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1. EDUCATION, BOARD OF—WIFE OF MEMBER MAY BE ELECTED CLERK OF BOARD—MAY ALSO BE APPOINTED SECRETARY TO SCHOOL SUPERINTENDENT.
2. CONTRACT TO HOUSE, SERVICE AND REPAIR BUSES—DEFINITE OVERALL AMOUNT—THREE YEAR PERIOD—NEW LOCAL SCHOOL DISTRICTS CREATED—COUNTY BOARD OF EDUCATION MUST CONSIDER AND INCLUDE CONTRACT IN MAKING DIVISION OF FUNDS AND INDEBTEDNESS—SECTION 3311.26 RC.

SYLLABUS:

1. The wife of a member of a board of education may lawfully be elected as clerk of said board and may also be appointed as secretary to a school superintendent.

2. Where several new local school districts have been created by division of a local school district pursuant to Section 3311.26, Revised Code, a contract made by the original district for housing, repairing and servicing the buses belonging to said district for a definite overall amount, and for a period of three years, will be binding upon the several districts into which such original district is divided, and it is the duty of the county board of education to consider and include such contract in making the division of funds and indebtedness required by said section.

Columbus, Ohio, October 5, 1955

Hon. Charles W. Ayers, Prosecuting Attorney
Knox County, Mt. Vernon, Ohio

Dear Sir:

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

"1. In view of R. C. Sections 3313.33 and 3319.21 and the decision in 19 Ohio Opinions page 263, can the wife of a member of a board of education be appointed as clerk of the same board of education on which her husband serves as board member and may the board also appoint her as secretary to the Superintendent of Schools?"

"2. Some few years ago a consolidated school district was created out of the old Amity, Bladensburg, Gambier and Howard Local School Districts. Thereafter it was determined that the school district was too large and the county board of education under R.C. Section 3311.26 created four new local school districts comprising the former territory occupied by Amity, Bladensburg, Gambier and Howard school districts. Prior to the creation of the four new local school districts, the Kokosing Valley Board of Education awarded a contract to a person to house, repair and service its school busses for a period of three years beginning in 1953. After the new school districts were created the Bladensburg School District, without making a new contract and without any written agreement whatsoever, operated under the old contract for one year. The Board of Education now wants to let a new contract. Are they in any way bound by the contract formerly made by the Kokosing Valley School District Board of Education?"

1. Section 3313.33, Revised Code, to which you refer, reads in part as follows :

"Conveyances made by a board of education shall be executed by the president and clerk thereof. No member of the board shall have, directly or indirectly, *any pecuniary interest* in any contract of the board or be employed in any manner for compensation by the board of which he is a member except as clerk. No contract shall be binding upon any board unless it is made or authorized at a regular or special meeting of such board."
(Emphasis added.)

Section 3319.21, Revised Code, reads in part as follows :

"Whenever a local director or member of a board of education votes for or participates in the making of a contract with a person as a teacher or instructor in a public school to whom he is related as *father, brother, mother, or sister*, or acts in any matter in which he is *pecuniarily interested*, such contract, or such act in such matter, is void."
(Emphasis added.)

Many opinions have been written by this office endeavoring to determine just what constitutes such a pecuniary interest on the part of a

member of a board of education as will invalidate a contract entered into by such board. Thus, it has been held that a contract made with the adult son of a member of the board of education for the transportation of pupils where the father has no direct financial interest in the contract is not illegal. Opinion No. 3200, Opinions of the Attorney General for 1931, page 624.

On the other hand, employment of a minor son of a member of the board of education was held illegal under the provisions of a statute similar to Section 3313.33 *supra*, on the ground that the son had not been emancipated and that the father had a right to his wages. In *re. Leach* (C. P.) 19 Oh. Op., 263. To like effect, see Opinion No. 302, Opinions of the Attorney General for 1923, page 236.

The question you present as to the employment of the wife of a member, as clerk of the board, seems to have been conclusively settled by the decision of the Supreme Court in *Board of Education v. Boal*, 104 Ohio St., 482. In that case the wife of a member of the board of education was employed as a teacher in the district, and in an action brought by a taxpayer to enjoin the treasurer from paying her salary, the court held that such employment was legal. The court discussed Section 4757, General Code, which was the predecessor of Section 3313.33 *supra*, and also Section 12932, General Code, which was the predecessor of Section 3319.21 *supra*, and held that since neither of these statutes prohibited the employment of the wife of a member of the board her employment was legal.

