

ing under the control of the board, attention is invited to the second and third branches of the syllabus of the decision in the case of Brannon, et al. vs. Board of Education, 99 O. S. 369, reading as follows:

"2. 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.

3. A court will not restrain a board of education from carrying into effect its determination of any question within its discretion, except for an abuse of discretion or for fraud, or collusion on the part of such board in the exercise of its statutory authority."

In the case which you submit, it would appear that under the sections of the statutes above quoted the board of education was not exceeding its authority in providing that the salaries of principals in school buildings should be paid in the manner indicated, that is, that a certain fraction of such salary should be shown to be earned by the principal upon the facts shown in the attendance record for the particular school building before this additional portion of the salary should be paid. Evidently the board in its own judgment considered this to be a move for the betterment of the schools in the district, and there does not appear to be any abuse of discretion on the part of the board in providing that the salary of the principal should be paid in this manner rather than an outright flat increase which would apply to all principals in charge of buildings regardless of the attendance shown. This additional \$5.00 as described in the resolution of the board of education must be held to be a portion of the salary to be received in the aggregate by the principal, and you are therefore advised that where a board of education by resolution provides that in addition to the salary schedule adopted there shall be paid the sum of \$5.00 to the principal of each building for each and every thousand aggregate days of attendance of the pupils of such building, such additional amount earned by the principal under the resolution of the board of education is a portion of the aggregate salary set by the board of education for the principal, and may be legally paid by the board of education.

Respectfully,
JOHN G. PRICE,
Attorney-General.

2353.

APPROPRIATIONS—ADDITIONS AND BETTERMENTS PROVIDED FOR IN SENATE BILL NO. 263 (EDUCATIONAL AND INSTITUTIONAL BUILDING ACT) CANNOT BE PURCHASED, INSTALLED OR ERECTED BY FORCE ACCOUNT—GENERAL LAWS APPLICABLE FOR BUILDING WORK COSTING OVER \$3,000—HOW TO PROCEED IF COST LESS THAN \$3,000.

1. *Neither the requirement of section 6 of the general appropriation bill of 1921 that competitive bidding be had in all cases where labor and materials are furnished or commodities are purchased, nor the special exception for "force account" work when sanctioned by the controlling board, applies to the expenditure of the appropriations made by amended Senate Bill No. 263 from the educational building fund.*

2. Sections 2314 to 2330 of the General Code require structural improvement work for the department of public welfare costing over three thousand dollars for any project to be let by contract, after advertising, etc., unless labor and materials furnished by the state itself are employed.

3. If the cost of such a project is three thousand dollars or less, the department of public welfare may elect to proceed by non-competitive contract, in which event, however, plans must be prepared and the contract let by and under the supervision of the department of highways and public works.

4. If in a project costing three thousand dollars or less the department of public welfare desires to purchase the material in the open market, and to employ the labor otherwise than through the interposition of a contractor, the material must be purchased through the department of finance, but the department of public welfare may employ the labor; and the department of highways and public works must inspect the materials before their incorporation into the work and exercise general supervision over the manner in which the work is done.

COLUMBUS, OHIO, August 20, 1921.

Department of Public Welfare, DR. H. S. MACAYEAL, Director, Columbus, Ohio.

DEAR SIR:—YOU recently requested the advice of this department upon the following questions:

“H. B. No. 301 making general appropriation for the biennium beginning July 1, 1921, provides for the purchase of equipment and for construction by force account with the approval of the controlling board, as follows:

‘Sec. 6. If the order and invoice drawn against any appropriation herein is made for labor and material furnished or for commodities purchased, it shall show that the same was furnished or purchased pursuant to competitive bidding, and that the lowest bidder was awarded the contract, unless the controlling board shall have authorized the furnishing of such labor or material or the purchase of such commodity without competitive bidding.

