

Note from the Attorney General's Office:

1954 Op. Att'y Gen. No. 54-3644 was overruled in part
by 2008 Op. Att'y Gen. No. 2008-032.

3644

1. CITY SOLICITOR—CITY PARTLY OR WHOLLY WITHIN BOUNDARIES OF CITY SCHOOL DISTRICT—SECTION 3313.35 RC—APPLICABLE TO ALL CITIES WHICH HAVE NOT FRAMED OR ADOPTED A CHARTER—ARTICLE XVIII, SECTION 7, CONSTITUTION OF OHIO—SOLICITOR REQUIRED TO ACT AS LEGAL ADVISER AND ATTORNEY FOR BOARD OF EDUCATION.
2. Section 3313.35 RC DOES NOT OPERATE TO IMPOSE DUTY ON LEGAL OFFICER TO ACT AS ATTORNEY FOR BOARD OF EDUCATION—APPLIES TO CITY WHERE CHARTER ADOPTED PURSUANT TO ARTICLE XVIII, SECTION 7, CONSTITUTION OF OHIO.
3. BOARD OF EDUCATION—CITY SCHOOL DISTRICT—MAY LAWFULLY EMPLOY AND PAY FROM FUNDS OF SCHOOL BOARD, LEGAL COUNSEL TO ASSIST OR SUPPLEMENT SERVICES OF CITY SOLICITOR.

SYLLABUS:

1. The provisions of Section 3313.35, Revised Code, requiring the city solicitor of a city which is partly or wholly within the boundaries of a city school district, to act as legal adviser and attorney for the board of education of such district, is applicable to all cities which have not framed or adopted a charter pursuant to the provisions of Section 7, of Article XVIII, of the Constitution.

2. In case a city has adopted a charter pursuant to Section 7 of Article XVIII of the Constitution, which does not either directly or indirectly impose on its legal officer the duty to act as the legal adviser and attorney of the board of education, Section 3313.35, Revised Code, will not operate to impose such duty. Opinion No. 2478, Opinions of the Attorney General for 1934, page 435, approved and followed.

3. A board of education of a city school district may lawfully employ, and pay from the funds of the school board, legal counsel to assist or supplement the services provided to the school district by the city solicitor. Opinion No. 1392, Opinions of the Attorney General for 1933, page 1250, approved and followed.

Columbus, Ohio, March 26, 1954

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen:

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

"A question has arisen in the city of 'B' as to the services furnished by the City Solicitor of the city of 'B' to the 'B' city school district. Revised Code Section 3313.35 says:

'In city school districts, the city solicitor shall be the legal adviser and attorney for the board thereof, and shall perform the same services for such board as required of the prosecuting attorney for other boards of the county. * * * No compensation in addition to such officer's regular salary shall be allowed for such services.'

"The 'B' city school district is composed of the city of 'B', the villages of 'BP' and 'MH' and a portion of the 'WV' village. In the case of the 'B' city school district, approximately $\frac{1}{2}$ the population and $\frac{4}{5}$ ths of the tax duplicates lie outside the boundaries of the city of 'B'. The city of 'B' feels that since a substantial part of the population served by the district and 80% of the tax duplicate, which supports the school district, is outside the city corporation limits, that the city of 'B' should not be required to furnish, through its City Solicitor, the legal services required by the school district.

"An opinion is requested:

- "1. Whether or not a city lying wholly within a school district but which district embraces additional territory should through its City Solicitor, be required to furnish legal services to the board of education of the city school district.
- "2. Whether or not the city of 'B' school district could lawfully employ legal counsel either to assist and supplement the services provided by the city solicitor or to directly employ counsel to be the board's legal advisor."

The answers to the questions you submit appear to turn largely on the provision of Section 3313.35, Revised Code, which you have quoted in your communication. There is no ambiguity or uncertainty in the language of that statute. It is made very clear that in a city school district the city solicitor of the city shall be the legal adviser and attorney for the board of education thereof, and it is further provided by way of preventing the board of education from paying him anything for that service, that no compensation, in addition to such officer's regular salary, shall be allowed for such service.

In the school code there are descriptions of the various types of school districts set up by the law. Section 3311.02, Revised Code, 4830-1, G. C., reads as follows:

“The territory within the corporate limits of each city, excluding the territory detached therefrom for school purposes and including the territory attached thereto for school purposes, constitutes a city school district. When a city is reduced to a village, the city school district shall thereupon become a local school district.”

It will be observed that the statute places no limit on the portion of the city's area that may be detached, or on the amount of outside territory that may be attached for school purposes. It is a matter of common knowledge that the territorial boundaries of city and village school districts frequently do not coincide with the corporate limits. The case which you present, in which a city school district includes not only the city but also two villages and a portion of a third village with approximately one-half of the population and 80% of the tax duplicate lying outside the boundaries of the city, is an extreme case which at once suggests the unfairness of requiring an officer of the city whose salary is paid solely by the city, to furnish legal services to a school district of which the city is a minor fraction, and of requiring the city to pay for services to a political subdivision over which it has no control.

