

in the board of county commissioners to expend county funds for such purposes is predicated upon a finding by the county commissioners that the improvement is necessary. The authority to expend county funds for such purposes is further predicated upon the limitation that such funds may be expended only to the extent that the improvement benefits the general public or state or county roads or highways. In the instant case there is probably no question but that the portion of the cost which the county is willing to contribute toward this ditch improvement may be said to be the part which is conducive to the public welfare, or possibly the part which is of benefit to county or state roads, as provided in Section 6463, General Code. The statutory authority to expend county funds for a county ditch improvement apparently applies only to such improvement of which the county has taken jurisdiction. I find no such authority extended to an improvement constructed by municipalities. Obviously, if the board of county commissioners has not taken jurisdiction, the award of contracts and other vital factors entering into the matter of cost are not under their control. The Legislature might, perhaps, under the Constitution, empower the county commissioners to delegate to a municipality the authority to construct an improvement the cost of which is to be borne in part by the county, but it has not done so. The expenditure of county funds for ditch improvements, as above indicated, is predicated upon the county taking jurisdiction. I am of the view that the reasoning contained in Opinion 1231 is directly applicable to the question here presented.

It is suggested that if the county commissioners would take jurisdiction of this improvement, it could possibly be consummated in the same manner as if the municipality had taken jurisdiction. There are no limitations in Section 6463, General Code, as to percentages of apportionment of cost, and in the event the improvement is benefiting the municipality to a very great extent, there is no reason why the board of county commissioners could not apportion the cost in accordance therewith. If such procedure were followed, probably the desired ends would be reached by following the provisions of the statute instead of endeavoring to expend county funds without authority.

Specifically answering your question, I am of the opinion that in the event a ditch improvement lies wholly within the corporate limits of a municipal corporation and such improvement is being constructed by the municipality, which has taken jurisdiction thereof, there is no authority for the expenditure of county funds to pay a portion of the cost of such improvement, notwithstanding the fact that the county may be benefited thereby. In the event the improvement will result in a benefit to the county, the county commissioners should take jurisdiction thereof and proceed therewith pursuant to the provisions of Sections 6442, et seq. of the General Code.

Respectfully,

GILBERT BETTMAN,
Attorney General.

1380.

SCHOOL DISTRICT—SALARIES UPON WHICH PROPORTIONATE SHARE OF TAX LEVY UNDER SECTION 7575, GENERAL CODE, IS BASED—FINALITY OF COUNTY BOARD'S DETERMINATIONS—HOW BALANCE OF SAID TAX LEVY TO BE DISTRIBUTED.

SYLLABUS:

1. *In accordance with the terms of Section 7600, General Code, as amended by the 88th General Assembly, the proportionate share of the 2.65 mills tax levy provided*

for by Section 7575, General Code, which is to be allotted to each school district of a county school district is based on the salaries stated in the salary schedule adopted by the county board of education, and not on the salaries actually paid.

2. In the absence of abuse of discretion, the determination of a county board of education as to the number of teachers and other educational employes in the several districts of the county school district, the adoption of a salary schedule for these districts and a determination of a transportation schedule upon which are based the distribution of the 2.65 mills tax levy provided for by Section 7575, General Code, among these districts, is final.

3. Any balance of the 2.65 mills tax levy provided for by Section 7575, General Code, which is collected in a county school district, remaining after distribution of that portion of the tax attributable to the number of teachers and educational employes in the several districts of the county school district, and the expense of transporting pupils therein, should be distributed according to the ratio which the aggregate days of attendance of pupils in such districts bears to the aggregate days of attendance of pupils in the entire county school district, without regard to the number of tuition pupils that may be in attendance in the schools of the several districts.

COLUMBUS, OHIO, January 9, 1930.

HON. EDGAR G. MARTIN, *Prosecuting Attorney, Norwalk, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion, which reads as follows:

"In conference with our county school superintendent relative to the interpretations of Sec. 7600, as passed by the 88th General Assembly, numerous questions and problems have arisen as to the actual working of this section. I am, therefore, asking you to kindly furnish me your interpretation of the following questions pertinent to said Sec. 7600:

1. When the County Board of Education has adopted a salary schedule for the county district,

(a) Will a district paying less than the county schedule participate on the basis of the amount actually paid?

(b) Will a district paying more than the county schedule participate only on the basis of the county schedule?

(c) Is the county board's finding as to the 'number of teachers and other educational employes, and the number of transportation routes necessary to maintain the schools of the county school district' final in determining the extent to which any district may participate in the 'county equalization fund'?

