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SCHOOLS—DUTY OF BOARD OF EDUCATION TO PAY SCHOOLS OPEN DURING SCHOOL YEAR—MEMBERS OF BOARD MAY ENTER INTO CONTRACTS EVEN THOUGH NO FUNDS ARE IMMEDIATELY AVAILABLE—MEMBERS NOT PERSONALLY LIABLE—LIMITATIONS.

SYLLABUS:

1. *It is the duty of a board of education to use every possible lawful effort to maintain the schools of its district for a period of not less than 32 weeks in each school year.*

2. *It is impossible to lay down any comprehensive general rule for the guidance of boards of education in maintaining the schools of the district where there are insufficient funds to pay the cost thereof. Each district presents its own problem.*

3. *Lawful contracts may be entered into with school teachers, school janitors, school bus drivers and other employes whose compensation is provided for by regular payrolls even though moneys are not immediately available at the time of entering into the contract to meet the obligation thereof.*

4. *Even though there are no public funds immediately available to meet the cost thereof, the members of a board of education are not personally liable for the cost that may accumulate in connection with the operation of the public schools of its district, provided they act in good faith and within the law in directing the operation of the schools, unless they specifically assume personal responsibility for said expense.*

COLUMBUS, OHIO, September 24, 1931.

HON. B. O. SKINNER, *Director of Education, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your request for my opinion in answer to the following questions:

“Are Boards of Education required under the law to open schools when no funds are available to pay for same? If schools are so opened are board members personally liable?”

In connection with your request, you have submitted for my consideration certain data relative to a number of school districts in the State where financial conditions are such that there is not immediately available, within the limitations imposed by law, funds with which to pay the operating costs of the schools if they are opened and maintained as usual.

My attention is particularly directed to two districts where the receipts from the current tax distribution will be insufficient to pay accumulated past due accounts and provide for sinking fund requirements which must be met in October of this year, thus leaving no funds whatever to pay for operating the schools until moneys will be available from the next tax distribution. These particular districts are eligible under the law for but little, if any, state aid, and tax delinquencies are not sufficient to permit the issuance of bonds under what is known as the Hyre Bill (H. B. 394), which bill authorizes local subdivisions to issue bonds in the years 1931 and 1932 to supply deficiencies in revenues caused by

the nonpayment of taxes. It is stated that similar conditions exist in many other districts.

From the organization of government in Ohio to the present, it has been the policy to maintain schools. The ordinance of 1787 provides:

“Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”

The Constitution of Ohio in 1802 contains substantially the same language in article VIII, section 3. The Constitution of 1851, which is now in force, provides:

“Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of general assembly to pass suitable laws \* \* \* to encourage schools and the means of instruction.”

Article I, Section 7.

and further provides:

“The general assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state; \* \* \*.”

Article VI, Section 2.

The laws of Ohio provide for compulsory education and provide for punishing a child of school age by proceedings in the Juvenile Court if he does not attend school; provision is also made by statute to the effect that parents shall see that their children attend school and it is made a misdemeanor for parents to fail to send their children to school or have them instructed at home. The law further provides that whoever contributes to the delinquency of a minor may be punished.

Section 7644 of the General Code of Ohio provides that every elementary day school established by authority of law shall continue not less than 32 nor more than 40 weeks in each school year. Formerly section 7764-1, General Code, provided that high school facilities must be furnished within four miles of the residence of a pupil who had completed the eighth grade and was entitled to attend a high school, or transportation furnished to, or board and lodging near a high school. In 1925 the specific mandatory provision of the above statute was repealed. However, the compulsory school age is fixed at eighteen years, and the law still enjoins upon local boards of education the duty to provide high school facilities for children legally entitled thereto.

Notwithstanding the positive commands of the Constitution and the laws of this state, instances arise, such as you mention, where the way to open the schools may not seem clear, and where considerable difficulty is experienced in doing so. In spite of this difficulty, however, every effort should be made, within the range of human possibility, to open the schools and maintain them as provided by law. Courts have frequently expressed themselves as enjoining the keeping open of the public schools at any cost. The providing of means whereby the youth of the state may receive the advantages of the public schools is regarded

as the one most essential element of government. No court has ever sanctioned a letting down of efforts in this direction and no court will, in my opinion, sanction the closing of the schools in any school district for an appreciable time, even though the situation be such that administrative officials are required to take emergency measures not strictly sanctioned by positive law, so long as these measures are carried out in good faith and in the interests of the public schools.

Each district presents its own problems which must be solved in the light of all the particular circumstances, and it is difficult to lay down general rules that will fit the many situations that arise.

The local boards of education are the officials charged primarily with the duty of keeping the schools open. In the event of their failure to do so, county boards of education have a certain duty to perform with respect to schools coming within their jurisdiction, and in many instances the powers of the county board to keep in operation the schools of rural and village school districts, as authorized by section 7610-1, General Code, and pay the necessary cost thereof, temporarily, from the general fund of the county, may be resorted to. In city and exempted village districts the probate judge may exercise the same power with respect to keeping the schools open as county boards of education in village and rural districts. The director of education has considerable latitude by way of extending state aid to needy districts. In many instances teachers and other employes, as well as merchants from whom supplies, such as fuel, etc., must be purchased, are willing to extend credit to school districts until money becomes available to pay the bills.

Although the policy of the law is to require political subdivisions to pay as they go, and not to assume obligations where the money to meet the same is not in the treasury or in process of collection, the legislature in enacting section 5625-33, General Code, where it provided that no contract should be made by a political subdivision unless there is attached thereto a certificate of the fiscal officer to the effect that there is money in the treasury to meet the obligation, or in process of collection, specifically provided that the term "contract" as used therein "shall be construed as exclusive of current payrolls of regular employes and officers".

