

1792.

BOARD OF EDUCATION—BONDS ISSUED FOR NEW SCHOOL BUILDING—WHERE BOARD NEGLECTS OR REFUSES TO PROCEED WITH ERECTION OF SAME—NOT SUCH NEGLECT OF DUTY THAT WILL WARRANT COUNTY BOARD OF EDUCATION IN PERFORMING DUTIES OF LOCAL BOARD IN ERECTING SAID BUILDING.

The fact that a board of education has determined to erect a new school building and has submitted the question of a bond issue for the same to the electors of the district and has issued said bonds and obtained the money to build said building, but neglects or refuses to proceed with the erection thereof, is not such neglect of duty, in the absence of other facts, in violation of the powers enumerated in section 7610-1 G. C. that will warrant the county board of education to perform the duties of the local board in erecting said building.

COLUMBUS, OHIO, January 15, 1921.

HON. VERNON M. RIEGEL, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your recent request, which is as follows:

“The opinion of your department is requested in a case covered by the following statement of facts:

The electors of a school district have voted bonds for the erection of a school building, which bonds were thereafter issued and sold by the board of education and the money placed on deposit in the bank. Beyond this initial act the board of education of said school district has shown no disposition and has made no effort to go ahead with the necessary further steps, such as advertising for bids, letting of contracts, etc. Can the county board of education, under the provisions of section 7610-1, take over these obligations which the aforesaid local board is neglecting and go ahead with contracting for and constructing said school building, the erection of which the expressed will of the electors has directed?”

Section 7610-1 reads:

“If the board of education in a district 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, or to fill any vacancies in the board within the period of thirty days after such vacancies occur the county board of education of the county to which such district belongs, upon being advised and satisfied thereof, shall perform any and all of 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 on vouchers signed by the president of the 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."

This section places upon the county board of education the duty of doing the things enumerated therein upon the failure of the proper local board of education in doing them. Formerly, under section 7610 G. C., these duties fell upon the county commissioners when the proper local board of education had defaulted or failed to act.

Board of Education vs. Commissioners, 10 O. N. P. (n. s.) 505, was a case where the residents of a township school district petitioned the board of education to establish a sub-district and to build a building therein, which was refused by the local board of education, and thereupon the residents of said district requested that the county commissioners act for the local board as was requested in their petition.

From the opinion in the above case the following is quoted:

"The school electors of each district elect a board of education for their district schools; into the hands of this board of education the law of our state commits, in general, all the powers granted respecting the maintenance of schools in such districts; * * *

As a rule courts will not interfere with boards of education in the exercise of these functions. The control and management of the schools of this state is given to the boards of education by the statute, and these boards can not be interfered with in any manner by the court unless there is a gross abuse of the discretionary powers given.

Nevertheless, the authority of the board of education is not final in all matters; a certain supervisory power invested in the county commissioners by Revised Statutes, section 3969, * * *.

It will be noted that some of these powers committed to the county commissioners after default on the part of the board of education, such as certifying the levy, hiring and paying teachers, etc., are ministerial merely in their nature, and that some of them are judicial. As to the ministerial acts, the law is simple; * * *

As to the exercise of judicial powers, the case is different. The county commissioners in such cases can not interfere merely by reason of a difference of opinion; they certainly have no higher powers than the courts have; that is, they can only interfere and assume the functions of the local board, when that board has acted, or declined to act, in such a way as to show a gross abuse of discretion. * * *

A ministerial act, according to the accepted definition, 'is one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to, or the exercise of, his own judgment upon the authority of the act being done.' *State vs. Nash*, 66 O. S. 558.

Judicial acts, on the other hand, involve the investigation and determination of a state of facts, an act of choice or discretion or judgment as to the propriety of actions to be taken in reference to the facts thus ascertained. * * *"

It is understood that the school district referred to in the question asked is not an exempted village or city school district, and this opinion proceeds on that assumption.

The opinion quoted above cites section 3969 R. S., which is now sections 7610

and 7610-1 G. C. At the time this case was decided the county school districts and county boards of education had not been created. The present law divides the powers enumerated in the original section between the county commissioners and the county board of education; otherwise it stands as before amendment.