The opinion of the court seems to me to lay down a general principle independent of the statutes, upon which the decision may be said to rest. Judge Matthias, speaking for the court, at page 484 of the opinion said:

“The rights of a married woman in this state have been extended by express provisions of our laws, and she now has the full power to contract, and the unlimited right to have and enjoy the benefits of her contracts and the fruits of her employment. These modern statutes relating to the property rights of married women are generally intended to cut off the common-law rights of the husband to the personal estate of the wife. They have been construed to constitute as her separate estate a separate business or trade which she may carry on, and all the property incident thereto. Under the provisions referred to, the earnings of a married woman, or property acquired by her labor, constitute her separate property, and no part thereof or interest therein can

in any wise be claimed by the husband as against her. 13 Ruling Case Law, 1149, Section 173.

“If the power to contract in her own right, or the enjoyment of the fruits of her employment, is to be denied or limited, such denial or abridgment thereof must be found in some express provision of the legislation of the state. It cannot be imposed by action of the court.”

Although that case involved employment of the wife as a teacher, I cannot see any reason why the principle of it should not be applied to employment as clerk of the board or as secretary to the superintendent.

I do not know whether you intended to raise a question of compatibility of the positions of clerk of the board and secretary to the superintendent, and I do not deem it necessary to discuss that question at length. They are certainly not rendered incompatible by any statute, and I do not consider that they fall within any rule of the common law rendering offices or positions incompatible. Certainly neither has any power or control over the other.

2. Your second question deals with the change made by a county board of education under the provisions of Section 3311.26, Revised Code, whereby four new local school districts were created by division of the territory of a single district, and your specific question is as to the binding effect of a contract made by the original district, upon the several districts into which it has been divided. Section 3311.26 provides in part as follows:

“A county board of education may create a new local school district from one or more local school districts or parts thereof, and in so doing shall make an equitable division of the funds and indebtedness between the newly created district and any districts from which any portion of such newly created district is taken.” * * *

What constitutes the funds and what the indebtedness of a district which is thus to be divided, has been the subject of a number of opinions of this office. In Opinion No. 762, Opinions of the Attorney General for 1949, page 433, it was held:

“2. The unpaid balance on a school bus, though not yet due, constitutes an ‘indebtedness’ as that term is used in Section 4831-13 of the General Code.

“3. ‘Indebtedness’ includes all liabilities incurred prior to the date of the transfer, including bonded indebtedness, contrac-

tual obligations, such as building contracts, teachers' contracts, janitors' contracts, and the like, though not as yet fully performed."

The case of Board of Education v. Board of Education, 114 Ohio St., 602, related to the division of funds and indebtedness where a portion of one district had been attached to another. The court in its per curiam, said:

"'Funds' include all moneys rightfully in the possession of the board of the original district, and all moneys to which the board of the original district is entitled at the date of the transfer. * * *

"'Indebtedness' includes all liabilities incurred prior to the date of the transfer, including bonded indebtedness, contractual obligations, such as building contracts, teachers' contracts, janitors' contracts, and the like, though not as yet fully performed."

In Opinion No. 225, Opinions of the Attorney General for 1951, page 74, it was held:

"Where limited contracts with teachers have been made by boards of education in districts which were thereafter merged pursuant to the provisions of Sections 4831 and 4831-1, General Code, such contracts are binding upon the board of education of such merged district, except that in case it becomes necessary by reason of such merger to reduce the number of teachers, such reduction shall be made in the manner set forth in Section 4842-13, General Code."

In the course of that opinion I said:

"My conclusions are based on the simple proposition of the sanctity of a contract and the obligation of the board of education to honor and abide by such contracts except to the extent that the statute authorizes a departure."

It appears to me that in the light of the foregoing, particularly the decision of the Supreme Court we must conclude that contracts made by the original district, such as mentioned in your letter, have all the force that the law gives to an agreement between parties competent to contract, and that no action by the new districts created by the severance of the original district could result in destroying the contract.

Since the receipt of your communication, you have submitted a copy of the contract in question, and have informed me that the contract, while

purporting to cover all the buses of the Kokosing Valley Consolidated district, was as a matter of fact only intended and used to cover the three buses used in the original Bladenburg district, similar contracts being made as to the buses in each of the other three districts, that after the four original districts were restored by the division of Kokosing district into its original components, Bladenburg district went on for a year under that contract, enjoying its benefits and paying its obligations before deciding to repudiate it.

These facts do not in any way alter the conclusion which I have indicated, but possibly make it easier for the county board of education to make an equitable division of the assets and liabilities of the dissolved district as provided in the law.

Accordingly, in specific answer the questions you have submitted, it is my opinion :

1. The wife of a member of a board of education may lawfully be elected as clerk of said board and may also be appointed as secretary to a school superintendent.

2. Where several new local school districts have been created by division of a local school district pursuant to Section 3311.26, Revised Code, a contract made by the original district for housing, repairing and servicing the buses belonging to said district for a definite overall amount, and for a period of three years, will be binding upon the several districts into which such original district is divided, and it is the duty of the county board of education to consider and include such contract in making the division of funds and indebtedness required by said section.

Respectfully,
C. WILLIAM O'NEILL
Attorney General