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BOARDS OF EDUCATION—MAY NOT EMPLOY OR PAY BUSINESS MANAGERS OR FINANCIAL AGENTS—ONE PERSON MAY BE CLERK OF SEVERAL BOARDS OF EDUCATION—ASSISTANT SUPERINTENDENT OF SCHOOLS CANNOT BE EMPLOYED AS FINANCIAL ADVISOR OR BUSINESS MANAGER OF BOARDS OF EDUCATION.

S'LLABUS:

1. *There is no legal authority for boards of education to employ and pay persons to act in the capacity of business manager or financial agents for such boards of education.*

2. *Where it is physically possible for one person to discharge the duties of clerk of several boards of education such positions may be held by one and the same person at the same time.*

3. *Clerks of several boards of education may as private individuals, jointly employ a person for the purpose of advising and assisting them in the performance of their duties as such clerks, such person to be paid by the clerks themselves from their private means and not from public funds. Such person would not in any sense be an employe of the several boards of education, and the clerks would still have full responsibility for the proper performance of all the duties of their respective offices.*

4. *An assistant superintendent of schools cannot be employed for the purpose of acting as financial adviser or business manager for the several local boards of education.*

COLUMBUS, OHIO, March 2, 1927.

HON. L. E. HARVEY, *Prosecuting Attorney, Troy, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication in which you state: "Our county superintendent of schools advised me that the local boards of education want to jointly employ a clerk (or?) business manager and pay him a sufficient salary to devote his entire time to looking after the financial affairs of the various school districts" and request my opinion in answer to the following questions:

"1st. Can the local boards of education of a county employ their clerks merely as recording secretaries and then jointly employ a business manager to look after their financial affairs?"

2nd. Can all or any number of the local boards of education of a county employ the same person as clerk and each contribute to the payment of his salary?"

3rd. Could the local clerks employ the same person as an assistant to look after the financial affairs of the various school districts and each contribute from their salary a certain amount to compensate him?"

4th. Is there any reason why an Assistant County Superintendent of Schools could not be appointed and given supervision over the financial affairs of the local districts of a county to act as a business manager or in an advisory capacity?"

The Supreme Court of Ohio in its decision in the case of *State ex rel Clarke v. Cook, Auditor*, 103 O. S. 465, makes the following observation with reference to the powers of boards of education:

"That Boards of Education are purely creatures of statute is an old and

uniformly accepted doctrine. Section III, article VI of the Constitution of Ohio adopted in 1912, provides in part, that: 'Provision shall be made by law for the organization, administration and control of the public school system of the state supported by public funds.'

As administrative boards created by statute, their powers are necessarily limited to such powers as are clearly and expressly granted by the statute. This same doctrine as to inferior boards or commissions was recently laid down in *State ex rel Locher, Prosecuting Attorney v. Menning*, 95 O. S., 97."

In the *Menning* case to which the court refers, the authority of county commissioners was under consideration, and the court in that case held:

"The legal principal is settled in this state that county commissioners in their financial transactions are invested only with limited powers and that they represent the county only in such transactions as they may be expressly authorized so to do by statute. The authority to act in financial transactions must be clear and distinctly granted and if such authority is of doubtful import the doubt is resolved against its exercise in all cases where a financial obligation is sought to be imposed upon the county."

In referring to this statement in the court's opinion in the *Menning* Case the court in the *Cook* case said:

"This doctrine as applied to boards of commissioners in their financial transactions must in principle be equally obligatory upon boards of education in their financial transactions."

This principle has been laid down in many former decisions in practically the same language used by the court in *State ex rel Clark v. Cook*, supra. See *State ex rel v. Freed et al* 6 O. C. D. 550 and *Matthew etc. v. Board of Education* 8 O. A. 206.

Boards of Education are by statute charged with the duty of conducting the schools under their jurisdiction, the management of the school finances and the control of the school property within their respective districts and in doing so are bound by the laws pertaining thereto, having no powers not expressly or by necessary implication granted to them. They are clothed with the power of appointing and employing only such officers and employes as the statutes provide, and no more. These include superintendents, clerks, janitors, superintendents of buildings, teachers, and in city school districts, school directors. At no place is to be found any provision for the employment of a business manager or financial adviser.

If such a position were created by a Board of Education no provision could be made by the board for paying from public funds the incumbent of the position for services rendered.

The duties of the board members themselves include the management of the financial affairs of the various school districts and while there can be no objection to board members seeking and acting on any advice they feel they may need from whatever source they may see fit to get it, there is no way provided by which they can pay for the services of a "business manager".

Each school district is a separate taxing subdivision and entity by itself and in the expenditure of its funds boards of education are confined to expenditures for its own district independent of each and every other district unless by statute authorization is given for joint action as in the case of the establishment of joint high

schools. No part of the funds belonging to it could be used for the school purposes of any other district, and the board could not act jointly with some other district in the employment of clerks or for any other purpose involving the expenditure of money.

Coming now to answer your specific questions I take them in their order:

1. Section 4747 of the General Code provides as follows:

"The board of education of each city, exempted village, villages and rural school district shall organize on the first Monday of January after the election of members of such board. One member of the board shall be elected president, one as vice president and a person who may or may not be a member of the board shall be elected clerk. The president and vice president shall serve for a term of one year and the clerk for a term not to exceed two years. The board shall fix the time of holding its regular meeting."

The duties of the clerk of a board of education which might be said to be in addition to acting as recording secretary or keeping the minutes of the meetings of the board are set out in Chapter 7, Title XIII of Part First of the General Code, and the duties of the clerk as therein set out must be performed by him.

As there is no authority for boards of education to employ business managers or financial agents and no authority for local boards to act jointly in the employment of anyone, your first question must be answered in the negative.

