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EDUCATION, BOARD OF—CONDEMNED BUILDING—FAILURE TO COMPLY WITH ORDER OF STATE FIRE MARSHAL TO TEAR DOWN SCHOOL BUILDING—BOARD NOT LIABLE FOR DAMAGES TO ONE WHO SUFFERS LOSS OR INJURY THROUGH FIRE OR OTHER CATASTROPHE—NO OTHER SUITABLE ROOMS OR BUILDING AVAILABLE—SECTION 835 G. C.

SYLLABUS:

Where a board of education fails to comply with an order of the state fire marshal given pursuant to Section 835, General Code, to tear down a school building belonging to said district, but continues to use said building for the reason that no other suitable building or rooms are available, such board of education will not be liable for damages to one who suffers loss or injury because of fire or other catastrophe in the condemned building.

Columbus, Ohio, April 13, 1948

Hon. James W. Williamson, Prosecuting Attorney
Fulton County, Wauseon, Ohio

Dear Sir:

I have before me your letter, requesting my opinion and reading as follows:

“I have a communication from the clerk of the board of education of Archbold-German Township Local School District, which reads as follows:

‘On the 14th day of July, 1947, the State Fire Marshal, by an order duly served on “M”, President of the local Board of Education, by registered mail, ordered and directed the local Board, within thirty days from the date of service of aforesaid order, to tear down the two-story brick and frame school building located at Archbold, Ohio, and remove all debris from the premises, which said order has not been modified or rescinded.’

‘Notwithstanding said order, the local Board of Education did not tear down said building and continued to use, and is now using said building for school purposes for the reason that no suitable building or rooms are available.’

‘However, the local Board did declare an amergency under the provisions of Section 2293-15a of the General Code, and submitted the question of the issuance of bonds in the amount of \$450,000 to the electors of this school district at the general election on Tuesday, November 4, 1947, at which election sixty-five per cent of the electors voting upon the proposition did not vote in favor thereof.’

‘Thereafter, on the 24th day of February, 1948, the question of the issuance of bonds in the amount of \$400,000 to replace the building condemned by the State Fire Marshal was submitted to the electors of the school district, which said proposition did not receive the approval of the necessary sixty-five per cent of the electors voting upon said issue.’

'Inasmuch as Section 837 of the General Code, makes it a misdemeanor for failure to comply with an order of the State Fire Marshal and in view of the failure of the local board to comply with said order of the State Fire Marshal and of the electors to approve a bond issue for the replacement of said building so condemned, is the local board of education liable for damages to anyone who suffers loss or injury because of fire or other catastrophe in the condemned building? In such an event, is a member of such Board, as an individual, liable for damages?'

"Your opinion on the questions presented is requested."

Section 837, General Code, to which you refer, is a part of the chapter relating to the powers and duties of the state fire marshal. Section 835 of the General Code, provides in part, as follows :

"If the state fire marshal, a deputy state fire marshal, or assistant fire marshal, or any officer mentioned in the preceding section, upon an examination or inspection finds a building or other structure, which for want of proper repair, by reason of age and dilapidated condition, defective or poorly installed electrical wiring and equipment, defective chimneys, defective gas connections, defective heating apparatus, or for any other cause or reason is especially liable to fire or endangers life or other buildings or property, such officer shall order such building or buildings to be repaired, torn down, demolished, materials removed and all dangerous conditions remedied. * * *"

Section 837, General Code, reads as follows :

"Any person or persons, being the owner, occupant, lessee or agent of buildings or premises, and any owner, lessee, operator or person having the direction and control of any tank, container, vehicle, piping or equipment used for the manufacture, storage, handling, sale or transportation of products subject to the provisions of this chapter who wilfully fails, neglects or refuses to comply with any order of the state fire marshal or any officer acting under him in the performance of the duties imposed by this chapter, within the time prescribed in such order, unless an appeal shall have been taken therefrom or with the final order of the state fire marshal or of the court on such appeal, shall be guilty of a misdemeanor and shall be fined not more than fifty dollars nor less than ten dollars for each day's neglect."