It is very clear that municipalities have no part whatsoever in the organization or control of the public schools, that being a function that is reserved to the state legislature. To what extent, if at all, the legislature may impose burdens on the taxpayers of a municipality for the support of a state agency which functions within its boundaries, is not altogether clear.

In a matter involving directly the relation of a city to a school district of which it was more or less a part, I call attention to the case of Board of Education v. Columbus, 118 Ohio St. 295. This was a case in which the constitutionality of Section 3963 of the General Code, was challenged, that section providing that, “No charge shall be made by a city or village or by the waterworks department thereof for supplying water for * * * the use of the public school buildings in such city or village,” the city having brought suit to recover from the board of education for water furnished to the schools of the city. It was there held:

“1. That portion of Section 3963, General Code, which prohibits a city or village or the waterworks department thereof from making a charge for supplying water for the use of the public school buildings or other public buildings in such city or

village, is a violation of the rights conferred upon municipalities by Section 4 of Article XVIII of the Ohio Constitution, and is unconstitutional and void. (*East Cleveland v. Board of Education*, 112 Ohio St., 607, 148 N.E., 350, overruled.)

"2. That portion of Section 3963, General Code, above referred to, is unconstitutional and void for the further reason that it results in taking private property for public use without compensation therefor, in violation of Section 19, Article I, of the Ohio Constitution."

The decision of the court in this case was by a majority of five to two. The two members dissenting had in an almost identical case, *East Cleveland v. Board of Education*, 112 Ohio St., 607, held the same statute to be constitutional, the five dissenting members being the same five who joined in the majority opinion. The *East Cleveland* decision was expressly overruled. In the *East Cleveland* case, a dissenting opinion was written by Marshall, C. J., concurred in by the other four. That opinion was adopted by Judge Marshall, in the *Columbus* case. The court, in effect, held that the burden of paying the expenses of the schools, including the cost of water, was to be borne by taxes levied upon the property of the school district and not out of revenues of the city. The court called attention to the fact that municipal corporations have nothing whatever to do with the administration of the public school system of the state. While the above holding might cast some doubt on the constitutionality of the statute here under consideration, it, of course, would be beyond my power as an executive officer, to make such a declaration. This could be done only by the judiciary.

In a city where a charter has been adopted pursuant to Section 7, of Article XVIII, and a legal officer has been provided for and his duties prescribed, *not including the duty to render service to the board of education*, I believe it may be said that Section 3313.35 *supra*, would cease to have any effect in such city. That precise question was the subject of an opinion by one of my predecessors, and it was held in Opinion No. 2478, *Opinions of the Attorney General for 1934*, page 435:

"1. In a municipality which has adopted a charter, which charter does not provide that the solicitor or law director of the said municipality shall act as adviser to and attorney for the board of education of the school district of said city and does not contain a provision expressly imposing upon the said solicitor or law director the duties imposed by the general laws of the state, it is not the duty of the said solicitor or law director to act as adviser

to, and attorney for the said board of education without compensation.

“Under such circumstances the said board of education may lawfully employ the said solicitor or law director as its adviser and attorney and may lawfully pay him reasonable compensation for his services as such.”

In the course of the opinion it was said:

“It is well settled by the courts of this state that the terms of Section 7 of Article XVIII of the Constitution of Ohio, vest in cities adopting a charter the power to provide the manner of the selection of their own purely municipal officers. State ex rel. Bailey et al. vs. George, 92 O.S. 344; State ex rel. vs. Hillenbrand, 100 O.S. 339. Also, that a charter provision as to city government prevails over inconsistent statutes where those statutes have not been enacted in pursuance of constitutional provisions expressly or impliedly reserving to the General Assembly powers in the exercise of which the statutes had been enacted. Fitzgerald vs. Cleveland, 88 O.S. 338; State ex rel. vs. Edwards, 90 O.S. 305; Billingsley vs. Ry. Co., 92 O.S., 478; State ex rel. vs. French, 96 O.S., 172; State ex rel. vs. Cincinnati, 101 O.S., 354; Hile v. Cleveland, 107 O.S., 144.”

In *Fitzgerald v. Cleveland*, 88 Ohio St., 338, it was held:

“1. The provisions of Section 7, Article XVIII, of the Constitution, as amended in September, 1912, authorize any city or village to frame and adopt or amend a charter for its government and it may prescribe therein the form of the government and *define the powers and duties of the different departments*, provided they do not exceed the powers granted in Section 3, Article XVIII, nor disregard the limitations imposed in that article or other provisions of the constitution.” (Emphasis added.)

I am in accord with the holding of the opinion last above referred to with this qualification: some cities, in framing charters, have seen fit to incorporate therein a general provision whereby, with the purpose of enlarging their powers they adopt as a part of such charter all of the statutes relating to municipalities “not inconsistent with this charter.” By such provision, a city might engraft on itself the burden of obedience to a statute from which it would otherwise be exempt.

Thus, it would appear that the provisions of Section 3313.35, Revised Code, are applicable to all cities except those which have framed and adopted a charter pursuant to the provisions of Section 7 of Article XVIII

of the Constitution, where such charter does not directly or indirectly impose such duty.

