"We would, therefore, like to exchange these 6,000 35% ammonium nitrate fertilizer tags (your number 3054-A) for the same number of 33% tags (your number 2981-A). The 35% tags will never be used as we are unable to purchase 35% ammonium nitrate elsewhere.

"We suggested to Mr. Ford that we would be glad to pay your printing costs for the new tags, and of course pay all express or postage charges.

"Inasmuch as an exchange would not involve a refund of money, and the 35% tags are to tax a material that does not exist, we hope you can find the authority to accommodate us."

Upon the reasoning and authority of official opinion of the Attorney General dated May 17, 1943, page 277, and official opinion No. 76, dated August 4, 1949, page 288, it is my opinion that such exchange of labels may lawfully be made, at least in 500 lots, in accordance with the rules and regulations of the State Chemist and at no expense to the State of Indiana.

OFFICIAL OPINION NO. 12
February 12, 1951.

Hon. Otto K. Jensen,
State Examiner,
State Board of Accounts,
Room 304, State House,
Indianapolis 4, Indiana.

Dear Sir:

I have your request for an official opinion, in which you set out certain law and facts concerning the city of Whiting, and then asked a number of questions the first of which is as follows:

"1. Will the change in the classification of the city of Whiting from a fourth class to a fifth class city, caused by a reduction in population by the 1950 census, involve a reduction in the salaries under the new classi-
The law in Indiana seems clear that a change in classification of a city is automatic and caused by reduction or increase in population and that the salaries of officers fixed on the basis of classification of the city change with the classification of the city. An outstanding case in Indiana to this effect is Crowe v. Board of Commissioners of St. Joseph County (1936), 210 Ind. 404, 405, 408, 409, 3 N. E. (2d) 76. In that case it was said on page 405:

"Appellant alleges in his complaint that he was auditor of St. Joseph county during the years 1930, 1931, and 1932; that he was paid a salary for those years upon the basis of $10,000 a year; that he was entitled to be paid at the rate of $15,000 per annum from April 1, 1930, by virtue of section 7830, Burns' Ann. St. 1926; * * *", and concluded on page 408:

"There is no merit in the contention that an increase in the salary of an officer during his term is involved. The salary was fixed before he was elected. The amount he was to receive from time to time was made to depend upon the population of the county. It is as though the statute in existence when the officer was elected had provided that he should receive $1,000 the first year and $2,000 the second year of his term. In the statute under consideration the legislature chose to make the amount of salary dependent upon population shown by the United States census. It might continue during the latter part of the term the same as before the census. It might be more if the population increased. It might be less if it decreased. * * *"
township trustee as fixed by law is less (sic) in the class to which the township is transferred than in the class from which transferred, would the township trustee be required to accept the decrease in salary during his term of office?"

After an extensive discussion of the authorities the then Attorney General concluded:

"It is, therefore, my opinion that where the classification of a township is changed during a term of office of a township trustee pursuant to the provisions of said Chapter 333 of the Acts of 1947 that the township trustee would be required to accept the decrease in salary during the remainder of his term of office. As pointed out in the case of State ex rel. Wadsworth v. Wright, supra, in connection with the reduction of the salary of the prosecuting attorney involved in that case, the reduction would be by virtue of the fact that the extent of his duties is reduced by reason of the reduction in the population and other factors considered."

In the case of population reduction from a fourth class city to a fifth class city the situation is simplified by the fact that each of these classifications provide for the same officers. That is, Section 7 of Chapter 233 of the Acts of 1933, same being Burns 48-1217, provides that there shall be elected in cities of the fourth class a mayor, a clerk-treasurer and members of the common council, while Section 8 of that Act as amended by Section 1 of Chapter 26 of the Acts of 1949, same being Burns 48-1219, provides that elective officers of a fifth class city shall consist of a mayor, a clerk-treasurer and members of the common council.

Your second question is as follows:

"2. If your answer to question 1 is in the affirmative, when will such salary reduction be effective?"

Such salary reductions will be effective as of April 1, 1950, when the 1950 United States Census is made official.

