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BOARD OF EDUCATION—SALARY OF CLERK SHOULD BE FIXED AT TIME ELECTED—NOT SUBJECT TO CHANGE—CONTRACT TO TRANSPORT PUPILS IN THIS CASE VALID—NO AUTHORITY TO EXPEND FUNDS FOR ERECTION OF RESIDENCE TO BE USED BY JANITOR—KINDERGARTEN TEACHERS SHOULD HAVE CERTIFICATES.

SYLLABUS:

At the time of the election of a clerk of the board of education, his salary should be fixed as provided in section 4781 G. C. and when once fixed should not be changed. Such salary so fixed would cover all compensation allowable for the work and duties as provided by law incumbent upon such clerk. Other duties clearly outside the duties of clerk and not inconsistent and incompatible with such duties may be compensated under a separate contract. It is believed the contract to transport pupils mentioned in the transcript of the minutes in the instant case would be valid.

A board of education is without authority to expend its funds for the erection of a residence for the use of a janitor employed by the board.

A board of education cannot legally employ teachers for kindergartens who do not have teachers' certificates.

COLUMBUS, OHIO, April 23, 1923.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Yours of recent date received in which you request a written opinion from this department upon the following question:

“1. Does section 4781 G. C. require a board of education to fix an annual salary for its clerk at the time of his election under section 4747 G. C., or may the compensation be fixed upon the basis of a percentage of disbursements or other indeterminate amounts and make the allowance to the clerk upon such basis at the end of the year or at stated periods during the year?

2. If a board of education fixes a salary for the clerk at the time of his election, may such salary be increased during the term for which he is elected?

(See State ex rel. Clarke v. Cook, Auditor, 103 O. S., 465).

3. If a board of education fixes the compensation of its clerk at a certain amount for ‘services in attending and keeping the minutes and records of the regular meeting’, may the board at the end of the year make an allowance to the clerk for attending and keeping minutes and records of special meetings and for any other services?

4. May a board of education legally expend school funds for the erection of a residence for use of a janitor employed by the board?

5. May a board of education legally employ teachers in kindergartens who do not have teachers' certificates?

In a later communication you submit the following transcript of the minutes of the board of education in question:

"Copy of Resolutions as they appear in the Minute Record of Washington Twp. Board of Education, Lucas County, Ohio.

Meeting of January 2, 1920:

Wernert moved that O. B. P. be nominated for clerk, Hochstetter seconds. Wernert moves that the nomination be closed and O. B. P. be hired for the term of two years at a salary of \$50.00 per month. Hochstetter seconds.

Vote:

Thal	Yes
Fitkin	Yes
Nickerson	Yes
Wernert	Yes
Hochstetter	Yes

Meeting of September 3, 1920:

Mr. Thal moves that this board increase the salary of clerk O. B. P. from \$50.00 to \$100.00 per month and to transport pupils from Detroit Ave. School to Wernerts Corners School for \$25.00 per week. Fitkin seconds.

Vote:

Wernert	Yes
Hochstetter	Yes
Thal	Yes
Nickerson	Yes

Motion Carried."

Your first three questions relate to the salary of a clerk of a board of education and will be considered together.

Section 4781, General Code(reads as follows:

"The board of education of each school district shall fix the compensation of its clerk and treasurer, which shall be paid from the contingent fund of the district. If they are paid annually, the order for the payment of their salaries shall not be drawn until they present to the board of education a certificate from the county auditor stating that all reports required by law have been filed in his office. If the clerk and treasurer are paid semi-annually, quarterly, or monthly, the last payment on their salaries previous to August thirty-first, must not be made until all reports required by law have been filed with the county auditor and his certificate presented to the board of education as required herein."

This is the *only* section of the General Code touching upon the subject of compensation or salary of a clerk of a board of education, and clearly provides that the board of education of each school district shall *fix* the compensation of its clerk and treasurer.

Section 4747, General Code, reads as follows:

"The board of education of each city, exempted village, village 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."

This section provides for the election of the clerk, but in nowise makes provision for his compensation or salary.

It clearly appears from the transcript you submit that the board of education in question, at their organization meeting held on January 2, 1920, elected O. B. P. clerk for a term of two years, at a *salary* of \$50.00 per month, and later, on September 30th of the same year, attempted to increase said salary "from \$50.00 to \$100.00 per month and to transport pupils * * * for \$25.00 per week." This action, as set forth in the transcript you submit, clearly fixes a *salary*. It also appears from said transcript that said clerk was not a member of the board and his contract with the board to transport pupils would not be a violation of 4757, General Code, which reads as follows:

"Conveyances made by a board of education shall be executed by the president and clerk thereof. No member of the board shall have directly or indirectly any pecuniary interest in any contract of the board or be employed in any manner for compensation by the board of which he is a member except as clerk or treasurer. No contract shall be binding upon any board unless it is made or authorized at a regular or special meeting of such board."

