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1. EDUCATION, CITY BOARD OF—SUPERINTENDENT OF SCHOOLS—AGREEMENT MAY BE MADE TO TERMINATE BY MUTUAL RESCISSION CONTRACT OF EMPLOYMENT OF SUPERINTENDENT—PRIOR TO EXPIRATION, TERM OF CONTRACT—NO LEGAL AUTHORITY FOR BOARD TO PAY SUM OF MONEY FROM PUBLIC FUNDS TO SECURE SUPERINTENDENT'S ASSENT TO RESCISSION OF CONTRACT.

2. WHERE PUBLIC FUNDS ILLEGALLY EXPENDED IN SUCH MANNER, FINDING AGAINST SEVERAL MEMBERS OF BOARD WHO ORDERED PAYMENT MAY BE MADE—SECTION 286 G. C.

SYLLABUS:

1. A city board of education may agree with a superintendent of schools to terminate, by mutual rescission, a contract of employment of such superintendent prior to the expiration of the stated term of such contract; but such board is not authorized by law to pay a sum of money from public funds to such superintendent to secure his assent to such rescission.

2. Where public funds have been so illegally expended, a finding against the several members of the board who participated in ordering such payment may properly be made under the provisions of Section 286, General Code.

Columbus, Ohio, August 4, 1952

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen:

I have before me your request for my opinion, which reads as follows:

"Under date of June 4, 1951, the Board of Education of W. City School District passed a resolution offering to terminate the contract of employment of its superintendent by paying to him the sum of $6428.50, which represents one year's salary payable to the superintendent under such contract, plus one month's salary minus deductions for such one month. On such date the superintendent acknowledged receipt of such check and stated that he was considering his contract with the Board as being terminated.

"The records disclose that the normal expiration date of the contract under which the superintendent was serving was June 30, 1953.

"The facts disclose that at the time such resolution was passed and the check received by the superintendent, such superintendent had been paid prior thereto all compensation due him for services rendered by him for the previous period of his contract. During the previous period of such contract the superintendent had been paid a monthly salary based on an annual compensation of $6000.00.

"It would appear that such Board offered to and did pay such superintendent a consideration in return for his termination of the contract of employment, and that such consideration was based on a figure equivalent to what his yearly salary was, plus one month's salary.

"In the light of the foregoing, your opinion is respectfully requested as to whether or not such Board of Education had the lawful authority to expend public funds in order to obtain the superintendent's agreement to terminate his contract when, as a matter of fact, the Board had prior thereto paid such superintendent all compensation and salary due him by virtue of his contract at the time the resolution was passed, and the check received and cashed by such superintendent. If it is your opinion that such represents an unlawful expenditure, may findings for recovery legally be made against the Board members approving such expenditure."

The authority of a city board of education to hire a superintendent is found in Section 4842, General Code. This section provides that where an individual is so employed on a continuing contract, the board of education may designate that he is to continue in the position of superintendent for a term not to exceed five years, during which term he may not be transferred to any other position.

In the matter of the termination of a superintendent's contract, however, the board does not have unlimited discretion under the statute. It is to be observed that a superintendent is included within the definition of "teacher" under the provisions of Section 4842-7, General Code. The termination of teachers' contracts is provided for in Section 4842-12, General Code, which reads as follows:

"The contract of a teacher may not be terminated except for gross inefficiency or immorality; for wilful and persistent violations of reasonable regulations of the board of education;

> or for other good and just cause. Before terminating any contract, the employing board of education shall furnish the teacher a written notice signed by its clerk of its intention to consider the termination of his contract with full specification of the ground or grounds for such consideration. Unless the teacher so notified shall, within ten days subsequent to the receipt of such notice, demand in writing an opportunity to appear before the board and offer reasons against such termination, the board may proceed with formal action to terminate the contract. If, however, said teacher shall, within ten days after receipt of notice from the clerk of the board, demand in writing a hearing before said board, the board shall set a time for the hearing within thirty days from the date of said written demand and the clerk of the board shall give the teacher at least fifteen days' notice in writing of the time and place of such hearing; provided, however, that no hearing shall be held during the summer vacation without the teacher's consent. Such hearing shall be private unless the teacher requests a public hearing. The hearing shall be conducted by a majority of the members of the board and be confined to the aforesaid ground or grounds for such termination. The board of education shall provide for a complete stenographic record of the proceedings, a copy of such record to be furnished to the teacher. The board of education may suspend a teacher pending final action to terminate his contract, if in its judgment, the character of the charges warrants such action. * * *"

It is true that a superintendent is not deemed to be a "teacher" within the scope of Section 4842-8, General Code, so as to entitle him to a continuing contract status as superintendent beyond the express period of his contract. State, ex rel. Saltsman v. Burton, 154 Ohio St., 262, 270, 95 N. E. (2d), 377. During the term of his contract, however, it has been determined that a superintendent does have a teacher's status. State, ex rel. Frank v. Board of Education, 140 Ohio St., 381, 383, 44 N. E. (2d), 455.

