

OPINION NO. 1286

Syllabus:

A board of education acting under Section 3917.04, Revised Code, has no authority to limit the insurance companies, otherwise qualified, permitted to write employee annuity insurance under this section or to require that its employees, or a majority thereof, agree to insure with the same insurance company.

To: George C. Steinemann, Erie County Pros. Atty., Sandusky, Ohio
By: William B. Saxbe, Attorney General, August 12, 1964

Your request for my opinion reads as follows:

"Whereas, the Erie County Board of Education under date of March 25, 1963, passed Resolution 63-14 adopting a 'Salary Modification and Deduction Policy' (marked copy attached), Section 2 of which states, 'The Board of Education reserves the right to limit the number of companies who may write annuities under this policy', and

"Whereas, in a letter of Mr. Wayne A. Whyte, County Superintendent of Schools, 420 West Third Street, Elyria, Ohio, dated April 1, 1964, and over the signature of Rex E. Haecker, Deputy Inspector and Supervisor, the Bureau of Inspection and Supervision of Public Offices - State of Ohio, states, '* * *be advised that no specific authority presently exists granting to the board of education the restriction or limitations whereby such "tax-sheltered annuity contracts" authorized by the board could be limited to certain insurance companies writing this form of contract.'

"We have been requested by the Erie County Board of Education to secure an opinion from you on the following questions:

"1) Under the terms of the employment modification agreement the annuity is purchased by the board of education from the company writing the annuity contract. Can the board therefore condition its agreement to enter into these annuity purchase agreements with its employees upon the requirement that it will contract with and pay premiums to only a certain annuity company or companies? The board would, within its sole discretion, select the company or companies, or it would establish criteria in creating a list of acceptable annuity writing companies to the exclusion of all others.

"2) If the answer to the above question is in the negative and the board cannot limit the number of contracting companies, (a) can the board condition its acceptance of the annuity purchase agreements upon the requirement that its teaching or non-teaching employees, as a class, elect one mutually acceptable annuity writing company, and (b) if, pursuant to such condition, the employees, as a group, designate one such company and the board accepts and acts in accordance with the election of the employees, does the board have the power thereafter to refuse to accept annuity agreements from dissenting members of the employee class who request that their annuity contracts be purchased from a company different from the one so designated?"

The type employment modification agreement which has given rise to your questions, has its genus in Section 403 (b) of the Internal Revenue Code, which in substance permits tax free deductions for the payment of annuity premiums under such a plan. The requirements of the Internal Revenue Code, and the nature of the qualifying agreements need not concern us here, except to note that the annuity must be purchased by the employer.

The authority to make premium deductions from the salaries of employees of a political subdivision of the state or employees of an institution supported in whole or part by public funds, is found in Section 3917.04, Revised Code. This statute provides:

"If any employee of a political subdivision or district of this state, or of an institution supported in whole or in part by public funds, or any employee of this state, authorizes in writing the auditor or other proper officer of the political subdivision, district, institution, or the state, of which he is an employee, to deduct from his salary or wages the premium or portion thereof agreed to be paid by him to an insurer authorized to do business in the state for life, endowment, accident, health, or health and accident insurance, annuities, or hospitalization insuring a group under the group plan, or salary savings plan, such political subdivision, district, institution, or the state of which he is an employee may deduct from his salary or wages such premium, or portion thereof, agreed to be paid by said employee, and pay the same to the insurer. The auditor or other proper official of such political subdivision, district, institution, or the state of which he is an employee may issue warrants covering salary or wage deductions which have been authorized by such employee in favor of the insurer and in the amount as authorized by the employee."

It will be noted that the authority is to make premium deductions from salary or wages. There is no express provision in this section, or any other that I am aware of, which permits the employer to enter into an agreement with the insurer. However, it was concluded in Opinion No. 3462, Opinions of the Attorney General for 1962, as disclosed by the syllabus, that:

"1. Pursuant to the powers granted by Chapter 3319., Revised Code, and Section 3917.04, Revised Code, a board of education may enter into a written modification agreement with a teaching and/or non-teaching employee whereby a part of the original compensation to be paid to such employee under his original employment contract will be withheld by the board of education and paid by it, as premiums on an annuity contract, to an insurer designated in said agreement, but the

amount so paid by the board of education as premiums may not exceed the amount authorized by the employee to be deducted from his compensation.

