

"Section 3138-1, General Code, to which you refer in your inquiry, has reference only to the making of contracts with sectarian institutions by county commissioners and is not applicable to situations wherein temporary relief is granted in emergency cases."

Accordingly, I am of the opinion that county commissioners may pay a sectarian institution for necessary services, rendered in an emergency, to an indigent person who is a proper county charge.

Respectfully,
 JOHN W. BRICKER,
Attorney General.

75.

BOARD OF EDUCATION—COUNTY BOARD TAKING OVER DUTIES
 OF LOCAL BOARD OF EDUCATION—FUNDS MUST BE APPROPRIATED BY COUNTY COMMISSIONERS BEFORE PAID FROM
 COUNTY GENERAL FUND.

SYLLABUS:

1. *The duty of a county board of education to take over and perform the duties imposed by law upon a local district board of education within the county school district, upon the failure of the local board to perform them in accordance with law, in compliance with section 7610-1, General Code, is not in anywise dependent upon whether or not the local board had complied with the terms of section 5625-33, General Code, in the making of contracts or with the so-called minimum salary law in the employment of teachers, or whether it had been extravagant in the administration of the schools under its control and for that reason had become short of funds.*

2. *It becomes the duty of a county board of education, by virtue of section 7610-1, General Code, to take over and perform the duties devolving under the law on a board of education of a school district within the county school district with respect to the schools of such district, when the local board fails to perform those duties and acts for the maintenance of its schools which the law requires and authorizes to be performed, and the county board is satisfied of such failure.*

3. *Before any funds may be paid from the general fund of the county upon vouchers signed by the president of the board of education of the county school district upon authorization of the said county board in pursuance of its duties under section 7610-1, General Code, said funds must first be appropriated for that purpose by the commissioners of the county.*

COLUMBUS, OHIO, January 27, 1933.

HON. FREDERIC V. CUFF, *Prosecuting Attorney, Napoleon, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion, which reads as follows:

"A district school board in this county has certified its resolution to the County Board of Education that it has not sufficient funds to keep

its school in operation throughout the current school year and it desired to avail itself of the provisions of section number 7610-1 of the General Code. Thereupon the County Board of Education adopted a resolution finding that the district board had failed to provide sufficient school privileges for the school year 1932-1933 for all youth of school age in said district; had further failed to provide for the continuance of the school in the district for thirty-two weeks in said school year; had further failed to provide the school in said district an equitable share of school advantages as required by law and had further failed to provide or rather failed to pay the salaries of teachers and other employes. The County Board further resolved to pay all said salaries and necessary expenses of the school in the district from the general fund in the county in accordance with the provisions of section number 7610-1 of the General Code.

Under these circumstances is it mandatory that the County Commissioners appropriate this money?

If the district board failed to comply with the provisions of section number 5625-33 of the General Code and contracted for teachers at a salary in excess of the minimum as fixed by law, can the district board through the provisions of section number 7610-1 of the General Code make the appropriation by the County Commissioners mandatory? Or is the act of appropriation in these last circumstances optional?

If the district board has failed to comply with section number 5625-33 and contracted for teachers at a salary in excess of the minimum provided by law, is the district in question entitled to the benefits of section number 7610-1 of the General Code?"

Section 7610-1, General Code, provides in part as follows:

"If the board of education in a district under the supervision of the county board of education fails to provide sufficient school privileges for all the youth of school age in the district, or to provide for the continuance of any school in the district for at least thirty-two weeks in the year, or to provide for each school an equitable share of school advantages as required by this title, or to provide suitable school houses for all the schools under its control, or to elect a superintendent or teachers, or to pay their salaries, or to pay out any other school money needed in school administration, * * * the county board of education of the county to which such district belongs, upon being advised and satisfied thereof, shall perform any and all such duties or acts, in the same manner as the board of education by this title is authorized to perform them. * * *

All salaries and other money so paid by the county board of education, * * * shall be paid out of the county treasury from the general fund on vouchers signed by the president of county board of education, * * * but they shall be a charge against the school district for which the money was paid. The amount so paid shall be retained by the county auditor from the proper funds due to such school district, at the time of making the semi-annual distribution of taxes."

The Supreme Court of Ohio in considering the terms of said section, 7610-1, General Code, in the case of *State ex rel. vs. Beamer*, 109 O. S. 133, said with reference thereto on page 139 of the court's opinion:

"Under section 7610-1 the duty of the county board of education is measured by the duty of the board of education in the district. The county board is liable to provide 'sufficient school privileges' only if the district board is under a duty to render such service and has failed, and if the county board is satisfied of such failure."

The duty of the county board of education, as fixed by said section, 7610-1, General Code, is in nowise dependent on whether or not a local board has acted within the law in all respects, or whether it has complied with section 5625-33, General Code, or the so-called minimum salary law in the conduct of the affairs of the district, or whether it had been extravagant in the operation of the schools and for that reason had run out of funds. The sole question in each instance is whether or not a local board fails to perform those duties and acts for the maintenance of the schools of its district which the law requires and authorizes it to perform, and the county board is satisfied of such failure. In those cases it becomes the duty of the county board to perform any and all such duties and acts in the same manner that the local board is authorized by law to perform them, regardless of the reason for the local board's failure.

It will be observed that a county board, when it determines that a local board has failed in its duty, is directed to perform those duties, and when necessary to pay out money in carrying out those duties the same "shall be paid out of the county treasury from the general fund on vouchers signed by the president of the county board of education." Any money so paid from the general fund is made a charge against the district for which it is paid and is to be restored by the county auditor from the funds due to the district at the time of the next semi-annual settlement of taxes.

