

OPINION 65-66

Syllabus:

A school board of a city school district may not expend public funds to pay legal fees of the city solicitor and private attorneys for their professional services rendered in the successful defense of a member of the school board charged with nonfeasance, malfeasance, and misfeasance where the board of education has no official interest in the adjudication of the charges.

To: Robert G. Rawson, Washington County Pros. Atty., Marietta, Ohio
By: William B. Saxbe, Attorney General, April 21, 1965

Your request for my opinion is as follows:

"Can a Board of Education of a City School District legally expend public funds to pay the legal fees of the City of Solicitor of the municipal corporation and two private attorneys who assisted him, upon Resolution of the Board of Education at the commencement of the suit, for their professional services rendered in the successful defense of three members of the School Board who were tried in the Court of Common Pleas of Washington County upon a Complaint of electors seeking removal of the Board members from office by reason of alleged nonfeasance, malfeasance and misfeasance in office, pursuant to R. C. Sections 3.07 and 3.08?"

The legal question posed in your letter of request is answered primarily by an interpretation of Section 3313.35, Revised Code, and an application of a common law rule as recognized by at least one of my predecessors. Section 3313.35, Revised Code, provides in pertinent part:

"Except in city school districts, the prosecuting attorney of the county shall be the legal adviser of all boards of education of the county in which he is serving. He shall prosecute all actions against a member or officer of a board for malfeasance or misfeasance in office, and he shall be the legal counsel of such boards or the officers thereof in all civil actions brought by or against them and shall conduct such actions in his official capacity. * * * In city school districts, the city solicitor shall be the legal adviser and attorney for the board thereof, and shall perform the same services for such board

as required of the prosecuting attorney for other boards of the county. * * * No compensation in addition to such officer's regular salary shall be allowed for such services."

(Emphasis added)

You will note that the portion of the statute defining the responsibilities of a county prosecutor defines also the duties of a city solicitor. The statute also indicates that the Legislature intended a distinction between the status of board member; board officer; and the board as a unit, as demonstrated by its specific reference to each status within a single paragraph of this section.

As indicated by the provisions of the statute underlined, the city solicitor has no official duty to represent the members of the board of education individually in a civil suit. On the other hand, it appears from the statute that the solicitor is required by statute to prosecute malfeasance and misfeasance suits against individual members of the board.

Therefore, in order to answer your question, I must assume that the solicitor of Belpre was in some manner properly relieved of his statutory duty to prosecute a legal action against the three members of the board and that there is no local ordinance preventing a city solicitor from engaging in the private practice of law, in which event the city solicitor's status is no different from that of a private attorney for purposes of this opinion. The last sentence of Section 3313.35, Revised Code, which provides that the solicitor shall not receive additional compensation for the performance of a statutory duty therefore does not prevent the reimbursement of the expenses incurred in the defense of a board member charged with nonfeasance, malfeasance and misfeasance. There is, in fact, no statutory provision expressly authorizing or prohibiting the use of the public funds of a board of education for the purpose of such reimbursement.

Reference must therefore be made to the common law rules regarding the use of public funds for the purpose suggested in your letter of request. Although the case of Knepper v. French, 125 Ohio St., 613 (1932), establishes the authority of a county board of education to hire private legal counsel where the board has an official interest in a suit filed against its members, I am able to find no express authority in Ohio for the expenditure of public funds for the payment of attorney fees with respect to services rendered in a nonfeasance, malfeasance or misfeasance suit against a member of the board. Rather, the few Ohio cases in point indicate by their facts that said funds may be used only to defend suits in which the board has an official interest. See Knepper v. French, supra, and Board of Education of Marion Local School District v. Board of Education of Marion County, 167 Ohio St., 543.

In fact, a comprehensive research of the law of other states reveals a general rule to the effect that where legal counsel is employed to represent board members in their individual capacity only, and the litigation is personal or solely for their own benefit, public funds may not be used to pay the fees of said counsel. The employment of legal counsel must

be for a purpose in which the school district or the board have an official interest. For this reason the rule recognizes no exception for the successful defense of a board member.

The Common Pleas Court of Hamilton County applied the rule herein stated when it held that the County Board of Police Commissioners could not expend public funds to pay an attorney who had represented the Chief of Police in a contempt proceeding charging him with misconduct and neglect for failure to serve a warrant of arrest for alleged violation of registration. The court said in the case of Lunkenheimer v. Hewitt, 10 O.D. Rep., 798 (1890):

"* * *Moreover, it would be unreasonable to imply that funds raised by taxation for police purposes should be used in the defense of an officer prosecuted individually for neglect or misconduct."

The question of whether public funds of a township board of trustees may be used to pay the fees of an attorney employed by two members of the board to prosecute the third member for malfeasance and misfeasance was posed to my predecessor in office in 1933. Section 2917, General Code, provided for the employment of counsel by a township board of trustees. In concluding that public funds could not be applied to the purpose stated, my predecessor in Opinion No. 169, Opinions of the Attorney General for 1933, Page 202, made the following observation which indicates his recognition of the common law rule:

"I find no statutory provision imposing upon the prosecuting attorney the duty of prosecuting proceedings commenced under the provisions of sections 10-1, et seq., General Code, and in this case it appears that the trustees passed the resolution required by section 2917 for the employment of counsel. However, this section can refer only to such legal services as may be required by a township officer in connection with his official duties. * * *"

(Emphasis added)

Your attention is directed also to Section 305.14, Revised Code, which provides:

"If it deems it for the best interests of the county, the court of common pleas, upon the application of the prosecuting attorney and the board of county commissioners, may authorize the board to employ legal counsel to assist the prosecuting attorney, the board, or any other county board or officer, in any matter of public business coming before such board or officer, and in the prosecution or defense of any action or proceeding in which such county board or officer is a party or has an interest, in its official capacity."

(Emphasis added)

You will note that the common pleas court has authority

to appoint counsel to assist the county prosecutor only if the proceeding is one in which the county board or officers thereof have an interest in an official capacity. The last four words of this statute reflect, in another form, the general rule of law defined herein and applied to your specific question.

It is my opinion and you are hereby advised that a school board of a city school district may not expend public funds to pay legal fees of the city solicitor and two private attorneys for their professional services rendered in the successful defense of three members of the school board charged with non-feasance, malfeasance, and misfeasance where the board of education has no official interest in the adjudication of the charges.