

1389.

APPROVAL, NOTES OF MUHLENBERG TOWNSHIP RURAL SCHOOL DISTRICT, PICKAWAY COUNTY, OHIO—\$2,400.00.

COLUMBUS, OHIO, August 11, 1933.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*

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1390.

APPROVAL, BONDS OF BELOIT VILLAGE SCHOOL DISTRICT, MAHONING COUNTY, OHIO—\$6,084.72.

COLUMBUS, OHIO, August 11, 1933.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*

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1391.

APPROVAL, BONDS OF BEDFORD CITY SCHOOL DISTRICT, CUYAHOGA COUNTY, OHIO—\$5,000.00.

COLUMBUS, OHIO, August 11, 1933.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*

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1392.

BOARD OF EDUCATION—MAY EMPLOY PRIVATE ATTORNEYS TO PASS UPON TRANSCRIPT OF PROCEEDINGS RELATING TO ISSUANCE OF BONDS—MUST BE PAID FROM SCHOOL FUNDS.

*SYLLABUS:*

*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.*

COLUMBUS, OHIO, August 12, 1933.

*Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.*

GENTLEMEN:—Your letter of recent date is as follows:

"You are respectfully requested to furnish this department your written opinion upon the following:

Under date of July 19, 1930, the then attorney general rendered opinion No. 2111 at page 1142 of his 1930 Report, in which he held, in the second branch of the syllabus, as follows:

'A board of education may not pay an attorney or firm of attorneys for approving the transcript of a bond issue of such board.'

Since that opinion was rendered, our attention has been called to the case of *Knepper vs. French*, 125 O. S. 613.

In your opinion does this decision of the Supreme Court reverse the opinion of the attorney general, above referred to, and may boards of education of city or rural districts now employ attorneys, other than the city solicitor or the prosecuting attorney, to pass upon the legality of a transcript for issuing bonds and pay such attorneys out of the school funds of the district?"

The duties of the prosecuting attorney as attorney for boards of education are set forth in Sections 2916, 2917 and 2918, General Code, enacted in 1906, and in Section 4761, General Code, enacted in its present form in 1904. Section 2918, General Code, provides as follows:

"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. Nothing in such sections shall prevent the appointment and employment of assistants, clerks and stenographers to the prosecuting attorney as provided in this chapter, or the appointment by the court of common pleas or circuit court of an attorney to assist the prosecuting attorney in the trial of a criminal cause pending in such court, or the county commissioners paying for such services as provided by law."

In the 1930 opinion to which you refer, Section 2918, *supra*, was considered and reference made to an opinion appearing in Opinions of the Attorney General for 1929, Vol. I, p. 216. The last mentioned opinion discussed the rulings of this office with respect to the question of boards of education employing counsel other than the prosecuting attorney, which opinions extended over a period of seventeen years. The language of this 1929 opinion appearing on pages 218 and 219 is as follows:

"The 'two preceding sections', referred to in the above section, means, as I take it, Sections 2916 and 2917 of the General Code. Section 2916, General Code, sets forth the powers and duties of prosecuting attorneys, and Section 2917 provides that the prosecuting attorney shall be the legal adviser of the county and township officers, except that township officers may employ other counsel 'on the order of the township trustees fully entered upon their journal.' This section was supplemented by Section 2917-1, General Code, which simply provides that the prosecuting attorney shall be the legal adviser of certain election officials. The language of the portion of Section 2918, General Code, above quoted, permits any board of education to employ counsel to represent it, provided such counsel so employed is paid by such board of

education from the school fund. By that language an exception is made to the rule laid down, that the prosecuting attorney shall represent all officials. However, it is necessary to look further to determine when and under what circumstances a board of education is authorized to employ an attorney other than the prosecuting attorney.