Whenever in the judgment of a department, board, commission or institution affected, it seems desirable and in the interests of economy to construct or repair any building or make any other improvement herein provided by force account and the controlling board consents to such method and certifies such consent in writing to the auditor of state and the director of finance in duplicate, sections 2314 to 2330, inclusive, of the General Code shall be deemed not to apply to that part of such work to be done by force account. It shall be the duty of the auditor of state or the director of finance to see that these provisions are complied with.’

This provision has obtained in preceding appropriation bills, and this department has found it economical and advisable to make certain improvements in this manner.

Amended S. B. No. 263 providing for the greater part of the immediately available appropriations, contains no provision for installation or construction by force account, and confining these improvements to the contract system may prove quite disadvantageous in many instances.

In the absence of provision for force account construction, and in view of the fact that Sec. 2314 G. C. does not apply to improvements costing less than \$3,000.00, we are at a loss to understand how such

improvements may be handled. We, therefore, respectfully request your opinion on the following questions:

1. Can additions and betterments provided for in A. S. B. No. 263 be purchased, installed or erected by force account?
2. Where there is no provision for force account construction, and where specific appropriations are for less than \$3,000.00, can the department empowered to spend the appropriation execute the respective improvements by force account, or by contract, in accordance with its own judgment?"

Amended Senate Bill No. 263 makes appropriations from the institutional building fund, a fund created by a tax levy. These appropriations are in part specific to the aggregate amount of \$1,193,300.00; but there is also appropriated, in addition to those items:

"The following sum, to be allotted to other additions and betterments * * * under the control of the department of public welfare, as determined by the director of public welfare subject to the approval of the 'Controlling Board' created by H. B. No. 301, eighty-fourth general assembly-----\$2,556,700.00"

There is no language in Amended Senate Bill 263 adopting the provision which you quote from House Bill 301, the general appropriation bill. The only question which arises here is as to whether the phrase "subject to the approval of the 'Controlling Board' created by H. B. No. 301, eighty-fourth general assembly" carries with it enough designation of authority in the controlling board under section 6 of House Bill 301 to permit that power to be exercised with reference to the unallocated appropriation in Amended Senate Bill 263. In the opinion of this department, a negative answer must be returned to this question. The functions of the controlling board are not extended generally to Amended Senate Bill 263 by the provision quoted from it; it is thereby given merely the power to approve the determination of the director of public welfare with respect to the projects on which this large appropriation shall be expended.

The conclusion therefore is that the special authority to proceed by "force account" so-called, and the special exemption from the provisions of sections 2314 to 2330 of the General Code, both embodied in section 6 of House Bill 301, do not apply to the department of public welfare in the expenditure of any of the appropriations made by Amended Senate Bill 263.

But it is just as clear that the first part of section 6 of House Bill 301 does not apply to the expenditure of these appropriations. That is to say, its requirement that competitive bidding be had in all cases, unless dispensed with by the controlling board, has no application to the expenditure of the appropriations made in the separate bill.

The conclusion of the whole matter thus far is that the powers and duties of the department of public welfare in the expenditure of appropriations made by Amended Senate Bill 263 are governed wholly by the general law, and not influenced in any respect by the provisions of House Bill 301.

The following provisions of the general law may be quoted:

"Sec. 154-57. The department of public welfare, with the approval of the governor, may assign labor of prisoners and inmates of institutions under the administration of the department of public welfare on any public work of the state."

This provision is quoted to show that when not otherwise restrained, the department of public welfare may use the labor of prisoners and inmates. It is not clear from your letter that you have this in mind, but it is mentioned for the sake of complete treatment of the question.

Section 2314 General Code:

"Whenever any building or structure for the use of the state or any institution * * * is to be erected or constructed, or whenever additions or alterations, structural or other improvements are to be made, or heating, cooling or ventilating plants or other equipment to be installed for the use of the state, or * * * in or for an institution * * * or for the supply of material therefor, the aggregate cost of which exceeds three thousand dollars, each officer, board or other authority, upon whom devolves the duty of constructing, erecting, altering or installing the same, hereinafter called the owner shall make or cause to be made * * * the following: full and accurate plans," etc.