The opinion of the court points out that the functions of a local board of education belong in two classes, i. e., ministerial duties and judicial acts, both of which are defined therein.

As to ministerial acts, when the local board fails to perform them the county board of education may now step in and do such acts for the local board; but as to judicial acts, it is observed that a county board of education may not do what the courts have consistently refused to do unless there is shown to be gross abuse of discretion, or, in the absence of fraud and collusion, a grave assumption of authority not granted.

The county board of education acts "upon being advised and satisfied" of the dereliction and neglect of duty or the abuse of power on the part of the local board.

In the case above quoted the court refused to permit the county commissioners to act because it was not shown that the local board had abused the judgment or discretion permitted it by the law.

In Board of Education vs. Shaul, 17 Dec. 269, the court says:

"The court's construction of section 3969 R. S. is, that when a board of education fails in any year to do any of the things enumerated therein, all of which in the opinion of the court, come within the class of ministerial duties as herein defined, the board of county commissioners, upon being advised and satisfied thereof, may do and perform any and all of said duties in as full a manner as the local board is authorized to do."

In this case the local board of education had abandoned two sub-district schools and were transporting the pupils thereof to other schools, and the county commissioners, on request of the residents of the sub-districts, had hired two teachers to teach in said local sub-district schools. The court held that the board under the law had the right to abandon these schools and transport the pupils to other schools and that the county commissioners could not subvert their judgment and restore the abandoned sub-district schools; that the most the county commissioners could do in the case would have been to provide transportation for pupils not so accommodated if the local board had failed to so provide for all the pupils. The board of county commissioners could not re-establish the abandoned schools.

The opinion observes:

"But, even as to these acts enumerated (in the statute), the court thinks that a mere difference of opinion between the commissioners and the board of education as to the manner of doing them, does not give the former the right to act for and instead of the board."

In the present instance the only thing complained of as against the local board is that it has not erected a new building after having issued and sold bonds for that purpose, but has kept the money thus received at interest in the bank and has so kept it for a considerable time.

It is probable that before the election which approved the bond issue, the board had some plan or idea of the building projected, or even had plans and specifications made for said projected building, in order to determine the cost of the proposed structure which it intended to erect on the site it owns, though these facts are not disclosed in your statement, and that something has occurred which caused

it to reverse its judgment as to the new building or which made it impossible to erect the desired building with the money at its disposal.

The questions before the county board of education are: Has the local board of education failed, by neglecting to build a new building, to provide sufficient school privileges for all the youth of school age in the district, or to provide for each school an equitable share of school advantages, or to provide suitable school houses for all the schools under its control? The law is that when the county board of education is "advised and satisfied thereof it shall perform any and all of such duties and acts, in the same manner as the board of education by this title is authorized to perform them."

Whether the neglect to build has resulted in a failure of any of the duties or acts enumerated, is not disclosed by the statement of facts given. A lengthy delay in building may not of itself be such omission of duty as to warrant interference on the part of the county board. So the solution of the question asked is not a mere conclusion of law, but a matter depending upon the facts and circumstances surrounding the case in its effect upon the schools of the district.

When the county board of education is advised and satisfied that the local board is in default it is empowered to act for and in the place of such local board. In ministerial functions the county board simply acts for and instead of the local board; in acts judicial in character it is cautioned that before acting, if it acts at all, it must be advised and satisfied that the facts are required to show such abuse of discretion or gross neglect of duty that would be convincing to a court if it hopes to have its action for the local board upheld.

The county board of education is advised that there can be no doubt of the intent of the law to invest it with power to perform all of the acts and duties enumerated in section 7610-1 G. C., in which the local board of education is in default or has failed in its duty, but that the mere refusal to proceed to build a new building, after having obtained the money with which to build it, may not be such dereliction of duty as to warrant the county board of education to interpose its acts for the local board. But if it be a fact that a new building is necessary to effectuate some of the powers granted in this section for the county board to assume to do, such new building may be erected for the local board. Yet, as has been said before herein, the necessity for such building must clearly appear from all the facts and circumstances of the case before such action is warranted under the law.

Respectfully,

JOHN G. PRICE,

Attorney-General.