A former Attorney General in an opinion found in reported Opinions of the Attorney General for 1927 at page 2256 held:

"The statutory requirement that no contract shall be entered into by any subdivision until the fiscal officer has certified that the money for the payment thereof is in the treasury or in the process of collection, has no application to the contract of employment between boards of education and the teachers of the district."

The same would be true of other employes of the district who are on the regular payroll such as janitors and bus drivers where the district owns its vehicles used in the transportation of pupils.

The practical difficulty which boards of education meet in attempting to open the schools where little or no money is available to pay the cost thereof is in finding teachers and other employes who can and will serve until such time as money to pay them becomes available, but it is believed that in very few, if any, instances a practical way cannot be found, if all administrative officers cooperate, whereby the schools may be opened and maintained for at least 32 weeks of a school year.

In any event if the schools are opened, even though there is no money available to meet the cost thereof, the members of the board of education in

charge of the schools are not personally liable for bills that may accumulate in connection therewith, provided they act in good faith and within the law, unless they specifically assume a personal responsibility.

It is well settled in Ohio and elsewhere that public officers, in the absence of fraud or a corrupt motive, are not personally liable for acts done in the honest discharge of their official duty. The general rule is stated in R. C. L. Vol. 22, page 475, as follows:

“The general rule is that a public officer acting within the scope of his authority and in his official capacity is not personally liable on contracts executed in behalf of the government unless he expressly and unequivocally agrees to be bound.”

Even when he exceeds his authority, if he acts in good faith, he does not become personally liable on a contract made with a person who has full knowledge of the extent of his authority or who has equal means with him of knowing the extent of his authority. See R. C. L. Vol. 22, page 477. See also R. C. L. Vol. 24, page 602, Corpus Juris, Vol. 46, page 1042.

The Supreme Court of Ohio in the case of *Gregory v. Small*, 39 O. S., 346, held:

“A public official is not liable individually, in the absence of bad faith or a corrupt motive for failure to properly perform a duty involving judgment or discretion.”

See also *Stewart v. Southard*, 17 O., 402

*Ramsey v. Riley*, 13 O., 157

*State v. Blair*, 71 O. S., 427

*Thomas v. Wilton*, 40 O. S., 516

It is the duty of boards of education to maintain schools of the district for at least 32 weeks of the school year, and, in the absence of fraud or misrepresentation, or positive violation of law, they will not become personally liable in carrying out this duty whether or not there are funds immediately available to pay the cost of maintaining the school.

It should be noted in this connection that while teachers may be employed without regard to the provisions of section 5625-33, General Code, as may also other regular employes whose compensation is provided for by regular payrolls, contracts for supplies, such as coal, etc., or for equipment, repairs and similar expenditures, may not be made unless the money to meet the same has been lawfully appropriated, and there is attached to such contract, or order for expenditure of money, the certificate of the fiscal officer of the district to the effect that moneys are in the treasury or in process of collection to meet the contract or order.

It is therefore impossible for a board of education to make a regular contract for such things if there is no money in the treasury and none in process of collection which may be used for the purpose, and the making of a contract without complying with the provisions of said section 5625-33, General Code, renders the person so contracting personally responsible. Section 5625-37, General Code, provides in part as follows:

“Any officer, employee or other person who issues any order contrary to the provisions of section 33 of this act (General Code, Section 5625-33), or who expends or authorizes the expenditure of any public

funds, or who authorizes or executes any contract contrary to the provisions of this act (General Code, Section 5625-1 to 5625-39), unless payments thereon are subsequently ordered as provided in section 33, or expends or authorizes the expenditure of any public funds on any such void contract, obligation or order, unless subsequently approved as provided in such section, or issue a certificate under the provisions thereof, which contains any false statements, shall be liable to the political subdivision for the full amount paid from the funds of such subdivision on any such order, contract or obligation."

However, it is possible in most cases, at least, to act within the law and still secure necessary fuel and supplies to operate the schools. It is believed that there is not a school district in Ohio wherein there is not some one who is sufficiently interested in the welfare of the children to either furnish or guarantee payment for necessary fuel and other supplies to insure the operation of the schools, in an emergency, even though no legal obligation may be incurred by the school district to pay therefor, if, in fact, it actually becomes necessary to resort to this method of securing those articles.

Every reasonable and possible effort should be made by a board of education to open the schools of the district and maintain them for at least 32 weeks of a school year. If there are no immediate funds available for this purpose, and it is necessary to operate the schools on credit, so to speak, the persons extending this credit should be fully apprised of the situation and of the law restricting the board of education in the entering into of contracts for certain purposes without available funds. If this is done, no personal liability will attach to members of the board.

In specific answer to your questions, I am of the opinion:

1. A board of education should use every possible effort to maintain in operation the schools of its district for at least 32 weeks of each school year. It is impossible to lay down comprehensive general rules to be followed by a board in carrying out its duty with respect to maintaining the schools where insufficient funds are available to pay the cost thereof. Each district presents its own problem in this respect. The foregoing discussion will, I believe, afford some valuable leads in this direction.

2. In the event the schools of a district are opened, even though there is no money available to meet the cost thereof, the members of the board of education in charge of the schools are not personally responsible for bills that may accumulate in connection therewith, provided they act in good faith and within the law, unless they specifically assume a personal liability.

Respectfully,

GILBERT BETTMAN,  
*Attorney General.*