The related sections proceed, then, to require competitive bidding, etc. Sections 2317, however, contains the following exception:

"Such owner shall give public notice of the time and place when and where proposals will be received * * * , and a contract or contracts therefor awarded, except for materials manufactured by the state or labor supplied by the Ohio board of administration that may enter into the same."

It will be observed that the general provisions of law authorize the direct supply of labor and materials by the state. This is mentioned for the sake of complete discussion, though it is not clear that you have in mind by the use of the phrase "force account" the direct supply of labor and materials. As a matter of fact, the phrase "force account" lacks authoritative definition as used in statutes like section 6 of House Bill 301, and still more is it a matter of doubt in this department as to the sense in which you use the term in your letter. If you mean by the term "force account" the doing of the work by the department itself, using materials of its own production and labor of prisoners and inmates, then it would seem that section 2317 of the General Code authorizes this to be done. But if you mean the letting of a contract or contracts without competitive bidding, or the purchase of materials and the securing of labor in the open market, then the general building regulations of the state do not permit this to be done unless the cost does not exceed three thousand dollars.

Your first question is therefore answered by the statement that additions and betterments provided for in Amended Senate Bill No. 263 cannot be purchased, installed or erected by force account unless the cost of the project is three thousand dollars or less in the aggregate, or unless by the term "force account" you mean the furnishing of the labor and materials by the state itself. If, however, the cost of a given project is three thousand dollars or less, then, in the opinion of this department, specific authority to use "force account" is not required in order to enable this method of construction to be employed. We have only to look for authority to contract generally, which authority will include any and all appropriate methods of getting work done.

Now, an appropriation for the construction of a building or other im-

provement is in and of itself the equivalent of authority to make contracts to have the work done. Amended Senate Bill No. 263 makes its appropriations to the department of public welfare, and, standing by itself, would authorize that department to make the contracts. However, section 154-40 of the General Code must now be considered. It provides, in part, as follows:

“The department of highways and public works shall have all powers and perform all duties vested by law in the * * * state building commission. * * *

In addition to the power so transferred to it, the department of highways and public works shall have the following powers:

(1) To prepare, or cause to be prepared, general plans, specifications, bills of materials, and estimates of cost for the public buildings to be erected by the state departments, offices and institutions. Nothing in this section shall be so construed as to require the independent employment of an architect or engineer as provided by section two thousand three hundred and fourteen of the General Code, in the cases to which said section applies.

(2) To have general supervision over the erection and construction of public buildings erected for the state government, or any department, office or institution thereof, and over the inspection of all materials previous to their incorporation into such buildings or work.

(3) To make contracts for and supervise the construction and repair of buildings under the control of the state government, or any department, office or institution thereof.

(4) To prepare and suggest comprehensive plans for the development of grounds and buildings under the control of the state government, or any department, office or institution thereof.

* * *”

This sections modifies materially the building regulations of the state. In the first place, it transfers the authority of the building commission provided for by section 2314 and succeeding sections of the General Code to the department of highways and public works. This authority includes the approval of plans and specifications, etc. In the second place, and in addition to this, it vests authority to prepare the plans or cause them to be prepared, to supervise construction and to make contracts for construction and repair. In other words, the contracts for all new buildings and repair of existing buildings are now to be made by the department of highways and public works; yet the department of highways and public works has no direct authority to expend an appropriation like those in Amended Senate Bill No. 263.

The procedure is as follows: The department to which the appropriation is made (in this instance the department of public welfare) should make requisition upon the department of highways and public works for the preparation of such plans, etc., as are required. When the plans are approved by the department of public welfare, that department may order the department of highways and public works to proceed with the contract and the execution of the work.

The foregoing is an outline sketch of the manner in which the activities of the department of highways and public works are to be correlated with those of the department or institution to which an appropriation for construction or repair of a building is made. So that if in the instances in which the specific appropriations are for three thousand dollars or less, or the total

cost of the project as estimated is not more than that amount, the department of public welfare desires to proceed by contract, or by that type of "force account" (if it may be called such) in which the work is done by a contractor who furnishes labor and materials, the procedure should be as above outlined.