The substantial legal question presented by your inquiry is whether or not, when a county board of education becomes obligated to pay out moneys from the general fund of the county in pursuance of the performance of its duties under section 7610-1, General Code, those payments may be made regardless of whether or not the money has been appropriated for that purpose. The language of the statute, section 7610-1, General Code, is clear, positive and mandatory, wherein it provides that "all salaries and other moneys so paid by the county board of education * * * shall be paid out of the county treasury upon vouchers signed by the president of the county board of education."

The language of section 5625-33, General Code, is equally clear and positive to the effect that "no subdivision or taxing unit shall * * * make any expenditure of money unless it has been appropriated as provided in this act." Section 5 of Article X of the Constitution of Ohio, provides:

"No money shall be drawn from any county or township treasury, except by authority of law."

When demands are made by a county board of education by virtue of the authority granted to it by section 7610-1, General Code, such payments clearly require a withdrawal of money from the county treasury. The terms of said section, section 7610-1, General Code, are, in my opinion, "authority of law" for

such withdrawals. The question arises, however, whether or not the terms of section 5625-33, General Code, quoted above, constitute a limitation on that "authority of law" to the extent that an appropriation must exist for the purpose before the authority may be exercised.

The paying out of this money is authorized and directed by the county board of education, which is not a "subdivision" or a "taxing unit" as those terms are used in section 5625-33, General Code. The actual payment of the money, however, is made from the county treasury, and if the paying out of the money constitutes an "expenditure" it is an expenditure of the county rather than the county board of education, because the county board of education, as such, does not have either the title or custody of the money, nor is it a part of the "county board of education fund" created by section 4744-3, General Code. The county board simply draws the vouchers for the payments and therefore authorizes the payments, which are made from county funds. It is a payment made by one subdivision, the county, by authority of law for the benefit of another subdivision, to-wit, a local school district within the county. The mere fact that a payment of this character is temporary and is made a charge against the school district on behalf of which it is paid and provision is made for reimbursing the county fund at the next tax settlement with the school district, makes it none the less an "expenditure," in my opinion, for which an appropriation must exist before the payment may legally be made.

Obviously, no payments for this purpose can be made from the county treasury unless there are funds there to meet them, nor can such payments be made from funds in the treasury that are already encumbered. A county board of education should be guided in drawing vouchers in the performance of its duties under section 7610-1, General Code, by the amount of funds available for the purpose, and should be limited by that amount, so that the very purpose of requiring appropriations will be met. In as much as the duty to pay the moneys necessary for a county board of education to perform its duties under section 7610-1, General Code, is fixed by mandatory language in the statute, and the apparent intent of the legislature in enacting the statute was to make that duty mandatory within the limits of the funds available for the purpose, I am of the opinion that it is the mandatory duty of a board of county commissioners to make appropriations so that the provisions of section 7610-1, General Code, may be carried out, if it is possible to do so, and that this duty may be enforced in an action in mandamus.

Under former statutes, very similar to section 5625-33, General Code, with respect to appropriations, a former Attorney General held in an opinion which may be found in the published Opinions of the Attorney General for 1925, at page 785, as follows:

"The county board of education under section 7610-1 of the General Code, may meet the obligations of a school district which is without funds if there is a balance in the county general fund which is unappropriated and unobligated. Such funds must be appropriated for that purpose by the county commissioners and certified by the county auditor before the same can be used."

I am, therefore, of the opinion in specific answer to your questions that:

1. The duty of a county board of education to take over and perform the duties imposed by law upon a local district board of education within the county

school district, upon the failure of the local board to perform them in accordance with law, in compliance with section 7610-1, General Code, is not in anywise dependent upon whether or not the local board had complied with the terms of section 5625-33, General Code, in the making of contracts or with the so-called minimum salary law in the employment of teachers, or whether it had been extravagant in the administration of the schools under its control and for that reason had become short of funds.

2. It becomes the duty of a county board of education, by virtue of section 7610-1, General Code, to take over and perform the duties devolving under the law on a board of education of a school district within the county school district with respect to the schools of such district, when the local board fails to perform those duties and acts for the maintenance of its schools which the law requires and authorizes to be performed, and the county board is satisfied of such failure.

3. Before any funds may be paid from the general fund of the county upon vouchers of the county school district upon authorization of the said county board in pursuance of its duties under section 7610-1, General Code, said funds must first be appropriated for that purpose by the commissioners of the county.

Respectfully,

JOHN W. BRICKER,
Attorney General.

76.

CRIMINAL LAW—CONCURRENT AND CUMULATIVE SENTENCES—
WHEN PERSON SERVING INDETERMINATE SENTENCE ELIGIBLE
FOR PAROLE.

SYLLABUS:

1. *Where several sentences are imposed for separate and distinct offenses charged in separate indictments or in separate counts of the same indictment, the sentences run consecutively unless a contrary intention is expressed by the court in its judgment. Opinions of the Attorney General for 1932, No. 4701 followed and approved.*

2. *A person serving several indeterminate sentences consecutively in the Ohio Penitentiary is deemed to be serving one continuous term for the purposes of parole. Such a person is eligible for parole on the expiration of the aggregate of the minimum terms of his several sentences, less good time off for good behavior as provided by section 2210, General Code. A prisoner who is serving successive or cumulative sentences is also eligible for parole, as provided by section 2210-1, General Code, providing the aggregate of the minimum terms of his several sentences is longer than fifteen years.*

3. *The provisions of section 2166-1, enacted in 114 O. L. 188, do not apply to an indeterminate sentence to the Ohio Penitentiary for a term of ten to thirty years imposed on a person after being convicted for a violation of section 710-172, General Code.*

COLUMBUS, OHIO, January 27, 1933.

HON. LELAND S. DOUGAN, Chairman, Ohio Board of Parole, Columbus, Ohio.

DEAR SIR:—This will acknowledge your letter of recent date which reads in part as follows: