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1. BOOKS—BOARD OF EDUCATION—AUTHORIZED TO PURCHASE AS OTHER SUPPLIES ARE PURCHASED, SUCH BOOKS AS IT DEEMS NECESSARY FOR SUPPLEMENTARY READING—LIBRARY BOOKS, REFERENCE BOOKS AND OTHERS, EXCEPT TEXTBOOKS—MAY PURCHASE SUCH BOOKS IN SUCH NUMBERS AS IT DEEMS NECESSARY AND PROPER IN EXERCISE OF SOUND DISCRETION.
2. PUBLICATION DESCRIPTIVE OF CHARTER GOVERNMENT OF CINCINNATI, "KNOW YOUR CITY", MAY PROPERLY BE PURCHASED—REQUIREMENT THAT IT BE SUITABLE FOR SUPPLEMENTARY READING IN CONNECTION WITH "CIVICS"—SECTION 4854-4, G. C.

SYLLABUS:

1. A board of education is authorized by Section 4854-4, General Code, to purchase, in the same manner as other supplies are purchased, such books as it deems necessary and proper for supplementary reading, together with library books, reference books and other books except textbooks; and in the exercise of a sound discretion may purchase such books in such numbers as it deems necessary and proper.

2. The publication entitled "Know Your City," descriptive of the charter government of the city of Cincinnati, if deemed by the board of education of that city as suitable for supplementary reading by the pupils in connection with the courses in "Civics," may properly be purchased by said board in such number of copies as it considers requisite, pursuant to the authority of Section 4854-4 of the General Code.

Columbus, Ohio, September 5, 1945

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen:

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

"We are enclosing herewith a copy of a booklet entitled 'Know Your City,' 2400 copies of which have been purchased by the Board of Education of the Cincinnati City School District at a cost of \$720.00, for use in the schools of that district.

In addition, we are enclosing copies of letters from Superintendent Claude V. Courter and Assistant Superintendent G. H. Reavis, relative to the reason for such purchase, and the use of same in the various classes of the school.

May we respectfully request your opinion whether the board of education has authority to expend public funds for the purchase of this booklet."

A somewhat careful examination of the booklet referred to reveals that it is a very thorough and clear analysis of the entire plan of the government of the City of Cincinnati, as set up by its charter, an explanation of the method of selecting its officers, the functions of its various departments, and the character of its services. It contains, in addition to reading matter, pictures, drawings and charts, descriptive of the city and its many activities and governmental organization. It contains among other things a discussion of the little understood system of voting by Proportional Representation. It gives a resume of the history of the founding and growth of the city, the development of its principal industries and the changes in its plan of governmental organization. Its sponsors assert that the book is strictly non-partisan, free from any tincture of propaganda, and designed solely to give the people of Cincinnati, and particularly its school youth, a clear comprehension of the government of their city. It is not my province to pass on the merits of the publication or its value as supplementary reading for the classes in Civics. That is a matter that is within the sound discretion of the board of education.

Section 4854, General Code, provides in part as follows:

"When and so often as any book and the price thereof is filed in the office of the superintendent of public instruction as provided in Section 4854-1 of the General Code, a commission consisting of the governor, secretary of state, auditor of state, attorney general and superintendent of public instruction immediately shall fix the maximum price at which such books may be sold to or purchased by boards of education, as hereinafter provided, which price must not exceed seventy-five per cent of the published list wholesale price thereof. * * *"

Section 4854-1, General Code, provides in part:

"Any publisher or publishers of schoolbooks in the United States desiring to offer schoolbooks for use by pupils in the public schools of Ohio as hereinafter provided, before such

books may be lawfully adopted and purchased by any school board, must file in the office of the superintendent of public instruction, a copy of each book proposed to be so offered, together with the published list wholesale price thereof. * * *

Section 4854-2, General Code, provides a penalty for any publisher who fails or refuses to furnish to any board of education, in accordance with the listing which he has filed, text-books ordered by such board.

Section 4854-3, General Code, reads as follows :

“A board of education shall not adopt or cause to be used in the public schools any book whose publisher has not complied, as to such book, with the provisions of law relating thereto.”

Section 4854-7, General Code, provides :

“At a regular meeting, held between the first Monday in February and the first Monday in August, the board of education of each city and exempted village and the board of education of each local school district from lists adopted by the county board of education, shall determine by a majority vote of all members elected which of such *textbooks* so filed shall be used in the schools under its control. But no *textbooks* now in use or hereafter adopted shall be changed, nor any part thereof altered or revised, nor any other textbook be substituted therefor for five years after the date of the selection and adoption thereof, as shown by the official records of such boards, except by the consent at a regular meeting, of four-fifths of all members elected thereto. Books so substituted shall be adopted for the full term of five years. (Emphasis added.)

It becomes of especial importance to note the provisions of Section 4854-4, General Code. It reads:

“The provisions of Sections 4854, 4854-1, 4854-2, 4854-3, and 4854-7 of the General Code *shall not apply to the purchase of supplementary reading books, library books, reference books or any other books except textbooks*, required by the board of education. All of such books except textbooks required by the board of education, shall be ordered, received, examined and paid for in the same manner and by the same person as other supplies and equipment.” (Emphasis added.)

A reading of the above statutes makes it very plain that one of the questions we have to decide is whether the booklet in question is or is not such a "textbook" as is referred to in the above quoted sections. If not, is it such a book as the board of education is authorized to buy under the authority of Section 4854-4, *supra*? If it falls within the scope of that section, then you could not, in my opinion, justify a finding against the board because of the purchase in question.

It appears to me that on no theory could the publication in question be regarded as a textbook. It has none of the features that would make it a textbook for the use of the schools of the state generally. It is hardly conceivable that any publisher would offer it to the governor, secretary of state, auditor of state, attorney general and superintendent of public instruction with a view to fixing a price for sale of such booklet to boards of education throughout the state. Nor would the board of education of any district in the state be at all likely to adopt it as a textbook. It is purely a local publication. It was prepared for Cincinnati and is of vital interest to that city and to it alone. And even for that city it was not designed for use as a textbook, nor is it so used. By the statement of both the superintendent and the assistant superintendent, it is deemed highly desirable and helpful as "supplementary reading" in connection with classes in civics, and is purchased and used for that purpose.

Both the courts of Ohio and this office have had occasion many times to declare the principle that boards of education, being creatures of the statute, have only such powers as are expressly granted to them, and such as are necessarily implied as essential to carrying out the powers granted.

But another principle is equally well settled, *viz.*, that where the power is granted, a board of education has very wide discretion in carrying out such power. And it is well settled in Ohio and elsewhere that the courts will not interfere with the actions of such boards in the exercise of their discretion unless there is a clear abuse. As stated in 36 Oh. Juris. p. 192:

"A court has no authority to control the discretion vested by the statutes in a board of education or to substitute its judgment for that of the board upon any question it is authorized by law to determine. * * * Since the control and management of the schools of the state is given to the boards of education by the statute, these boards cannot be interfered with in any manner by

the court; nor will a court restrain such boards from carrying into effect their determination of any question within their jurisdiction except for an abuse of discretion, a gross abuse of the discretionary powers given, or such a wrongful and arbitrary act as shows a gross, wanton, and intentional abuse of discretion, fraud, or collusion on the part of such boards in the exercise of their statutory authority."

In 47 Am. Juris., p. 325, it is stated:

"The courts will not interfere with the exercise of discretion by school directors in matters confided by law to their judgment, unless there is a clear abuse of the discretion, or a violation of law. Every presumption is in favor of the proper exercise of power when its object is reasonably germane to the purposes of the grant."

In *Brannon v. Board of Education*, 99 O. S. 369, it was held:

"A court has no authority to control the discretion vested in a board of education by the statutes of this state, or to substitute its judgment for the judgment of such board, upon any question it is authorized by law to determine."

In *State ex rel. v. Board of Education*, 11 Oh. App. 146, it was held:

"Section 7620, General Code, vests in boards of education the power to select school sites; and in the absence of abuse of discretion, fraud, or collusion, the exercise of such power will not be interfered with by a reviewing court."

Section 7620, General Code, referred to by the court, is now Section 4834-10, General Code, which authorizes a board of education to provide buildings and equipment and to "make all other necessary provisions for the schools under its control."

