

OPINION 65-30

Syllabus:

1. A local board of education may enter into a one year lease of musical instruments with an option to renew for additional one year periods.

2. An agreement denominated a "lease", which provides that upon payment of five "rental" payments title to musical instruments will pass to the board of education, is in effect an installment purchase and beyond the authority of the board of education to enter.

To: Thomas L. Tribbie, Guernsey County Pros. Atty., Cambridge, Ohio
By: William B. Saxbe, Attorney General, March 2, 1965

I have your request for my opinion wherein you pose the

following questions:

"1. Can a local school board enter into a one year lease of musical instruments with an option to renew for additional one year periods?

"2. Does the fact that title to the musical instruments passes to the board of education after five 'rental' payments have been made and thus becoming in effect an installment sale alter the locality of the transaction?

"3. Is the board of education required to state in its advertisement for bids that proposals for a lease arrangement as well as a cash sale would be entertained?"

A local board of education may, pursuant to its statutory power to manage and control the public schools in its district, purchase or obtain the necessary textbooks and such supplies and equipment as are necessary to operate the public school system in its district, 48 Ohio Jur. 2d., Schools, Section 179, page 624. This power is subject, however, to the well-established rule that boards of education, being creatures of statute, have only such powers as are expressly granted by law or necessarily implied to carry out the express grants of power and the obligations imposed by law. Verberg v. Board of Education, 135 Ohio St., 246; 48 Ohio Jur. 2d., Schools, Section 78, page 481.

There is no question that a local board of education may provide, by the expenditure of school funds, musical instruments. Section 5313.53, Revised Code, provides in part that boards of education, including local boards "...may pay from the public school funds, as other school expenses are paid, the expenses ...of directing, supervising, and coaching the pupil-activity programs in music...". In Opinion No. 1495, Opinions of the Attorney General for 1930, Vol. I, page 216, it was noted that "...the power to prescribe a course of study in instrumental music carries with it the power to provide the means to carry the power into effect."

In Opinion No. 3293, Opinions of the Attorney General for 1948, page 279, it was noted, at pages 282-283, that musical instruments were included in the term "apparatus" as it appeared in Section 4834-10, General Code (now Section 3313.37, Revised Code). Section 3313.37, Revised Code, provides in pertinent part as follows:

"The board of education of any school district, except a county school district, may build, enlarge, repair, and furnish the necessary schoolhouses, purchase or lease sites therefor, or rights of way thereto, or purchase or lease real estate to be used as playgrounds for children or rent suitable schoolrooms, either within or without the district, and provide the necessary apparatus and make all other necessary provisions for the schools under its control.

(Emphasis added)

In Opinion No. 1304, Opinions of the Attorney General for 1960, page 305, a question was raised as to whether "apparatus" might be acquired by rental. In answering the question, the then Attorney General made the following statements:

"It may be seen that a board of education is authorized under the terms of this section to 'provide the necessary apparatus' for the operation of the schools under its control. While no particularized method for acquiring such necessary apparatus has been set forth in this section, it appears to be the obvious intent of the General Assembly to leave such methods to the discretion of the particular board of education. * * * Such apparatus could then be acquired by a board of education by outright purchase or by leasing such equipment over a given period of time. Which method is more desirable is a question to be left to the local board of education for decision."
(Id., at pages 306-307)

As was noted in Opinion No. 1304, supra, at pages 307-308, such an arrangement as you have proposed requires that the appropriate fiscal officer provide a certificate of the availability of funds, pursuant to the following provision of Section 5705.41, Revised Code:

"No subdivision or taxing unit shall:

* * *

"Make any contract or give any order involving the expenditure of money unless there is attached thereto a certificate of the fiscal officer of the subdivision that the amount required to meet the same, or in the case of a continuing contract to be performed in whole, or in part, in an ensuing fiscal year, the amount required to meet the same in the fiscal year in which the contract is made has been lawfully appropriated for such purpose and is in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances.
* * *"

Since the proposed contractual arrangement is to be on a year to year basis, it will, in effect, be a new contract each year and not a "continuing contract." The certificate of availability of funds need be made each year as to the amount of the rental for that year only.

A continuing contract is a present agreement intended to cover or apply to successive similar obligations, the payment to be made upon the performance of each successive obligation. An installment contract, on the other hand, is an agreement for present performance with payment to be made in the future at designated times. Because title to the instruments would vest in the school after a period of time, it is in legal effect a present agreement with successive future payments.