In considering section 4781, General Code, supra, it will be noted that mandatory authority to fix the compensation of its clerk and treasurer has been granted to a board of education. The word "compensation" is used interchangeably with the word "salary" and would doubtless justify the interpretation of the word compensation as used to mean salary, or at least to include salary. Such an interpretation would bring the instant case within the rule laid down in State ex rel v. Cook, 103 O. S., 465, where the change and increase of the salary of a county superintendent is considered. In the opinion in that case we find the following:

"This statute invests the board of education with power to appoint a county superintendent for a term not longer than three years. It did appoint the relator as county superintendent for three years, on the 13th day of March, 1918, and on the same date, agreeable to the statute, the same board fixed the salary of the superintendent for said term.

"The county board of education, having exercised that power at the proper time, in the proper manner, and the county superintendent having accepted the appointment and entered upon the discharge of his duties the question is whether or not such exercise of power is or is not an exhaustion of the power of the county board of education in respect to fixing the salary of such county superintendent for the maximum period of three years.

* * * * *

"The express power to fix a salary does not grant by implication the power to unfix such salary. The exercise of the power for the full three-year term, agreeable to the statute, exhausts the power conferred by the statute. The power to change after once having fixed the term and salary to employ the language of the *Locher case, supra*, must be 'clear and distinctly granted.' The power not being so granted to the board of education cannot be exercised by the board of education, and its attempted exercise thereof is *ultra vires*. The action of the board in attempting to change the salary of the county superintendent, after once fixed, is illegal and void under statute.

* * * * *

"It clearly appearing that the board of education has exceeded its statutory grant of power it is unnecessary here to determine whether or not a statute would have been constitutional had the board acted within its statutory grant of power."

In the above case the Supreme Court declined to pass upon the question of the right of the legislature, under Article 2, Section 20, to delegate to the board of education the authority to fix the compensation of the county superintendent. Section 20, Article 11, of the Constitution, reads as follows:

"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."

The discussion in the opinion, however, seems to favor the conclusion that such right exists.

Further, in support of the proposition that when a board of education, under the provisions of section 4781, have once fixed the salary of the clerk, no further power or authority exists to change the same, attention is directed to the provisions of section 7690 General Code, the pertinent part of which reads as follows:

"It (the board of education) may elect, to serve under proper rules and regulations, a superintendent or principal of schools and other employes, including, if deemed best, a superintendent of buildings, and *may fix their salaries.*"

Section 7690-1 provides as follows:

"Each board of education shall fix the *salary* of all teachers which be increased but not diminished during the term for which the appointment is made."

These two sections were formerly one and as it formerly stood the earlier part of the section mentions *superintendents, other officers and employes*, and contains separate *provision for fixing their salaries* without therein providing for the power to increase such salaries. This would seem to indicate that in this regard "*superintendents, other officers and employes*" were considered and thus treated separately. The latter part of the section (7690-1), relating to *teachers*, followed, and gave power to *fix teachers' salaries* and specifically provided for the *increase of said salaries* during their term, thereby indicating that a *different rule* was provided for the teachers than was provided for the *superintendent, other officers and employes*. The application of the rule of "*the expression of the one excludes the other*" would raise a very strong presumption that the intention was that the salaries of such "*superintendents, officers and other employes*," not teachers could not be increased during their term.

Considering these sections together with section 4781 G. C., it is clear that there is no express or implied power to change or increase the salary of a clerk or other employe of a board of education, and when the board has once acted, in the matter authorized and in the prescribed manner, it has exhausted its authority. See *Davis v. Davis*, 11 O. S., p. 392, in the opinion of which case, speaking with reference to a probate judge, appears the following:

"His duties under the statute, terminate with that entry, and no further action on his part is contemplated. *When the entry (of judgment) is once made in conformity with the statute, his authority in regard to it is at an end.*"

It is believed that this case, with others, establishes the proposition that when courts of limited or special jurisdiction, or boards or officers exercising specially granted powers exercise the authority granted in conformity with the grant thereof, their authority, as said in the Davis case "in regard to it, is at an end." They become, as the courts have expressed it, *functus officio*, and having fully and completely exhausted the authority granted, no further action on their part may be implied.

Therefore this department, in considering your first three questions, without passing upon the constitutional question referred to in *State ex rel v. Cook*, but relying on the decision therein, would advise as follows:

At the time of the election of a clerk of a board of education, his salary should be fixed, as provided in 4781 G. C., and when once fixed could not be changed. Such salary would cover all compensation allowable for the work and duties as provided by law encumbent upon such clerk.