The several sections of the Code above noted have been under consideration by former attorneys general in a number of opinions. It will be noted that the language with reference to a city solicitor in cities and a prosecuting attorney in counties is very similar. It will also be noted that the language of Section 4761, General Code, with reference to the prosecuting attorney, wherein it says 'he shall be the legal counsel of such boards or the officers thereof in all civil actions brought by or against them and shall conduct such actions in his official capacity' is plain, and to the point, and an examination of the several previous opinions of this department will disclose that under no circumstances is a village or rural board of education authorized to employ any counsel other than the prosecuting attorney, or a city board of education to employ other counsel than the city solicitor, to conduct actions in court unless there is a conflict of interest, and thus a conflict of duty on the part of the prosecutor or the city solicitor, as the case may be, and the prosecutor or solicitor refuses to act as counsel for the board of education but chooses to act for the other party.

This often happens in city school districts where the controversy is between the city and the school district, and in rural and village school districts where the controversy is between two such districts, or between one district and the county as such, or the county school district. In those cases the prosecutor or solicitor is authorized to choose which of the parties he represents and of course the other party may employ other counsel.

In an opinion of the Attorney General, found in the Annual Report of the Attorney General for 1912, at page 487, it is said:

'Section 4761, General Code, beyond dispute, makes the city solicitor the legal advisor of city school districts. Also, by provision of Section 4761, the prosecuting attorney is made the legal advisor of all school boards within the county with the single exception of boards of education which are engaged in civil actions with one another.'

Again, in the Annual Report of the Attorney General for 1912, at page 1771, it is said:

'In a controversy between a board of education of a city school district and the city, the solicitor is at liberty to choose which of the two parties he will represent regardless of a resolution of council ordering him to represent the city.'

In Opinions of the Attorney General for 1915, at page 664, it is held:

'The board of education of a county school district has no authority in law to employ counsel other than prosecuting attorney of the county.'

And again, in Opinions of the Attorney General for 1915, page 1911, it is held:

'It is the duty of prosecuting attorneys to prepare bond issues and transcripts for boards of education of which they are legal advisers.'

The case of *Knepper vs. French, Auditor*, to which you refer, decided by the Supreme Court December 7, 1932, construed Section 2918, supra, as an exception

to Section 4761, General Code, on account of being a later enactment. In the per curiam opinion by Marshall, C. J., it is said at page 616:

"We have no difficulty in determining that the two preceding sections, 2916 and 2917, were particularly eliminated, so far as school boards are concerned in the employment of counsel, provided such counsel is paid not from county funds but from the school funds.

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We are only concerned with the power of the board of education of Delaware county to employ and pay for the services of an attorney other than the prosecuting attorney. Sections 2916 and 2917 are expressly eliminated, and we are of the opinion that 2918, having been enacted at a later date than 4761, becomes an exception thereto."

It is obvious that the foregoing decision of the Supreme Court is at variance with the former opinions of this office with respect to the power of boards of education of either city, village or rural school districts to employ counsel other than the prosecuting attorney or city solicitor. Your specific request relates to the employment of counsel to pass on the legality of a transcript of proceedings leading up to the issuance of bonds. In view of the fact that boards of education are authorized to employ counsel other than the prosecuting attorney to represent the board in litigation as decided by the Knepper case, it follows that counsel may be employed for the purpose mentioned in your inquiry.

Specifically answering your inquiry, it is my opinion that 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.

Respectfully,  
JOHN W. BRICKER,  
*Attorney General.*

1393.

BOND RETIREMENT FUND—UNEXPENDED BALANCE THEREIN  
TRANSFERABLE TO GENERAL FUND OF SUBDIVISION WHEN.

**SYLLABUS:**

1. *An expended balance remaining in the bond retirement fund may, with the approval of the court of common pleas, be transferred to the general fund of a subdivision when such subdivision has no sinking fund and after all indebtedness, interest and other obligations for the payment of which the bond retirement fund exists have been paid and retired.*

2. *The approval of the court of common pleas of such transfer should be sought by a written application addressed to the court and filed with the clerk thereof and the court's approval should be evidenced by an entry granting the same.*