"2. While a board of education may not make a deduction from a teaching or non-teaching employee's compensation for any purpose specified in Section 3917.04, Revised Code, without the written agreement of the employee, upon such an agreement, the board is under no obligation to enter into an agreement with any insurer for the purchase of annuities for such employee with moneys so authorized to be deducted.

"3. The entire compensation called for by the contract of employment between a board of education and a teaching or non-teaching employee should be considered in determining the contributions due from members and employers, and the retirement benefits, allowable to members of the State Teachers Retirement System and the School Employees Retirement System under Chapters 3307. and 3309., Revised Code."

In the text of the opinion the following statement is made by the Attorney General:

"* * *On the other hand, the type of annuity agreement apparently necessary to meet the requirement of Section 403 of the Internal Revenue Code of 1954, is one between the board of education and the company writing the annuity contract. As I have indicated by inference earlier herein, a board of education could enter into such an agreement as a power incident to its powers relating to employment and its duties under Section 3917.04, supra; however, there is no statutory obligation placed upon a board of education to enter into such an agreement.
* * *"

I must admit in all candor that I am not entirely persuaded by this reasoning and had I the question initially I might well have reached the conclusion that boards of education lack the authority to enter agreements of this kind. However, there is an element of judgment in any question of this nature and I am loathe to upset the ruling of a predecessor which I am unable to say is clearly incorrect, particularly where that ruling has been widely followed administratively--a condition I understand to exist in this instance. I am also mindful that the efficacy of the 1962 opinion has survived the regular session of the One Hundred and Fifth General Assembly--which presumably was aware of the construction given this statute--and, accordingly, it cannot be said with assurance that the 1962 opinion is a misinterpretation of the intention of the legislature in enacting Section 3917.04, Revised Code. Assuming, then, the power of a board of education to

enter an agreement of this type, your first question is, in substance, "may a board of education restrict the insurance companies with which it will contract, by name or by other method."

As the first and second paragraphs of the syllabus of Opinion No. 3462 show, it was concluded that while a board of education has the implied power to enter agreements with insurers for deductions of premiums for annuities covering board of education employees, a board of education "is under no obligation to enter into an agreement with any insurer." I agree that a board of education is under no obligation to enter these type agreements but I do not think it necessarily follows that having undertaken to enter agreements of this type, a board may limit those companies with which it will agree (a question not before my predecessor in 1962). In fact I think the opposite conclusion must be reached, viz., that if a board of education acting under the implied authority of Section 3719.04, Revised Code, undertakes to enter annuity agreements for deductions from salaries or wages of premiums in payment of policies on its employees, it may not discriminate between insurance companies with which it will enter agreements, on any basis other than that the company is not authorized to do business in this state. This is the single and apparently exclusive restriction on participating companies under Section 3719.04, supra, and there is no authority for a board of education, or other subject employer, to enlarge these statutory restrictions. And this is true not only where a board of education makes simple deductions from employees salaries or wages for premiums on individual annuity policies, but where it enters 403 (b) Internal Revenue Code--agreements as well.

I am of the opinion, then, that a board of education acting under Section 3917.04, Revised Code, has no authority to limit the insurance companies (which are otherwise qualified) permitted to participate in a program of deducting annuities premiums from the salaries or wages of board employees.

What I have said with regard to the first proposal applies equally to the second proposition, for while differing in form it appears to parallel the first in principle. In my opinion Section 3917.04, Revised Code, requires an employer to make premium deductions for employees on request and if the employer determines that it will voluntarily enter these annuity contracts it may not limit some employees right to have deductions made by requiring that all employees accept a single insurer. If this conclusion seems enigmatic I can only say that the implication of authority of an employer to enter an annuity agreement with an insurer cannot be used as the basis for finding further authority to add to statutory restrictions on employee or insurance company participation.

In specific answer to your request it is my opinion and you are advised that a board of education acting under Section 3917.04, Revised Code, has no authority to limit the insurance companies, otherwise qualified, permitted to write employee annuity insurance under this section or to require that its employees, or a majority thereof, agree to insure with the same insurance company.