

1. A municipal corporation may expend its funds for the purpose of purchasing busses to be used in the transportation of its citizens within the corporation.

2. A municipal corporation may issue bonds for the purpose of providing funds with which to purchase busses to be used as a part of a transportation system within the municipality providing said busses come within the definition of a permanent improvement as defined in Section 2293-1 of the General Code, that is, if the estimated life or usefulness of such busses be five years or more.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1048.

BOARD OF EDUCATION—NO LIABILITY INCURRED AT OTHER THAN
DULY AUTHORIZED MEETING—CONTRACT OF EMPLOYMENT FOR
LEGAL SERVICES—SPECIFIC CASE.

SYLLABUS:

1. *No liability is incurred by a board of education by reason of action taken by the members of the board at other than a duly authorized meeting.*

2. *The provisions of Section 5660 and 5661, General Code, apply to a contract of employment by a board of education for legal services; and in the absence of compliance with the provisions of these sections, a board of education has no authority to pay attorney fees incurred by one of its members in defending an action for malicious prosecution instituted against him as an individual by one who had been prosecuted at the instance of the board member, even though the prosecution had been authorized by all the members of the board as individuals, and had grown out of the theft of school property under control of the board.*

COLUMBUS, OHIO, September 23, 1927.

HON. E. A. BROWN, *Prosecuting Attorney, Circleville, Ohio.*

DEAR SIR:—This will acknowledge receipt of your communication in which you request my opinion as to the liability of a rural board of education for attorney fees incurred by one of its members in employing an attorney to defend a suit for malicious prosecution instituted against him as an individual by a person who had been prosecuted for burglary on the affidavit of the board member against whom the suit for malicious prosecution was brought.

It appears that a garage on the school property had been broken into on several occasions and property belonging to the school had been stolen. Upon investigation, the members of the board had an informal meeting and authorized one of their number to lay the matter before the prosecuting attorney, who, acting on the information presented to him, prepared an affidavit which the board member signed, and one D. M. was arrested and bound over to the grand jury on the charge of burglary. It later developed that the information presented to the board was not entirely reliable and the grand jury failed to indict, whereupon suit for malicious prosecution was instituted against the board member and he was put to the expense of employing counsel to defend the suit.

It further appears that some good grew out of the prosecution in that the deprecations ceased, but I do not attach any significance to that fact so far as the liability of the board for attorney fees is concerned, for the reason that the power, authority and liability of public boards created by statute are not measured by the resulting good their action engenders, but are strictly limited within the bounds of the authority granted to them.

Your specific question is, can a board of education pay for services of any attorney under the circumstances set forth.

That boards of education are purely creatures of statute and that as such their powers are necessarily limited to such powers as are clearly and expressly granted by statute and to such as may be necessarily implied to carry the express powers into effect, is an old and uniformly accepted doctrine. Public funds under their control can only be expended in such manner and for such purposes as are clearly authorized by law. Statutes authorizing the expenditure of public funds must be strictly construed, and when the authorization to expend public funds is doubtful, the doubt should be resolved against the expenditure. These principles are fundamental and too well settled to admit of discussion or to necessitate the citation of authority.

Moreover, it is well settled that any action by a board of education or any corporate public body, particularly if the expenditure of public funds is involved, must be taken in a duly authorized meeting of the board and in the manner provided by law. Ruling Case Law, Schools, Section 25, says :

"It is an elementary principle that when several persons are authorized to do an act of a public nature which requires deliberation they all should be convened because the advice and opinions of all may be useful though they do not unite in opinion. Therefore, matters requiring the actions of a school board must be considered at a meeting properly held."

The action of one member of the board, though with the knowledge and consent of the other members and in the furtherance of the objects of the board, is not the action of the board and has no binding force on the board unless that action was duly authorized in a legally assembled meeting. Authorization in an informal meeting even though all the members be present does not satisfy the requirements of the law in this respect. It has been held in the case of *McCortle vs. Bates, et al.*, 29 O. S. 419 :

"An agreement by members of the township board of education acting in their individual capacity to purchase from another person apparatus for the schools of the township and to ratify said contract of purchase at the next meeting of the board is contrary to public policy and therefore illegal and void."

The filing of the affidavit for the arrest of D. M. was the individual act of the board member and no liability could be imputed to the board, as such, by reason thereof.

I am not unmindful of the fact that the ordinary and necessary method of conducting a legal proceeding is with the assistance of legal counsel. Assuming that the board in this case duly authorized the steps taken leading to the arrest of D. M., as a consequence of which the suit for malicious prosecution was brought against the board member, it may be further assumed that the assistance of legal counsel to protect the interests of the member would be reasonably incident to the power to protect school property.