2. May the county board determine the basis for participation in the 'county equalization fund' for 'the expense of transportation' in any manner it may deem just, regardless of the provisions of Section 7787, G. C.?

3. Districts maintaining a school at a children's home or enrolling pupils from such a home receive tuition in accordance with the provisions of Sections 7677 and 7678, G. C.: May such districts still participate fully in the 'county equalization fund,' regardless of the amount received in tuition?

4. District A sends its pupils to high school in District B: Does A or B get credit for the 'aggregate days of attendance' of such high school pupils?"

Section 7600, General Code, sets forth the method by which the proceeds of the 2.65 mills tax levy provided for school purposes by Section 7575, General Code, and the money received from the State on account of interest on the common school fund, should be allotted to the several school districts entitled thereto. The portion of said

Section 7600, General Code, as amended by the 88th General Assmby (113 O. L. 292), which provides for the distribution of the said 2.65 mills tax levy, reads as follows:

"After each semi-annual settlement with the county treasurer each county auditor shall immediately apportion school funds for his county. Each city school district and each exempted village school district shall receive the full amount of the proceeds of the levy of two and sixty-five hundredths mills provided in Section 7575, General Code, in the given school district. The proceeds of such levy upon property in the territory of the county outside of city and exempted village school districts shall be placed in the 'county board of education fund' and shall be known as a 'county educational equalization fund.'

On or before the first day of April of each year, the county board of education shall make a survey of the county school district to determine the number of teachers and other educational employes, and the number of transportation routes necessary to maintain the schools of the county school district. After a public hearing, the county board of education shall certify to the board of education of each school district of the county school district the basis upon which they are determined and the approximate amounts which the several districts may expect to receive for teachers' salaries, the salaries of other educational employes and for transportation.

The proceeds of the county educational equalization fund shall be apportioned by the county board of education to each school district and part of district within the county outside of city and exempted village school districts on the basis of * * * the number of teachers and other educational employes employed therein, and the expense of transporting pupils as * * * determined by the above educational survey, and the balance according to the ratio which the aggregate days of attendance of pupils in such districts, respectively, bears to the aggregate days of attendance of pupils in the entire county outside of exempted village and city school districts.

"The annual distribution attributable to teachers and employes shall be according to the following schedule: Thirty-seven and one-half per centum of the salary of each teacher or educational employe receiving a salary of not less than eight hundred dollars and a like percentage of the compensation paid to each person giving instruction in trade or technical schools, extension schools, night schools, summer schools, and other special school activities, but not to exceed nine hundred dollars for any teacher or educational employe or other such person. * * * Provided that the amount distributed to each district shall be upon the basis of the same salary schedule as determined by the county board of education, but in no case shall the amount paid per teacher or educational employe be less than three hundred dollars or more than nine hundred dollars.

The annual distribution attributed to expense of transportation of pupils shall be * * * in accordance with a schedule to be determined by the county board of education.

No school district shall be entitled to receive any portion of the said funds in any year until the reports of numbers, salaries and qualifications of teachers employed and aggregate days of attendance and expense of transportation of pupils have been made as required by law. * * * "

Amended Section 7600, General Code, does not change the *basis* of apportioning the 2.65 mills tax levy referred to from what it was before amendment but does change the manner of computing the amount attributable to the three divisions on

the said basis of the apportionment. Said Section 7600, General Code, before the recent amendment, provided inter alia, as follows:

"The proceeds of such levy upon property in the territory of the county outside of city and exempted village school districts shall be apportioned to each school district and part of district within the county outside of city and exempted village school districts on the basis of the number of teachers and other educational employes employed therein, and the expense of transporting pupils as shown by the reports required by law, and the balance according to the ratio which the aggregate days of attendance of pupils in such districts, respectively, bears to the aggregate days of attendance of pupils in the entire county outside of exempted village and city school districts."

It will be observed by comparison of the terms of the statute before amendment, with those of the amended statute, that the basis of the apportionment of the proceeds of the said tax levy to the school districts of a county school district outside of city and exempted village districts consists of three divisions and is the same in both the original statute and the statute as amended, to-wit:

1. The number of teachers and other educational employes therein.
2. The expense of transporting pupils.
3. The balance according to the ratio which the aggregate days of attendance of pupils in such districts, respectively, bears to the aggregate days of attendance of pupils in the entire county outside of exempted village and city school districts.

It will also be observed that the provisions for the annual distribution attributable to teachers and employes is the same in both statutes except that the amended statute provides that the percentage of the salaries of the teachers and employes to be used as a basis of computing the amount attributable to the number of teachers and other educational employes shall be computed "upon the basis of the same salary schedule as determined by the county board of education."