It is the general rule that the enumeration in a teacher's tenure law of the causes for which a teacher's contract may be terminated without his assent is exclusive of all other causes. 47 American Jurisprudence, 396, §139; 110 A. L. R., 804. That this general rule is the law in Ohio is apparent from an examination of the first sentence above quoted in Section 4842-12, General Code, which contains an express prohibition of the termination of such contract for cause in any manner other than therein designated.

While your inquiry does not indicate the reason for the unusual action of the board in this case, it can be assumed, I think, since the board was willing to pay a substantial amount of money in order to secure a termination of the contract by agreement, that the board was dissatisfied with the superintendent's services. If this assumption is correct, then it would clearly appear that the board, in order to terminate the contract against the wishes of the superintendent, would be restricted, by the provisions of Section 4842-12, General Code, to the proceedings therein authorized to effect his dismissal for cause.

In this case, however, the board chose not to act under this section to effect a dismissal, but chose rather to secure the termination of the contract by mutual rescission and in order to secure this, they paid to the superintendent a substantial sum of money from public funds to secure his assent to such rescission.

At this point it should be noted that there is nothing in the law, nor in the contract itself, so far as it appears here, which would prevent the board and the superintendent from reaching an amicable agreement to terminate the contract prior to its complete execution. If such were done, without the payment of any money consideration by either party to the other, the agreement to rescind would be entirely valid, the agreement of each party being deemed a sufficient consideration for the agreement of the other. 17 Corpus Juris Secundum, 883, §391. If we were concerned with private parties, or with politicial entities having unlimited power to contract, we should encounter no difficulty with the payment made by one party to another to secure his assent to rescind, but such is not the case here where one of the parties is a city board of education.

The question of the legality of this payment necessarily involves a consideration of the powers of the city board of education. The powers and duties of boards of education generally are stated in Section 4833, et seq., General Code. The corporate nature of the board and the extent of its general contracting powers are indicated by the provisions of Section 4834, General Code, which reads as follows:

> "The board of education of each school district shall be a body politic and corporate, and, as such, capable of suing and being sued, contracting and being contracted with, acquiring, holding, possessing and disposing of real and personal property, and taking and holding in trust for the use and benefit of such district, any grant or devise of land and any donation or bequest of money or other personal property and of exercising such other powers and privileges as are conferred upon it by law."

The precise questions here involved are whether the board possesses unlimited power to contract and be contracted with as the case of general corporations, or whether such power is limited to that which is expressly or impliedly reposed in it by statute. In this connection it should be borne in mind, of course, that the board is a creature of statute and would ordinarily be supposed to possess statutory powers only. A general statement relative to the nature and powers of boards of education is found in 16 McQuillin on Municipal Corporations, page 562, §46.03, as follows:

> "However, authorities in control of the public or common schools, under whatever name, are mere auxiliaries or agencies of the state for educational purposes only, created by the state as a means of exercising its political powers in an orderly manner, and as such, unless limited by the constitution, are subject to the unrestricted control and direction of the legislature in matters of internal government and having only such powers as the legislature grants it. * * *"

The status of a board of education, as a creature of the state, rather than an arm of the municipality concerned, is recognized in Cleveland v. Board of Education, 112 Ohio St., 607, 148 N.E., 350, where the following statement is found in the dissenting opinion of Marshall, C. J. (p. 617):

> "* * * Every member of this court recognizes the pertinent provisions of Sections 2 and 3, Article VI of the Constitution, requiring the General Assembly to pass laws making provision for a thorough and efficient system of common schools throughout the state, and every member of this court agrees that the thorough and efficient system which has been provided by legislative enactment has application in every municipality of the state, and that no board of education in any municipality, and no legislative authority of any municipality, has any power to override or disregard any of the constitutional legislative provisions pertaining thereto. * * *"

We may refer again to 16 McQuillin on Municipal Corporations for a statement of the contract powers of boards of education, where the following language is found on page 576, §46.07:

> "* * * Consequently, the prevailing rule is that such body can enter into such contracts only as it is empowered, expressly or impliedly to make and enforce. That is to say, school boards or school districts cannot contract, ad libitum, as individuals may do, but only respecting objects in the mode and to the extent the law permits. * * *"

The question of the generality of the power of a board of education was considered at some length in Opinion No. 120, Opinions of the Attorney General for 1917, page 286. It was held therein by one of my predecessors that a board of education had authority to compromise claims for money due it, the specific question there involved being a compromise settlement by certain bank sureties of the loss of school funds deposited in a bank which had failed.

The question here involved is a matter considerably different from the compromise of a claim in a case where the possibility of the collection of the amount in full is highly uncertain; and I can not see that the rule stated in the 1917 opinion is helpful in the instant case.