However, it seems to me that there is an insurmountable reason why, in the case submitted by you, payment of the counsel fees in question cannot lawfully be made by the board of education at this time. Your attention is invited to Sections 5660 and 5661 of the General Code, as they read prior to the passage of House Bill No. 80, by the 87th General Assembly, which respectively provided in part as follows:

Sec. 5660. "No expenditure, excepting from the proceeds of bonds, shall be made unless authorized by appropriation both as regards purpose and amount, nor shall any expenditure be made from the proceeds of bonds unless duly authorized or directed.

No contract, agreement or other obligation calling for or requiring for its performance the expenditure of public funds from whatsoever source derived, shall be made or assumed by any authority, officer, or employee of any county or political subdivision or taxing district, nor shall any order for the payment or expenditure of money be approved by the county commissioners, council or by any body, board, officer or employee of any such subdivision or taxing district, unless the auditor or chief fiscal officer thereof first certifies that the money required to meet such contract, agreement or other obligation, or to make such payment or expenditure has been lawfully appropriated or authorized or directed for such purpose and is in the treasury or in process of collection to the credit of the appropriate fund free from any previous and then outstanding obligation or certification, which certificate shall be filed with such authority, officer, employee, commissioners, council, body or board, or the chief clerk thereof. The sum so certified shall not thereafter be considered unencumbered until the county, subdivision or district is discharged from the contract, agreement, or obligation or so long as the order is in force. Taxes and other revenues in process of collection or the proceeds to be derived from lawfully authorized bonds, notes, or certificates of indebtedness sold and in process of delivery shall, for the purposes of this section, be deemed in the treasury or in process of collection and in the appropriate fund." * * *

Sec. 5661. "Every contract, agreement or other obligation and every order entered into or issued contrary to the provisions of the preceding section shall be null and void, and no claim or demand thereon shall be recoverable from any county or other political subdivision or taxing district or from any public funds." * * *

These sections as above indicated were both amended by House Bill No. 80, passed by the Eighty-seventh General Assembly on April 20, 1927, effective August 10, 1927. These amendments, however, do not affect the question here under consideration.

With reference to the application of Sections 5660 and 5661, supra, as they then read, to a contract of employment of an attorney by a school board, in an opinion rendered under date of May 6, 1915, reported in Opinions, Attorney General, 1915, p. 664, it was held as follows:

"The contract of employment would not be within the exceptions to the requirements of Section 5660, G. C., provided in Section 5661, G. C., and it would, therefore, be necessary that a certificate of available funds be filed with said contract by the clerk of said board."

This holding was approved and followed in a later opinion dated May 24, 1916, and reported in Opinions, Attorney General, 1916, Vol. I, p. 915.

While the language of the above sections was changed since the date of the two opinions above cited, the provisions of the sections have not been changed in such a way as to make a contract by a school board for legal services an exception to the requirements of the sections.

The breadth of your question however demands an answer as to whether, although there be no present legal obligation, the board may not now recognize the claim of the member as just, and make payment thereof. While there may be instances in which a board of education might properly ratify its prior informal or irregular action, and so assume a legal obligation where none had theretofore existed, such action must be predicated upon the fact that it would have been legal for the board to have acted formally in the first instance; and in the instant case no legal obligation could be incurred by the board until and unless the provisions of Sections 5660 and 5661, *supra*, were complied with.

In connection with your question, the language of Attorney General Lawrence, in an opinion reported in *Opinions, Attorney General, 1883-1888, Vol. III, p. 213*, is pertinent:

"Your favor of the 24th ult. was duly received. The case you present is certainly a hardship upon your county infirmary directors, but I do not see how the county can pay them either for their time or expenses in the matter referred to. There is no general grant of power to the commissioners which would authorize them to expend money for this purpose, nor does the special authority conferred by Section 968 extend so far. Official capacity must be limited to a capacity pertaining to the office of infirmary director. The services for which compensation can be allowed must be rendered in the performance of some duty prescribed by law or in the exercise of some authority conferred thereby. I do not think that it can in any sense be said that the directors attended this trial in their official capacity. The suit was not against the county, but against them individually. It was a matter for which the county had no possible liability, and the suit could only have been maintained against them on the ground that they had acted beyond their official authority. I question whether it would be possible to obtain any legislation such as you suggest. The hardship here is no greater than in a similar suit against a sheriff or other officer. Indeed, a private individual may sustain equal loss when a groundless suit is brought against him. I do not see how any law can meet the case without being liable to great abuse."

While it is a matter of regret that in a case of this kind, the necessary attorney fees of the board member can not legally be paid, under the law I see no alternative. I am therefore constrained to hold that since the arrest of D. M. was caused by the individual act of the person who signed the affidavit, and because of the provisions of Sections 5660 and 5661, General Code, such person is individually responsible for any expenses incurred by him in the employment of counsel to defend the action for malicious prosecution brought against him as a result of the failure of the grand jury to indict, and the board of education is without authority to pay such expenses, including attorney fees.

Respectfully,
EDWARD C. TURNER,
Attorney General.