As I have noted above, Opinion No. 3293, Opinions of the

Attorney General for 1948, page 279, 282-283, held that musical instruments are included in the general term "apparatus" as it appears in what is now Section 3313.37, Revised Code. In Opinion No. 2820, Opinions of the Attorney General for 1958, page 597, a question similar to your second question was propounded to me. The particular question in Opinion No. 2820, supra, was whether a local board could purchase a heating plant for a school pursuant to Section 3313.37, Revised Code, by a "lease-purchase" agreement. In the course of the Opinion, at page 599, I made the following statement:

"In my examination of the authorities, I have been unable to find any extension to a board of education of any power, either expressed or implied, to acquire property of any description in pursuance of an agreement to pay for it on the installment plan; the single exception is the authority given by Section 3327.08, Revised Code, to purchase school buses in that manner.

"Since Section 3327.08, Revised Code, is the only instance in the law of Ohio where a board of education is expressly granted the authority to enter into an installment purchase agreement, it can be concluded, that it was not the legislative intent to confer such power by implication in statutes which in general terms authorize the purchase of other property.

"Under the principle of the Clark case, supra, (State, ex rel. Clark v. Cook, 103 Ohio St., 465) even if no other limitation upon the contractual relationship existed, it is clear that in the absence of statutory authority, a board of education does not possess such powers as to purchase a heating system pursuant to the provisions of Section 3313.37, supra, on an installment plan. The same result has been reached in Opinion No. 1604, Opinions of the Attorney General for 1958 p. 22; Opinion No. 398, Opinions of the Attorney General for 1957, p.118, Opinion No. 143, Opinions of the Attorney General for 1945 p. 110; Opinion No. 1267, Opinions of the Attorney General for 1939 p. 1567."

I note that since I rendered Opinion No. 2820, supra, there has been an amendment of Section 3313.37, supra. The amendment does not, however, change the application of that Section to this situation.

In your letter of request, you have outlined the terms of the proposed rental agreement. The proposal is for the manufacturer to retain title until an amount equal to five annual rental payments, at which time, title will vest in the local board. It is apparent that although your inquiry designates the proposal as an agreement to renew or not to renew the annual rental, it is in essence an attempt to purchase instruments on an installment plan. Upon the authority of my Opinion No. 2820, supra, such a proposal is not within the power of local boards of education and the proposed agreement is, on that basis, invalid.

Your third question asks whether the advertisement for bids must state that proposals for a lease arrangement as well as a cash sale will be entertained. The procedure for advertising for bids is regulated by Section 3313.46, Revised Code, which reads in pertinent part as follows:

"When the board of education determines to build, repair, enlarge, or furnish a school-house, or make any improvements or repairs,* * * it must proceed as follows:

"(A) For the period of four weeks, the board shall advertise for bids in some newspaper of general circulation in the district and two such papers, if there are two. If no newspaper has a general circulation in the district, then the board shall post such advertisement in three public places in the district. Such advertisement shall be entered in full by the clerk of the board of education, on the record of proceedings of the board."

Your letter states that the notice which was actually published stated that the board "is taking sealed bids on high school band instruments", stating when bids were due and that "specifications may be obtained" at a specified school. You also state that the top of the first page of specifications bore the notation "Five year lease" etc.

Clearly Section 3313.46, supra, does not require that the bid advertisement do more than solicit bids. There is no requirement of specificity. However, the purpose of Section 3313.46, supra, is to give notice to all prospective bidders to the end that all interested parties will compete for a particular contract. The element of competition among bidders tends to give the board of education the benefit of the lowest possible price. Without notice that lease proposals and cash sales will be entertained, the board is deprived of the benefit of increased competition since prospective lessors to the board will not enter their bids due to the lack of notice to them. Therefore, although it is not required by the letter of the law, the spirit certainly would dictate that where the board will entertain proposals other than the usual cash sale, notice of the same should be given to the end that the board will benefit from the competition of all prospective bidders.

You are therefore advised that:

1. A local board of education may enter into a one year lease of musical instruments with an option to renew for additional one year periods.

2. An agreement denominated a "lease", which provides that upon payment of five "rental" payments title to musical instruments will pass to the board of education, is in effect an installment purchase and beyond the authority of the board of education to enter.