A number of cases discussed in detail the effective date of a decennial census of the United States. The case of Underwood, et al. v. Hickman (1931), 162 Tenn. 689, 39 S. W. 2d 1034, is particularly persuasive in stating that the United States census is effective as of the date on which it is required to be taken, here April 1st, 1950. The more recent case of Varble v. Whitecotton (1945), 354, Mo. 370, 190 S. W. 2d 244, discusses why it becomes effective as of April 1st, 1950, on the date of official publication.

Your third question is as follows:

"3. Has the city of Whiting the privilege of electing a city judge under any existing statute under the present classification as a fourth class city or under the new classification as fifth class city which Whiting will enter when the 1950 census is official?"

The city of Whiting does not have the privilege of electing a judge under any existing statute, either as a fourth class city or a fifth class city.

Section 215 of Chapter 129 of the Acts of 1905 established city courts in the first, second, third and fourth class cities and Section 216 of that Act, same being Burns 4-2402, provided for the election of such judges. In 1920 Section 1 of Chapter 36, which as amended is Burns 48-1212, provides as follows:

"* * * Provided, further, That in any city of the fourth class the powers and duties of city judge may be devolved wholly upon the mayor, by an ordinance of the common council duly passed, at least ninety (90) days prior to any city election, and such ordinance shall take effect, and the office of city judge shall be abolished, upon the expiration of the term of office of the city judge then in office, and in case no city judge has been elected such ordinance may be made to take
effect immediately upon its passage, or at such time as the council may determine: * * *"

In 1923 a limited act having application to Whiting was passed. That act was Chapter 25 of the Acts of 1923, same being Burns 4-2801. It's only effect was to redefine and extend the jurisdiction of the city courts involved.

In 1933 Section 7 of Chapter 233, 48-1217, it is provided concerning cities of the fourth class:

"In such cities the mayor shall act as city judge and the duties now provided by law for city judge shall be devolved wholly upon the mayor. The salary herein provided for mayor shall be in full for all services performed by him as mayor and for acting as city judge",

and Section 1 of Chapter 277 of the Acts of 1945, same being Burns 4-2614 and 4-2615, provided that if the mayor did not wish to serve as city judge he might appoint a city judge for a period of one year at a salary to be fixed by the city council. This act contained a proviso excluding Whiting, which is as follows:

"The provisions of this act (§§ 4-2614, 4-2615) shall not apply to or effect city courts existing under an 'act concerning city courts in cities of the fourth class in certain townships of the state, and declaring an emergency,' the same being chapter 52 of the Acts of 1923 (§§ 4-2801—4-2810), approved March 2, 1923."

Thus we see that although at one time it was entitled to elect a city judge in 1920 this became optional and since 1933 there has been no authority to elect a city judge. The only act authorizing the appointment of a city judge is the 1943 act just referred to. Inasmuch as the city of Whiting is excluded from this act I find no authority to appoint a city judge for the City of Whiting as long as it remains a fourth class city answering the description of the 1923 Act.

However, it has been held that when one is elected to an office under an unconstitutional statute, he is a defacto officer. Park v. State ex rel. Powell 189, 193 Ind. 178, 200; Filker v. Cladwell, 1919, 188 Ind. 364, 366 to 371.
When an official person or body has apparent authority and enters upon the performance of the duties of office, all acts done are valid. In respect to the public, regardless of any lack of authorization.

Standard Oil Co. v. Henry, 1922, 192 Ind. 171, 180, 182.

Where an individual is in position of an officer, performing his duties, and claims to be the rightful incumbent under color of an election, he is a defacto officer regardless of whether his election is valid.

McGuirk v. State ex rel. Gottschalk, 1930, 201 Ind. 650, 656 to 660.

See also

State ex rel. Leal v. Jones, 1862, 10 Ind. 356, 358, 359;
City of Terre Haute v. Burns 1918, 69 Ind. App. 7, 17, 18;

In view of these authorities and the fact a succession of persons have purported to act as city judge of Whiting from 1933 to 1950, it is my opinion that such persons are defacto officers. Their acts are valid and they are entitled to the compensation provided for that office.

Your fourth question is as follows:

"4. If your answer to question 3 is in the negative, what effect will the classification change have on the salary of the present city judge?"

Inasmuch as I find no authority fixing the salary of the city judge of Whiting, there would be no salary classification act which could be effected by the 1950 United States decennial census.