Other services clearly outside the duties of clerk, and not inconsistent or incompatible with such duties, might be compensated under a separate contract. It is believed the contract to transport pupils, mentioned in the transcript of the minutes, would be valid.

In answer to your fourth question, relative to the use of school funds for the erection of a residence for the use of a janitor employed by the board, necessitates an examination of several sections of the statutes to ascertain if a board of edu-

cation has authority to thus expend public funds. Without quoting the several sections, attention is directed to sections 7620, 7690, 7666 and 4749 of the General Code of Ohio. These are the principal sections in which the powers and authority of a board of education are conferred and I do not find in any of these sections any provision granting power or authority to expend school funds for the purpose of erection of a residence for the use of a janitor.

Bearing upon the authority of boards of education, your attention is invited to the very recent decision of the Supreme Court in the case of State of Ohio ex rel. Clark v. Cook, decided November 22, 1921, the second branch of the Syllabus reading as follows:

"Boards of education and other similar governmental bodies are limited in the exercise of their powers to such as are clearly and distinctly granted. (State ex rel Locher, Prosecuting Attorney, v. Menning, 95 O. S., 97; approved and followed.)"

Therefore, in reply to your fourth inquiry, you are advised that it is the opinion of this department that a board of education is without authority to expend its funds for the erection of a residence for the use of a janitor employed by the board.

In response to your fifth question, in regard to the right of a board of education to employ teachers in kindergartens who do not have teachers' certificates, your attention is first directed to section 7722 of the General Code, which reads as follows:

"Any board of education may establish and maintain manual training, domestic science, and commercial departments; agricultural, industrial, vocational and trades schools, also kindergartens, in connection with the public school system; and pay the expenses of establishing and maintaining such schools from the public school funds, as other school expenses are paid."

This section provides, among other things, that any board of education may establish kindergartens in connection with the public school system and pay the expense of establishing and maintaining such kindergartens from the public school funds.

Section 7830, General Code of Ohio, reads as follows:

"No person shall be employed or enter upon the performance of his duties as teacher in any elementary school supported wholly or in part by the state in any school district who has not obtained from a certificating authority having legal jurisdiction a certificate of good moral character; that he is qualified to teach orthography, reading, writing, arithmetic, English grammar and composition, geography, history of the United States, physiology, including narcotics, literature and elementary agriculture, and that he possesses an adequate knowledge of the principles of teaching; except as provided in section 7807-9, 7807-10, 7807-6, 7852 and 7831-1."

It will be noted that this section provides that no person shall be employed or enter upon the performance of his duties as teacher in any elementary school, who has not obtained from a certificating authority a certificate of good moral

character and that he is qualified to teach the branches mentioned in said section; and said section also makes an exception as provided in 7807-10, General Code.

Section 7807-10 G. C. read as follows:

"State provisional certificates valid for four years to teach in kindergarten and first and second grades of elementary schools shall be granted by the superintendent of public instruction upon formal application and the payment of a fee of one dollar, to those who have completed a four year high school course or the equivalent and at least a two year course in an approved school for the training of teachers provided the course as conducted is approved by the superintendent of public instruction for the specific purpose."

It will be noted that this section provides for a provisional certificate for kindergarten teachers of the first and second grades.

The above quoted sections are the only sections of the Code relative to kindergarten teachers and there can be no question that under the provisions of said sections, and especially section 7830, a board of education could not legally employ teachers in kindergartens who do not have teachers' certificates.

Therefore, in answer to your fifth question, you are advised that a board of education cannot legally employ teachers for kindergartens who do not have teachers' certificates.

Respectfully,
C. C. CRABBE,
Attorney General.

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APPROVAL, BONDS OF VILLAGE OF ROCKY RIVER, CUYAHOGA COUNTY, \$5,600.00, SPECIAL ASSESSMENT BONDS TO INSTALL ADDITIONAL FIRE HYDRANTS.

COLUMBUS, Ohio, April 24, 1923.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.

259.

APPROVAL, CONTRACT BETWEEN THE STATE OF OHIO, AND THE JOSEPH L. SKELTON ENGINEERING COMPANY, TOLEDO, OHIO, FOR ENGINE AND GENERATING UNIT, OHIO STATE REFORMATORY, AT A COST OF \$24,032.00.

COLUMBUS, Ohio, April 24, 1923.

Department of Public Welfare, Columbus, Ohio.

Attention Mr. J. B. Youngblood.

GENTLEMEN:—You have submitted for my approval contract between the State of Ohio, acting through the Department of Public Welfare, and The Joseph L.