICIAL OPINION NO. 29.

March 29, 1951.

Mr. Robert B. Hougham,
Executive Secretary,
Indiana State Teachers'
Retirement Fund,
336 State House,
Indianapolis, Indiana.

Dear Sir:

Your letter of 19 March 1951 has been received requesting an official opinion on the legal effect of the 1951 amendment to the Teachers' Retirement law. Your specific questions being as follows:

"1. If a member of the 1951 law attains age 68 before August 1, 1951, may she be employed to teach in the school year 1951-52?

"2. If a teacher attains age 68 at any time after August 1, 1951, and before July 31, may she be employed for, and teach throughout, the school year 1951-52?

"3. Does the 1951 amendment to the retirement fund law in any way affect the requirement theretofore existing, that members under the 1939, 1945, 1947 and 1949 laws cannot be employed after reaching age 66?"

Chapter 142, Section 1, Clause (d) provides as follows:

"(d) No teacher who has received credit under this act for the maximum years of service, as pro-