

his term of office and does not designate him as a deputy, the conclusion is compelled that such a position is in the classified service. In examining Section 1181-1, with reference to the duties of the auditor of your department, it would appear that he is in no different status than many other employes in your department and in other departments in so far as the fiduciary relationship is concerned, which said positions are regarded as in the classified service.

In this connection it will be noted that under sub-section 8 of paragraph (a) of Section 486-8, General Code, each of the principal appointive executive officers of the State is entitled to have exempted from the classified service two secretaries, assistants or clerks and one personal stenographer. It follows of course that the auditor may be exempted by you as an assistant, if you so desire.

In view of the foregoing, you are specifically advised that it is my opinion that the Auditor of the Department of Highways appointed under Section 1181-1 of the General Code, is in the classified civil service of the State unless exempted therefrom under the provisions of sub-section 8 of paragraph (a) of Section 486-8 of the General Code.

Respectfully,  
 GILBERT BETTMAN,  
*Attorney General.*

261.

BOARD OF EDUCATION—INJURY IN MANUAL TRAINING DEPARTMENT OF A SCHOOL—NO LIABILITY FOR DAMAGES.

*SYLLABUS:*

*A board of education is not liable in its corporate capacity for damages for an injury resulting from the use of the machines or apparatus in the manual training department of a school.*

COLUMBUS, OHIO, April 4, 1929.

HON. MARION F. GRAVEN, *Prosecuting Attorney, Wooster, Ohio.*

DEAR SIR:—I am in receipt of your request for my opinion as follows:

“The following question concerning the liability of a board of education of Orrville, Ohio, presents itself as follows:

Is a board of education liable for the injury of one of the pupils in the Orrville High School, in the Manual Training Department resulting from an injury by a rip saw equipped with an approved guard?

The teacher of the Manual Training Department has always warned the pupils not to use the saw in question unless he was present, and never without a guard. The boy apparently in this case violated these instructions.

The doctor bill resulting from this injury amounts to \$65.00. An application has been made and filed against the board of education for the payment of that amount. Suit is threatened unless same is paid.

Please forward to me your opinion in regard to this matter.”

After more or less judicial uncertainty in this State, it has been definitely determined by the Supreme Court, in the case of *Board of Education vs. McHenry, Jr.*, 106 O. S. 357, that a school district is not responsible in damages for the failure of its

board of education to faithfully perform the duties of its office, or on account of the negligence or carelessness of the board or its agents or servants.

In the case of *Conrad, a minor, vs. Board of Education of Ridgeville Township*, decided by the Court of Appeals for Lorain County, and reported in the December 3, 1928, issue of the Ohio Law Bulletin and Reporter, it is held, as stated in the headnote:

"In the absence of a statute specifically creating a civil liability, a board of education is not liable in damages to a pupil who is taking a manual training course in its mechanical department, and who suffers injury as a result of the board's failure properly to protect, as required by law, the machinery used by said pupil."

In that case the board had failed to provide a guard for the saw. It was admitted that there was no liability at common law, but it was contended that, by reason of the fact that under Sections 1027, 1028 and 12600-72, General Code, boards of education are required to provide guards for such machines as buzz saws, if they failed to do so they could be held liable in damages for injuries received on account thereof. In the course of the opinion the court said:

"In the instant case it is beyond question that the board of education was required by the sections hereinbefore quoted, to guard the saw which injured the plaintiff, and its failure to do so made the members thereof guilty of a misdemeanor, for which they could be punished in an action at law; but these sections do not impose a civil liability upon said board for failure to do so, \* \* \* See *Finch vs. Board of Education*, 30 Ohio St. 37. \* \* \* *Board of Education vs. Volk*, 72 Ohio St., 469."

A board of education, in carrying out the functions of its office, is said to be acting in a governmental capacity rather than a proprietary capacity and is not responsible in damages for misfeasance, malfeasance or nonfeasance in office. For that reason, there can be no question but that the board of education of Orrville can not be held responsible in damages for the accident about which you inquire, and a suit against the board for the doctor bill would result in a judgment for the board.

Respectfully,

GILBERT BETTMAN,  
*Attorney General.*

262.

DISTRICT BOARD OF HEALTH—ORDERS INVALID IF NOT ADOPTED  
LIKE ORDINANCES OF MUNICIPALITIES—EMERGENCY MEAS-  
URES EXEMPTED.

SYLLABUS:

*An order of a district board of health made pursuant to the provisions of Section 1261-42, General Code, which is not declared to be an emergency measure and which has not been adopted, recorded and certified as are ordinances of municipalities as provided in said section, is not a valid order and an action to prosecute a violation thereof cannot be maintained.*