If, however, the department of public welfare desires to proceed by that type of so called "force account" which involves the purchase of the materials by it and the employment of labor directly by it, then so far as the purchase of materials is concerned the co-operation of the department of finance is required by section 154-37 of the General Code, which provides in part as follows:

"The department of finance shall succeed to and exercise all powers of the state purchasing agent in the office of the secretary of state, and the secretary of state and auditor of state with respect to the purchase of supplies and equipment required for the use and maintenance of state officers, boards and commissions, * * * and shall exercise all powers and perform all duties as to purchases heretofore vested in the Ohio board of administration under the provisions of section one thousand eight hundred and forty-nine of the General Code. * * * In addition to the powers so transferred to it, the department of finance shall have power to purchase all other supplies, materials and equipment for the use of the state departments, offices and institutions * * *. So far as practicable, the department of finance shall make all purchases under authority of this chapter from the department of public welfare in the exercise of the functions of said department in the management of state institutions."

So far, then, as materials are to be purchased in the open market instead of furnished by the department of public welfare itself, they must be purchased through the department of finance, notwithstanding the fact that the appropriation is made to the department of public welfare. The procedure is the same as has heretofore prevailed with respect to the purchase of supplies, namely, making of requisitions and the charging of proper appropriation accounts, etc.

None of the other state departments, however, is given authority with respect to the employment of labor in the open market. If, therefore, what might be determined as pure force account, i. e., the employment of labor and the purchase of materials in the open market, is followed in making improvements costing three thousand dollars or less, the department of public welfare, though required to purchase materials through the department of finance, may itself arrange for the employment of the necessary labor and may itself actually conduct the work.

However, in the conduct of such work the department of public welfare comes again into contact with the department of highways and public works, which is to exercise general supervision over the erection of new buildings and over the inspection of materials previous to their incorporation into such buildings. This provision seems to relate only to new buildings, but it has the effect of requiring supervision of construction and inspection of materials by the department of highways and public works in all cases of new buildings, whether the cost of those buildings exceeds three thousand dollars or not. Moreover, under another provision of section 154-40 the supervision of repair of existing buildings is committed to the department of highways and public works, so that even though the department of public welfare may be

authorized to proceed by force account in cases involving the expenditure of not more than three thousand dollars, and in so doing may purchase materials through the department of finance and employ its own labor in the open market, yet the supervision of the repairs themselves is subject to the authority of the department of highways and public works.

Your second question is therefore answered by the statement that where specific appropriations are for three thousand dollars or less, or the cost of a particular building or repair project is not more than that amount, the respective improvements may be executed by force account or by contract, within the judgment of the department of public welfare. If that department determines to proceed purely by contract, i. e., the contractor agreeing to furnish materials and labor and execute the work, then such contract must be actually entered into through the department of highways and public works. If the department of public welfare determines to proceed by force account, i. e., by purchasing materials and hiring labor in the open market, then the materials must be purchased through the department of finance, but the labor may be employed directly by the department of public welfare, which has sufficient authority to this end from the appropriation itself; but the work so done by the department of public welfare is subject to the supervision of the department of highways and public works, and in case the project consists of a new building the materials previous to their incorporation therein are subject to the inspection of the department of highways and public works.

Respectfully,

JOHN G. PRICE,
Attorney-General.

2354.

APPROVAL, BONDS OF TRUMBULL COUNTY IN AMOUNT OF \$50,000
FOR ROAD IMPROVEMENTS.

COLUMBUS, OHIO, August 22, 1921.

*Department of Industrial Relations, Industrial Commission of Ohio, Columbus,
Ohio.*

2355.

APPROVAL, BONDS OF JACKSON CITY SCHOOL DISTRICT IN AMOUNT
OF \$30,000 TO REPAIR AND FURNISH EXISTING SCHOOL HOUSES.

COLUMBUS, OHIO, August 23, 1921.

*Department of Industrial Relations, Industrial Commission of Ohio, Columbus,
Ohio.*