Your second question concerns the power of the school district to employ legal counsel either directly or as a means of assisting and supplementing the services of the city solicitor.

There are certain cases, of course, where it long has been recognized that a school district may employ counsel other than the prosecuting attorney or the city solicitor. Thus, it was held in Opinion No. 934, Opinions of the Attorney General for 1918, page 99, that where the city solicitor had a personal interest in a particular case, the board might employ and pay outside counsel to represent it.

Other opinions have recognized the right of the board to employ the city solicitor to perform duties which were not considered to be encompassed within the scope of being the "legal adviser and attorney for the board." Based on this reasoning, it was held in Opinion No. 634, Opinions of the Attorney General for 1923, page 508, that a board of education could legally pay the city solicitor for the preparation of an abstract of title, and in Opinion No. 3441, Opinions of the Attorney General for 1938, page 2323, that the board could employ and pay the city solicitor to prepare the necessary legislation incident to the issuing of bonds.

These opinions, however, do not answer your question, in view of the fact that here I presume there would be no question of the service being legal service in every sense of the word.

I find that a somewhat similar question was under consideration in Opinion No. 1392, Opinions of the Attorney General for 1933, page 1250, the syllabus of which reads:

"Under authority of *Knepper vs. French*, 125 O. S. 613, a board of education of a city, village or rural school district may employ attorneys other than the city solicitor or prosecuting attorney to pass upon the legality of a transcript of proceedings relating to the issuance of bonds, providing such attorneys are paid by the board of education from the school fund."

While, as in the 1938 Opinion, *supra*, a bond issue was involved, there hardly could be any question that "passing on the legality of a transcript of proceedings", would constitute the practice of law and would fall within the scope of being a part of the duties of the "legal adviser and attorney for the board."

As pointed out in the 1933 Opinion, prior to the case of *Knepper v. French*, the Attorney General had held in Opinion No. 336, Opinions of the Attorney General for 1915, page 664, that a board of education had no authority in law to employ counsel other than the prosecuting attorney of the county.

This 1915 Opinion, in effect, was overruled by the Supreme Court in the case of *Knepper v. French*, decided in 1932. The court therein noted that there were two sections which, in effect, made it the duty of the prosecuting attorney to act as the legal adviser for a board of education. Section 2917, General Code, 309.09, Revised Code, provided that the prosecuting attorney shall be the legal adviser of the various county officers and boards. Section 4761, General Code, Section 3313.35, Revised Code, provided that with the exception of city school districts, the prosecuting attorney should be the legal adviser of all boards of education of the county in which he was serving. However, Section 2918, General Code, Section 309.10, Revised Code, provided that "nothing in the preceding two sections shall prevent a school board from employing counsel to represent it, but such counsel, when so employed, shall be paid by such school board from the school fund."

The court held all three of these sections to be in *pari materia* and thus concluded that under the provisions of Section 2918, General Code, the board was authorized to employ and pay legal counsel. The opinion of the court did not limit the right of the board to employ such outside legal counsel to cases where the prosecuting attorney was unable to act, but instead seemingly held that it had this power without limitation.

In the 1933 Opinion it was pointed out that the statute, now Section 3313.35, Revised Code, provided that the city solicitor should perform the same services for a board in a city school district as required of the prosecuting attorney for other boards of the county. Since under the holding of the Supreme Court in the case of *Knepper v. French*, a prosecuting attorney would not be required to act in cases where the board had employed outside legal counsel, the Attorney General in the 1933 Opinion concluded, and properly so in my opinion, that this case had equal application to the relative powers and duties of a city board of education and a city solicitor.

It should be noted that the Supreme Court in the case of *Knepper v. French* specifically held that it was not passing upon the question of the

power of the prosecuting attorney to interfere or control the legal proceedings. This would indicate the desirability of the city board of education in employing legal counsel to assist and supplement the services of the city solicitor to do so with the acquiescence, approval and cooperation of the city solicitor.

In conclusion, it is my opinion:

1. The provisions of Section 3313.35, Revised Code, requiring the city solicitor of a city which is partly or wholly within the boundaries of a city school district, to act as legal adviser and attorney for the board of education of such district is applicable to all cities which have not framed or adopted a charter pursuant to the provisions of Section 7, of Article XVIII of the Constitution.

2. In case a city has adopted a charter pursuant to Section 7 of Article XVIII of the Constitution, which does not either directly or indirectly impose on its legal officer the duty to act as the legal adviser and attorney of the board of education, Section 3313.35, Revised Code, will not operate to impose such duty. Opinion No. 2478, Opinions of the Attorney General for 1934, page 435, approved and followed.

3. A board of education of a city school district may lawfully employ, and pay from the funds of the school board, legal counsel to assist or supplement the services provided to the school district by the city solicitor. Opinion No. 1392, Opinions of the Attorney General for 1933, page 1250 approved and followed.

Respectfully,

C. WILLIAM O'NEILL
Attorney General