Section 12600-279 of the General Code, is a penal section forming a part of the Ohio State Building Code and omitting irrelevant portions, provides :

“Whoever being the owner or having the control as an officer, or as a member of a board or committee or otherwise of any * * * school-house, * * * violates any of the provisions of the foregoing act or fails to conform to any of the provisions thereof, or fails to obey any order of the state fire marshal, unless the court shall sustain the appeal, * * * shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than one thousand dollars and stand committed until said fine and costs be paid or secured to be paid or until otherwise discharged by the due process of law.”

While your letter does not raise the question of criminal liability, I have noted the last above quoted statute as indicating a determination of the legislature to make the law as effective as possible, even to the extent of imposing a criminal liability on members of boards of education who disregard an order of the state fire marshal as to the demolition of dangerous buildings. For the purpose of this opinion we may assume that the order in question was justified.

At the outset, it may be observed that the school system of Ohio, established pursuant to the mandate of the Constitution (Art. VI, Sec. 3), is an arm of the state government, controlled not by local authorities but by the state under general laws enacted by the General Assembly. 36 Oh. Juris., page 46.

The rule seems to be quite generally established that a board of education being charged with the administration of a function belonging to the state, may not be held liable in the absence of a statute making it liable for injuries to persons or property growing out of the negligence of the officers and employees of the board. This proposition is thus stated in 47 Am. Jur., page 335:

“Contrary to what appears to be the English rule, the general rule in this country, in the absence of a statute imposing liability, is that a school district, municipal corporation, or school board is not liable for injuries to pupils of public schools suffered in connection with their attendance thereat.”

Again, it is said at page 337:

“In harmony with the general doctrine governing liability in the case of injury to a pupil, it is established that ordinarily, a school board, district, or municipal corporation operating a school is not, in the absence of statute, liable to one other than a pupil for per-

sonal injuries sustained on account of the condition of the school premises.”

We find this statement in 36 O. Jur., page 382 :

“The school authorities of a school district are not liable to persons injured from the insufficiency or dangerous character of schoolhouses within such districts, or from the careless construction or negligent keeping or control of the same.”

In *Finch vs. Board of Education*, 30 O. S., 37, a school child was injured by falling into an excavation negligently caused and permitted by the board of education, adjacent to the school building. The court held :

“A board of education is not liable in its corporate capacity for damages for an injury resulting to a pupil while attending a common school, from its negligence in the discharge of its official duty in the erection and maintenance of a common school building under its charge, in the absence of a statute creating a liability.”

The court in its opinion pointed out that while a board of education is a quasi corporation and empowered by law to sue and be sued, it is organized merely as one of the state's ministerial agencies, with power to levy taxes for school and school building purposes and no others; that it has no powers except those given it by law and is not authorized to levy taxes for any other purpose than to provide educational facilities and that it is not subject to the maxim of *respondeat superior*.

This case was discussed and followed by *Board of Education vs. Volk*, 72 O. S., 469. To like effect, *Sub-School District vs. Burton*, 29 O. S., 421; *Board of Education vs. McHenry*, 106 O. S., 357; *Conrad vs. Board of Education*, 29 O. App., 317; *Diehm vs. Cincinnati*, 5 Oh. Dec. Rep. (Aff'd., 25 O. S., 305); *Shaw vs. Board of Education*, 17 O. L. A., 588; and *Elias vs. Norton*, 53 O. App., 538, also sustaining the principle announced in the cases above referred to.

There is no escape from the conclusion that in the case which you present, no liability could arise against the board of education for damages growing out of the failure of the board to comply with the order of the fire marshal for the maintenance of the condemned building.

As to the personal liability of individual members of the board, that question does not appear to relate to the official duties of a prosecuting

attorney, as to which, under Section 343, General Code, I am to give advice, and accordingly I do not deem it proper to discuss that question, and I am therefore confining my opinion to the question of the liability of the board.

Specifically answering your question it is my opinion and you are accordingly advised that where a board of education fails to comply with an order of the state fire marshal given pursuant to Section 835, General Code, to tear down a school building belonging to said district, but continues to use said building for the reason that no other suitable building or rooms are available, such board of education will not be liable for damages to one who suffers loss or injury because of fire or other catastrophe in the condemned building.

Respectfully,

HUGH S. JENKINS,
Attorney General.