The general powers of boards of education was considered by another of my predecessors in office in Opinion No. 1890, Opinions of the Attorney General for 1933, page 1780. In that opinion, page 1782, the following statement is found:

> "* * * From an examination of such Sections 4749 and 3244, General Code, and related sections, it becomes evident that neither boards of education nor boards of township trustees have all the attributes of a corporation, as such. Thus, they have no charter, they do not have perpetual existence, but exist only during the pleasure of the legislature, their powers are granted by the legislature, and new powers or duties may be added at any time at the will of the legislature. * * * As stated in Harris vs. School District, 28 N. H. 58: 'A school district is a quasi-corporation of the most limited powers known to law.' "

It is to be observed that Section 4749, General Code, mentioned in the quotation above, is the prior statutory provision analogous to present Section 4834, General Code, relative to the corporate powers of the board.

In view of the foregoing general rules as stated in the texts cited, and in view of the clear status of a city board of education as a creature of statute, I must conclude that the powers of a city board of education to contract are not general but are limited to those expressly or impliedly conferred by statute. I conclude further that, since the statute in the case at hand makes express and exclusive provisions for the termination of a teacher's contract by the board for cause and without the teacher's consent, any action by the board, based on unsatisfactory service on the teacher's part, to secure a mutual rescission of such contract by payment

of public funds to the teacher to secure his consent to such rescission, is not authorized by law; and such expenditure of funds is, therefore, contrary to law.

You will observe that the foregoing reasoning is based on the premise that the teacher's service was, in the judgment of the board, unsatisfactory and that the board was motivated by such judgment in moving to secure a rescission of the contract.

If, however, the contrary situation is assumed to be the case, we are compelled to reach precisely the same conclusion as to the legality of the expenditure, although by another line of reasoning. In such case, the payment to the teacher, being without any proper consideration in return, becomes a mere gift of public funds to him. On this point we must bear in mind that public officers, in the expenditure of public funds, are the trustees of such funds and are not philanthropists. Thus, in 67 Corpus Juris Secundum, 409, §118b(1), it is said:

> "A public officer may pay out public funds only where the law requires or permits him to do so, and only in the manner provided by the statute, where the statute directs the manner and method of payment. A public officer has no right to give away public funds, and must deliver such funds or property to the public official or function for whom or which they were intended. Any public officer who wrongfully withholds or misappropriates public funds, or who pays or authorizes the illegal payment of public funds, is personally liable for such misappropriation or illegal payment."

The mere giving away of public funds to private persons without such persons rendering any service or providing any sort of consideration in return is clearly not the expenditure of public funds for a public purpose, but rather is the expenditure of public funds for a private purpose has been judicially recognized as illegal in Ohio. Miller v. Korns, 107 Ohio St., 287, 306, 140 N. E. 773, 778; State, ex rel. Dickman v. Defenbacher, 151 Ohio St., 391, 396, 86 N. E. (2d) 5.

It follows, therefore, that the payment here under scrutiny must be considered one which is not authorized by law, irrespective of the question of whether the superintendent's services were satisfactory or unsatisfactory in the judgment of the board.

Your second question as to the propriety of findings against the members of the board who approved such expenditure presents no par-

ticular difficulty. The general rule as to liability of public officers for illegal disbursements of public funds is stated in the passage in 67 Corpus Juris Secundum, quoted above. The general rule on this point is expressed in 43 American Jurisprudence, 111, §306, in the following language:

> "Public officers who have charge of public funds and public moneys are charged with the duty, as trustees, to disburse and expend the money for the purposes and in the manner prescribed by law. They are liable if they divert the trust funds from the governmental purposes for which they are collected. Mere good faith in making an improper payment of public funds is not recognized as any excuse whatever."

That this rule is followed in Ohio is indicated by the following language in a per curiam opinion in Crane Township v. Secoy, et al., 103 Ohio St., 258, 259, 132 N. E. 851:

> "It is pretty well settled under the American system of government that a public office is a public trust, and that public property and public money in the hands of or under the control of such officer or officers constitutes a trust fund, for which the official as trustee should be held responsible to the same degree as the trustee of a private trust fund. Surely the public rights ought to be as jealously safeguarded as the rights of any individual made the beneficiary of a trust by the private party creating such trust."

I must conclude, therefore, that where any public officer orders or participates in the ordering of the expenditure of public funds, which expenditure is not authorized by law, such officer is personally liable for the amount of the funds so expended. Section 286, General Code, authorizes the Bureau of Inspection and Supervision of Public Offices to report the illegal expenditure of any public money. From this it follows that a finding against the several members of the city school board who participated in ordering the illegal disbursement in this case is authorized by the provisions of Section 286, General Code.

Respectfully,

C. WILLIAM O'NEILL
Attorney General