

1327.

MUNICIPAL RECREATION BOARD—COOPERATING WITH CITY SCHOOL BOARD IN MAINTAINING RECREATIONAL ACTIVITIES—RIGHTS AND LIABILITIES OF CLERK OF LATTER BOARD ACTING AS SECRETARY OF FORMER BOARD—COMPENSATION OF RECREATION DIRECTOR.

SYLLABUS:

1. *The manner by which a school district may cooperate with other public officials in the maintenance of recreational activities as authorized by Sections 4065-5 and 7622-6, General Code, is within the discretion of the authorities so cooperating, and may lawfully be the subject of agreement between them.*
2. *The clerk of a city board of education is not ipso facto the secretary of a recreation board existing in the city, even though the board of education and the recreation board cooperate in the maintenance of recreational activities.*
3. *The positions of clerk of a city board of education and secretary to a recreation board existing in the city are not necessarily incompatible.*
4. *If a recreation board in the exercise of a sound discretion finds it necessary for its recreation director to attend a convention, it may lawfully allow him his expenses in so doing.*
5. *A public board or officer is not empowered to release, without consideration, an obligation owing to the public.*
6. *A recreation board may lawfully allow and pay to its recreation director, in addition to his salary, an amount sufficient to cover the cost of the operation of his private automobile while being used in the performance of the duties of his employment, unless under the terms of his contract he is required to use his automobile in the performance of his duties and for the salary specified in the contract.*

COLUMBUS, OHIO, December 23, 1929.

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

GENTLEMEN:—This will acknowledge receipt of your inquiry, as follows:

“You are respectfully requested to render this department your written opinion upon the following:

The recreation department of the Canton City School District is maintained by funds of the board of education received from a levy voted under the provisions of Sections 5625-15 and 5625-16, General Code.

Question 1. May the recreation board pay the clerk of the board of education an additional salary for services in connection with that board?

Question 2. Has the clerk of the board of education, as fiscal officer of the recreation board, any responsibility in drawing warrants for expenditures allowed by the recreation board, if he deems them illegal?

Question 3. May the director of recreation be paid expenses incurred attending a convention at the request of the board?

Question 4. May the director of recreation have his salary increased during the term of his contract?

Question 5. May the recreation board allow the director a set sum per month for the maintenance of personal auto used in performing his duties?”

I am advised that the recreation board, referred to by you, was appointed by the mayor of Canton by authority of an ordinance of the Canton City Council creating said board. At a meeting of the board, on February 28, 1927, a recreation director

was appointed, and his salary fixed at \$3,200.00 per year, with an additional allowance of \$25.00 per month, to cover the expenses of operating his own automobile in the performance of his duties. On March 5, 1927, a written contract was entered into between the newly appointed recreation director and the recreation board, which contract fixed in a general way, the duties of the recreation director, and obligated the board to pay him a salary in the sum of \$3,200.00 for one year beginning April 15, 1927. Nothing was said in the written contract requiring the recreation director to use his own automobile in the performance of his duties, or of any allowance to him for expenses if the automobile should be used. This, however, had been provided for by resolution of the board on February 28, 1927, as noted above.

On December 23, 1927, the board determined by resolution to employ the same recreation director for the period beginning April 15, 1928, the date of the expiration of the former contract, and ending December 31, 1931, at a salary of \$3,600.00 per year. Under date of March 5, 1928, a written contract was entered into between the recreation director and the board, in accordance with the resolution of December 23, 1927. Again, nothing whatever was said in the contract about the use of the director's automobile, or about any allowance for expenses incurred in the use of the same.

On March 30, 1928, the recreation board adopted a resolution to the effect that the director be allowed \$30.00 per month "automobile maintenance" from April 15, 1928, to April 15, 1929.

On March 28, 1929, the board adopted a resolution increasing this "automobile maintenance" allowance for the director from \$30.00 to \$35.00 per month, dating from April 15, 1929 to April 15, 1930.

I am also advised by letter from one of your examiners, as follows:

"As to the clerk of the board of education being the fiscal officer of the recreation board there is considerable doubt in my mind, but the clerk of the board of education has been acting in that capacity since the board of education submitted a request for recreation levy under Section 5625-15 and 16 to the voters of Canton City and taxes have been levied and received. The board of education have never given the taxes received from this voted levy to the recreation board, although the city solicitor has ruled that it is optional whether the board of education retains this money or gives it into the custody of the recreation board.

The recreation board passes on all expenditures incurred by its department and submits them attached to vouchers signed by the president and director of recreation board to the board of education who authorizes them paid and the clerk of the board of education issues warrants signed by the president of the board and countersigned by himself.

If the clerk of the board of education by virtue of such office is not the fiscal officer of the recreation board than the recreation board has no fiscal officer as their records do not reveal any action on the appointment of such an officer."

In accordance with the terms of Sections 4065-1, 4065-2, and 4065-3, of the General Code, the council of a city may establish playgrounds and recreation centers.