That language evidently means that the county board of education shall adopt a salary schedule and the computation for each district shall be upon this *same* salary schedule. The county board is directed to make a survey and certify to the several boards the approximate amount they may expect to receive for salaries. In doing so, the county board necessarily must adopt a schedule, and it is upon this same schedule that the tax must be apportioned. The expression in the statute that districts shall receive 37½% of the salaries is modified by the latter expression that the distribution shall be based on the same salary schedule adopted by the county board, which latter expression was inserted by the last amendment. That being the case, your first question (a) will be answered in the negative, and (b) in the affirmative.

By the terms of the statute, the county board of education is charged with the duty of making a survey of the county district to determine the "number of teachers and other educational employes, and the number of transportation routes necessary to maintain the schools of the county school district," and after a public hearing thereon, of certifying the result of this determination to the several boards of education of the districts comprising the county school district. It is the result of the county board's determination with respect to these matters that is the controlling factor in the final determination of the amount of the tax that each district shall receive. There is no provision made by this statute, or by any other provision of law, for an appeal from or a review of the finding of the county board of education on these matters, and in the absence of an abuse of discretion, the board's finding is necessarily final.

Of course the action of any administrative board in matters wherein it is vested with discretion must not be capricious or arbitrary or so manifestly unfair and unequitable as to amount to an abuse of that discretion, and if it is so unjust or arbitrary as to amount to an abuse of discretion, its finding will be corrected by the courts in a proper proceeding brought for that purpose. With that qualification, the answer to your first question (c) is yes.

Coming now to the question with respect to the manner of determining the proportion of the 2.65 mills tax levy referred to, attributable to "the expense of transportation" to which the several districts are entitled, the former statute provided with respect to this matter:

"The proceeds of such levy upon property in the territory of the county outside of city and exempted village school districts shall be apportioned to each school district and part of district within the county outside of city and exempted village school districts on the basis of * * * and the expense of transporting pupils as shown by the reports required by law, * * *

The annual distribution attributed to expense of transportation of pupils shall be fifty per centum of the personal service expense incurred in such transportation."

The "report required by law" refers to the report required by Section 7787, General Code, where also the term "personal service expense" as used above, is defined. The amended statute provides that the annual distribution attributed to the expense of transportation of pupils shall be "in accordance with a schedule to be determined by the county board of education."

The amended statute does not refer in any way to Section 7787, General Code, and makes no mention of the reports required by said section or of "personal service expense," as defined by said Section 7787, in their relation to transportation of pupils. Neither does it give the board of education any guide by which to formulate a schedule upon which to base the annual distribution attributed to expense of transportation other than "the number of transportation routes necessary to maintain the schools of the county school district."

The determination of the schedule referred to is left, to a great extent, to the discretion of the county board of education, which discretion should, of course, be exercised judiciously. The elements which controlled in the determination of what is designated as personal service expense, under the statute, would no doubt be proper subjects for consideration by the county board of education, in its determination of a schedule upon which to base the annual distribution attributable to the expense of transportation of pupils, but the amended statute does not specifically limit the board to a consideration of those matters alone in determining this schedule.

In Opinion No. 1257, rendered by me under date of December 4, 1929, and addressed to the Prosecuting Attorney of Marion County, I said, with reference to this subject:

"One effect of the amendment to Section 7600, General Code, is to render inconsequential the 'personal service expense' incurred in transporting pupils spoken of in Section 7600, General Code, in so far as it has anything to do with the distribution of the 2.65 mill tax levy.

This amended section places in the county board of education a certain discretion with reference to the formulation of a schedule upon which to base the annual distribution of that portion of the tax which is attributed to expense of transportation.

However, the expense of transportation of pupils in any district must be considered as a factor in the distribution of the taxes. You will note that the

statute provides that the proceeds of this tax shall be apportioned by the county board of education to each school district and part of the district within the county outside the city and exempted school district on the basis of the number of teachers and other educational employees, *the expense of transporting pupils*, as determined by the educational survey which the board must make and the balance according to the aggregate days of attendance of pupils in such districts.

The schedule to be determined by the county board of education upon which to base that portion of the annual distribution of the tax attributed to expense of transportation must be such as to have uniform operation over the county district, and not based on arbitrary or whimsical considerations. The statute does not assume to definitely formulate a schedule and does not direct how the schedule shall be determined. That is left, to a great extent, to the discretion of the county board of education, which discretion, of course, must not be abused. It does provide, however, that all the proceeds of this levy which are collected outside of city and exempted village school districts in a county shall be distributed among those districts from which it is collected, and that three different and distinct things shall be the basis upon which the distribution shall be made, one of which is the 'expense of transporting pupils, as determined by the above educational survey.'