2. It is my opinion that the provisions of law setting forth the duties of a clerk of a rural or village board of education does not require of such clerk the performance of any duties that would in any way conflict with the duties to be performed by the clerk of another local board of education.

The well known rule of incompatibility as laid down by the court in the case of *State v. Gilbert* 12 O. C. C. (N. S.) 275 is:

"Offices are considered incompatible when one is subordinate to or in any way a check upon the other, or when it is physically impossible for one person to discharge the duties of both."

In applying this rule to the question of whether or not the same person might act as clerk of several boards of education it would appear that if it were physically possible to perform the duties of each of said positions as provided by law other incompatibility would not exist because it cannot be said that the several positions would be in any way subordinate to or in any way a check upon each other.

It would appear from the provisions of Section 4747 of the General Code, *supra*, that with the exception of the organization meeting which should be held on the first Monday in January as provided by the statute the several boards of education may set their own time for their regular meetings and such meetings might be so arranged by the several local boards as not to conflict with each other as to time. If however, two local boards of education would hold their meetings at the same time it would be physically impossible for one person to act as clerk of both boards as his duties require among other things that he be present at the meetings and keep the minutes of the same.

It was held in a former opinion of this department found in the *Opinions of the Attorney General for 1915*, Vol. III, page 2453, that it was necessary for a person to be an elector in a school district to be qualified for the position of clerk of the board of education of that district. If that were true it would necessarily follow that the same person could not qualify as clerk in a district other than the one in which he was a qualified elector.

The opinion was grounded on the provisions of the Ohio Constitution which provides:

“No person shall be elected or appointed to any office in this state unless possessed of the qualifications of an elector.”

Section 4, Article XV, Constitution of Ohio.

Since the rendition of that opinion, the Supreme Court of Ohio has held that a clerk of a board of education is not an “officer” within the prohibition of Section 20, Article II of the Constitution which provides that:

“The general assembly in cases not provided for in this Constitution shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished.”

Board of Education v. Juergens, 110 O. S. 667.

Board of Education v. Featherstone, 110 O. S. 669.

If such a clerk is not an officer within the contemplation of Section 20, Article II of the Constitution, it is clear that he could not be considered an officer within the contemplation of Section 4 of Article XV of the Constitution.

In view of this holding of the Supreme Court that a Clerk of a school board is not an officer, the provisions of Section 4, Article XV of the Constitution would not apply, and such appointee need not be an elector of the school district.

3. There could be no legal objection to the clerks of the several local boards of education as private individuals jointly employing a helper or financial adviser and paying him by contribution from their private funds. Such person would not, of course, be in any sense an employe of the several boards of education, and the clerks would still have full responsibility for the proper performance of all the duties of their respective offices.

4. Pertinent to your fourth inquiry is Section 7706 of the General Code reading as follows:

“The county superintendent and each assistant county superintendent shall visit the schools in the county school district, direct and assist teachers in the performance of their duties, and classify and control the promotion of pupils. The county superintendent shall spend not less than one-half of his working time, and the assistant county superintendents shall spend such portion of their time as the county superintendent may designate in actual class room supervision. Such time as is not spent in actual supervision shall be used for organization and administrative purposes, and in the instruction of teachers. At the request of the county board of education the county superintendent and the assistant county superintendents shall teach in teachers' training courses which may be organized in the county school district.”

It will be observed from the provisions of this statute that assistant county superintendents of schools are to devote such portion of their time as the superintendent may designate to actual class room supervision and such time as is not spent in actual supervision shall be used for organization and administrative purposes and in the instruction of teachers. Thus the use of their time is all provided for and they would have no time to devote to the financial affairs or business matters pertaining to the several districts. Moreover the purpose of employing assistant

superintendents is to assist the superintendent in the furtherance of the academic interests of the schools and not to assist boards of education in their financial or business affairs. The qualifications for the one are quite different from those for the other.

While Section 4739 of the General Code gives to county boards of education the power to appoint as many assistant superintendents as they may deem necessary they could not appoint more of such assistants than are needed for the purposes for which assistant superintendents are to be appointed, and thus circumvent the law with the idea of having such extra assistant superintendents act as financial advisers or business managers for the several local boards of education. Such a subterfuge would be doing indirectly what could not be done directly and would be illegal.

Respectfully,
EDWARD C. TURNER,
Attorney General.

134.

DEPARTMENT OF AGRICULTURE—HAS AUTHORITY TO COOPERATE
WITH U. S. DEPARTMENT OF AGRICULTURE FOR THE PURPOSE
OF ERADICATING EUROPEAN CORN BORER.

SYLLABUS:

Under the provisions of Sections 1122 to 1140-6 of the General Code, the Department of Agriculture of Ohio has authority to cooperate with the United States Department of Agriculture for the purpose of eradicating the European corn borer.

COLUMBUS, OHIO, March 2, 1927.

HON. CHARLES V. TRUAX, *Director, Department of Agriculture, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter dated February 28, 1927, which reads as follows:

“Some question has arisen in regard to the authority of the various states interested in the European corn borer clean up campaign to co-operate with the U. S. Department of Agriculture, and to carry out the inspection and clean up program which is provided for in the so-called Purnell Act. Your opinion is asked as to the Ohio Department’s authority under Section 1128 of the General Code and subsequent sections dealing with the control of plant pests.”

You have furnished this department with a copy of the act (H. R. 15649), to which you refer in your letter as “the so-called Purnell Act,” which is as follows:

“AN ACT

To provide for the eradication or control of the European corn borer.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That to enable the Secretary of Agriculture to apply such methods of eradication or control of the European