For the purpose of maintaining and operating such playgrounds or recreation centers, a recreation board to be appointed by the mayor of the city may be provided for. A recreation director may be employed either by the city council or by the recreation board, if such a board is created. Sections 4065-4 and 4065-5, General Code, provide in part, as follows:

Sec. 4065-4. "The members of a recreation board established pursuant to this act (G. C. 4065-1 to 4065-7) shall elect their own chairman and sec-

retary, and select all other necessary officers to serve for a period of one year, and may employ such persons as may be needed. \* \* \*

Sec. 4065-5. “\* \* \* Any school district shall have power to join with any city, village or county, in equipping, operating and maintaining playgrounds, playfields, gymnasiums, public baths, swimming pools, and indoor recreation centers, and may appropriate money therefor.”

The local authorities operating such recreation centers are authorized by Section 4065-7 of the General Code, to appropriate and cause to be raised by taxation an amount sufficient to maintain and operate them. Tax levies made in pursuance to the above section are subject to the general tax limitations provided by law. See Opinions of the Attorney General for 1922, page 1080.

Sections 7622-6 and 7622-7, of the General Code, also authorize a board of education to cooperate with other public officials in the maintenance of recreation centers, playgrounds and similar activities, and specific authority is given to a board of education by Section 7622-7, General Code, to levy an annual tax within general tax limitations not to exceed two-tenths of a mill for a social center fund to be used for social and recreational purposes. Such special levies as those authorized by Sections 4065-7 and 7622-7, of the General Code, may now be included in the general levy for current expenses, by authority of Section 5625-6, General Code.

Levies for recreational purposes may be made outside the fifteen mill limitation, if authorized by vote of the people. Section 5625-15, General Code, provides that any subdivision may submit to the voters a proposition to levy taxes in excess of the fifteen mill limitation for recreational purposes, and Section 5625-16, General Code, provides that upon petition of ten percent of the electors such proposition shall be submitted in any subdivision except townships. Section 5625-16, General Code, reads in part, as follows:

“\* \* \* The proceeds of any recreational levy outside of the fifteen mill limitation shall be used for the purpose of establishing, equipping, operating and maintaining playgrounds, play-fields, gymnasiums and indoor recreational centers and shall be in addition to any revenue for such purpose derived from any tax within the fifteen mill limitation.”

Apparently, in Canton, revenues were made available for recreation purposes by the Canton City Board of Education, from tax levies made by authority of Sections 5625-15 and 5625-16, General Code, and the board made use of the proceeds of this tax levy by cooperating with the recreational board appointed by the mayor. The proceeds of the levy were retained in the treasury of the board of education and paid out upon warrants drawn against the fund by the clerk of the board of education, in accordance with vouchers approved by the recreation board and the recreation director, and upon the authority of the board of education.

I take it, from the statements of your examiner, that the recreation board did not formally, at least, elect a secretary but probably permitted the clerk of the board of education to act as its secretary. The secretary of the recreation board would be its fiscal officer. It also appears from the examiner's statements, that the recreation board had no other funds upon which it could draw than those of the board of education derived from the levies mentioned.

• The law, as you will note, is rather indefinite as to just how a board of education may cooperate with a municipality in the maintenance of recreational activities. Apparently, the manner of cooperation is left to the discretion of the authorities. I quite agree with the solicitor in Canton that the Board of Education might cooperate with the recreation board, by turning over the moneys for recreational work to the recreation board or might lawfully keep it in its treasury and pay it out upon orders of the board, as seems to have been done in this case.

Under the circumstances, unless the recreation board had other moneys upon which it could draw, it would have very little use for a fiscal officer or a secretary except for the purpose of keeping its minutes and records.

Whether the recreation board formally elected a secretary or not, if someone acted as such, with the consent and approval of the board, the board could lawfully compensate him for his services, either by way of a salary or by a stated amount for each meeting, the manner of fixing such compensation, and the amount thereof being purely within the discretion of the board. The statute authorizes the board to employ such persons as may be deemed proper and is broad enough to authorize the employment of the clerk to keep the minutes and records even though no formal election of a secretary be made. If a person employed for that purpose happens to be clerk of the local board of education, the employment would be lawful. There is no reason why a clerk of the board of education might not also act as clerk or secretary of the recreation board in the same locality unless his contract with the board of education were such as to preclude him from taking any other employment. The mere fact of his being clerk of the board of education would not in and of itself, stand in the way of his also acting as a clerk or secretary of a recreation board. The clerk of the board of education, however, is not ipso facto constituted fiscal officer or secretary of the recreation board, simply by reason of the fact that the board of education cooperates with the recreation board. Under the circumstances existing in Canton, as outlined in your communication, when the clerk of the board of education draws warrants against the recreation fund in payment of vouchers or orders of the recreation board, he does so as the fiscal officer of the board of education and not of the recreation board. His duties in this respect are such as to impose on him no liability for the payment of claims even though such claims might turn out to be illegal, unless the claims were void because of non-compliance with Section 5625-33, General Code, in incurring them. He acts, when drawing such warrant, merely as the agent of the board and upon the orders of the board. No statute makes him personally responsible for the payment of void or illegal claims except Section 5625-37, General Code, which imposes on such an officer a personal liability in the drawing of warrants in violation of Section 5625-33, General Code.