Your second question will therefore be answered in the affirmative.

After that portion of the tax attributable to the number of teachers and employes and the expense of transporting pupils is distributed to the several districts entitled thereto, the remainder is to be distributed "according to the ratio which the aggregate days of attendance of pupils in such districts, respectively, bears to the aggregate days of attendance in the entire county outside of exempted village and city school districts."

The language of the amended statute with reference to this balance is exactly the same as before the amendment. By that language the aggregate "days of attendance" is made the norm both in the local districts and in the county school districts upon which the ratio spoken of is computed, not the enrollment or enumeration of the pupils in a district nor the number of pupils living in a district and attending school. No exception is made as to those days of attendance, whether the attendance be by a pupil who lives in the district or those coming from outside, or whether they are tuition pupils or pupils who attend school free of tuition.

A similar expression has been used in the statutes since 1914, with reference to the distribution of this tax. In 1914 provision was made for the distribution of this fund then known as the "State common school fund" on the basis of "average daily attendance of pupils." (104 O. L. 159.) It was later changed to provide as it now does. I have never known of the question being raised that the "average daily attendance" or "aggregate days of attendance" meant anything less than the total attendance of all pupils, regardless of their status as paid pupils or otherwise.

Prior to 1914, the statute provided that the State common school fund should be apportioned "in proportion to the enumeration of youth in each of the several school districts within the county." (97 O. L. 350). The Legislature apparently made the change from "enumeration" to "attendance" with the idea in mind of permitting the district where the pupil attended school to have the benefit of that attendance in the distribution of the fund rather than where the pupil was enumerated. Your third question will therefore be answered in the affirmative.

In specific answer to your questions, I am of the opinion in answer to 1— (a) that in accordance with the terms of Section 7600, General Code, as amended by the 88th General Assembly, the proportionate share of the 2.65 mills tax levy provided for by Section 7575, General Code, which is to be allotted to each school district of a

county school district is based on the salaries stated in the salary schedule adopted by the county board of education, and not on the salaries actually paid.

(b) The answer to (a) above, will suffice to answer this question.

(c) In the absence of abuse of discretion, the determination of a county board of education as to the number of teachers and other educational employes in the several districts of the county school district, the adoption of a salary schedule for these districts and a determination of a transportation schedule upon which are based the distribution of the 2.65 mills tax levy provided for by Section 7575, General Code, among these districts, is final.

2. In determining a schedule upon which is based that portion of the 2.65 mills tax levy attributable to the expense of transportation which will be distributed to the several school districts of a county school district, the county board of education is not limited to a consideration only of the "personal service expense" as the same is defined in Section 7787, General Code, nor does any other provision of said section control in the county board's determination of said schedule.

3. Any balance of the 2.65 mills tax levy provided for by Section 7575, General Code, which is collected in a county school district, remaining after distribution of that portion of the tax attributable to the number of teachers and educational employes in the several districts of the county school district, and the expense of transporting pupils therein, should be distributed according to the ratio which the aggregate days of attendance of pupils in such districts bears to the aggregate days of attendance of pupils in the entire county school district without regard to the number of tuition pupils that may be in attendance in the schools of the several districts. School districts in which are located children's homes, the inmates of which attend the schools of the district are to be credited with the attendance of those pupils even though the district receives tuition from other districts for their attendance.

4. District B, should be credited with the number of days the pupils residing in district A attend the school in district B as a part of its "aggregate days of attendance" to be considered in making distribution of the 2.65 mills tax levy provided for by Section 7575, General Code.

Respectfully,

GILBERT BETTMAN,

Attorney General.

1381.

APPROVAL, DEED TO LAND OF DAVID S. LONG AND WIFE IN MIDDLETOWN, GUERNSEY COUNTY, OHIO.

COLUMBUS, OHIO, January 9, 1930.

HON. ROBERT N. WAID, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of your communication referring to Opinion No. 1283, issued to you under date of December 11, 1929. In said opinion it was pointed out that the deed of David S. Long and Maud Long, husband and wife, conveying the premises under consideration in said opinion to the state, had not been executed, and you return said deed for my consideration.

Upon examination, I find that said deed has been executed according to law, and therefore hereby approve the same and return it herewith.

Respectfully,

GILBERT BETTMAN,

Attorney General.