In *Stinson v. Board of Education*, 17 Oh. App. 437, it was held:

"Under our existing school laws boards of education are clothed with almost unlimited power."

The court in its opinion said:

"It is not a question as to whether or not the members of this court personally approve the acts and procedure in the premises of the defendant board of education, or whether or not if we had been members of that board we would have done likewise;

but the question for us to determine is, were the proceedings legal, and in accordance with statutory law? We must follow the statutes and properly interpret them, and we cannot push them aside simply because personally we may not favor them."

Among many other cases that might be cited emphasizing the same principle, I note *Board of Education v. State*, 80 O. S. 133; *State ex rel. v. Board of Education*, 76 O. S. 297; *Board of Education v. Boehm*, 102 O. S. 292; *State ex rel. v. Board of Education*, 104 O. S. 360. And see 33 A. L. R., 1176, citing a long list of cases.

The authority given by Section 4854-5, *supra*, is express, explicit and quite free from ambiguity. Aside from text books, the board has authority to purchase "supplementary *reading books*, library books, reference books or any other books" as it deems proper. And the statute, expressly excluding such books from the provisions relating to text books, says that they may be ordered and paid for in the same manner and by the same persons as other supplies and equipment. If the Supreme Court would not and could not substitute its judgment for that of the board in determining that the selection and purchase of the booklets in question was unwise, I certainly would hesitate to do so, and so should you, even though we deemed the purchase wholly unnecessary and improvident.

It may be suggested that the board purchased more of these booklets than were necessary. But the statute does not limit the board to one or any certain number which it may purchase, and if the board deemed the number which it purchased necessary for its purpose, and considered the method of use and distribution adopted to be most conducive to the betterment of its courses in civics, who is to find fault with its judgment? The plan of the use of these booklets, as revealed by the superintendent's letter, is certainly not an unreasonable one, and even though an outsider might get along with a lesser number if he were a member of the school board, that again is not a matter in which even a court, much less an administrative officer of the state, should venture to interpose his judgment. It is conceivable that a power of this sort could be abused to the extent that the action of the board would amount to "gross, wanton and intentional abuse of discretion, fraud or collusion," but there is certainly nothing in the situation which you present which even suggests such abuse.

Furthermore, it is not within the province of an administrative officer or department to pass on the question whether a given action by a board

or other public officer amounts to an abuse of discretion, where the authority to act in the matter is clear. That is a question for the courts alone, in a proper action, and, as already shown, even in such action "every presumption is in favor of the proper exercise of power when its object is germane to the purposes of the grant." 43 Am. Juris. p. 325, citing *Goodman v. School District*, 32 F. (2d), 586, and other cases.

I note an opinion of a former Attorney General found in 1925 Opinions Attorney General, page 33, in which it was held that a board of education is without authority to use school funds to publish a book described as "A course designed for pupils who are finding difficulty with the regular course in mathematics for the ninth year." The opinion is predicated on the statement that "in the preface of the book submitted, the author himself practically recognizes the same to be a textbook."

Likewise, it was held in 1932 Opinions Attorney General, p. 178, that a county board of education is without authority to pay from school funds for the publication of a directory of teachers within the school district; and in 1938 Opinions Attorney General, p. 2413, it was held that the board of education of a city school district had no authority to establish and maintain a department of publicity, and to publish a series of books and pamphlets which were, in the opinion of the attorney general, plainly for the purpose of "conducting a campaign of advertising the schools to the public."

The facts underlying the above opinions are wholly unlike those which are before me, and the opinions expressed are in no way in conflict with the conclusions I have reached.

Accordingly, in specific answer to your inquiry, it is my opinion:

1. A board of education is authorized by Section 4854-4, General Code, to purchase in the same manner as other supplies are purchased, such books as it deems necessary and proper for supplementary reading, together with library books, reference books and other books except textbooks; and in the exercise of a sound discretion may purchase such books in such numbers as it deems necessary and proper.

2. The publication entitled "Know Your City," descriptive of the charter government of the city of Cincinnati, if deemed by the board of education of that city as suitable for supplementary reading by the pupils

in connection with the courses in "Civics," may properly be purchased by said board in such number of copies as it considers requisite, pursuant to the authority of Section 4854-4 of the General Code.

Respectfully,

HUGH S. JENKINS

Attorney General