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

First, a recreation board appointed by authority of Section 4065-3, General Code, may employ such persons as may be needed. The clerk of the local board of education may be employed by a recreation board for services in connection with that board unless the said clerk, by reason of his contract with the board of education, is precluded from taking other employment. There is no incompatibility between the clerkship of the board of education, and the performance of similar duties for a recreation board, even though the board of education may cooperate with the recreation board in the maintenance of playgrounds and recreation centers.

Under the circumstances, it is possible that the board of education might have required its clerk to act as secretary to the recreation board for the purpose of keeping a check on the activities of the recreation board. In that case his salary as clerk of the board of education would include his pay for services in connection with the recreation board, and it would not be lawful for the recreation board to again pay him for the services for which he had already been paid by the board of education. That of course involves a question of fact, of which I am not advised.

Second, the clerk of the city board of education in Canton is not, ipso facto, the fiscal officer of the recreation board. Under the circumstances existing in Canton with reference to the functioning of the recreation board and the cooperation therewith of the board of education in the maintenance of recreation centers, the clerk of the board of education in the drawing of warrants for the payment of vouchers presented and allowed by the recreation board, acts as the fiscal officer of the board of education and incurs no personal responsibility in the drawing of said warrants, should

any of the claims for which vouchers are allowed prove to be illegal, unless such liability might arise because of a failure to comply with Section 5625-33, General Code in the incurring of obligations.

In the preparation of this opinion I have assumed that the recreation board recommended the incurring of obligations and that the actual incurring of the obligation and the making of contracts was done by the board of education. The recreation board being without funds of its own, could not incur obligations and comply with Section 5625-33, of the General Code, which provides in substance that before any obligation is incurred or any contract let there must be attached thereto the certificate of the fiscal officer that the money has been appropriated and is in the treasury free from any prior encumbrance. For that reason all that the recreation board could do would be to recommend to the board of education the incurring of obligations and the making of contracts and the board of education then would incur the obligation and its fiscal officer would make the certificate provided for by said Section 5625-33, General Code.

Third, under the contract with the Director of Education the said director is required to perform such duties in connection with the recreational activities of the city as may be required of him by the recreation board. If the recreation board and the board of education, in the exercise of their sound discretion, deem it advisable for the recreational director to attend a convention and determine such attendance to be in furtherance of the city's recreational activities, the director's actual expenses lawfully may be allowed to him. See *Corpus Juris*, Vol. 46, p. 1018.

Fourth, upon the execution of the contract with the director of recreation an obligation of the director of recreation to perform the duties specified in the contract for the salary mentioned becomes fixed. To change the amount of salary to be paid to the recreation director for the performance of the duties specified in the contract during the life of the contract would be in effect releasing to the director of education the obligation of the contract. A public officer or board is without power to release without consideration an obligation owing to his or its public. It is said in *Ruling Case Law*, Vol. 22, p. 532, et seq. with respect to public officers, and I believe the same rule would apply to public employes who are employed under contract for a definite time:

"When he takes office he undertakes to perform all its duties although some of them may be called into activity for the first time by legislation occurring after he enters on his term. In such an event he must perform the increased service without increased compensation unless the Legislature has the power and sees fit to grant him additional pay. \* \* \* If the duties of the office are diminished he is entitled to the same salary for those which remain; \* \* \* and on the other hand, if new duties are added he must perform them for the same salary, \* \* \* a constitutional provision forbidding the change of the compensation of an official during his term of office is inexorable. It admits of no exception and it affords no opportunity for evasion by the Legislature or other body. But such a constitutional provision does not prohibit the Legislature from changing the duties of public officers by either adding to or taking from them."

Of course if the recreational director may lawfully be employed to do something not germane to his duties as recreational director and is so employed he might be paid for those services. It has been held that federal employes might be paid compensation in addition to their salaries in an employment that was not in line with their usual duty or had no affinity or connection with that position. In such cases the officer may be considered as holding two places or positions the functions of which are separate and distinct and he is therefore entitled to recover the two compensations. *U. S. vs.*

*Saunders*, 120 U. S., 126, *Woodwell vs. U. S.*, 214 U. S. 82. With reference to this subject it is said in *Ruling Case Law*, Vol. 22, page 534:

“Where new duties are imposed on a public officer which are not within the scope of his office, and extra compensation is provided therefor, such increase in compensation is not within a constitutional provision prohibiting any increase in the compensation of any officer during his term of office.” See note 18, *Annot. Cases*, 404.

Fifth, a recreation board is empowered to contract for the use of an automobile to be used in furtherance of the activities of the board or for the use of any of its employes. Should the recreation director employed by the board use his own automobile in the performance of his duties, a proper allowance may be made for the maintenance of the same.

Respectfully,  
GILBERT BETTMAN.  
*Attorney General.*

1328.

APPROVAL, NOTES OF WESTERVILLE VILLAGE SCHOOL DISTRICT,  
FRANKLIN COUNTY—\$125,000.00.

COLUMBUS, OHIO, December 24, 1929.

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

1329.

ELECTION—CITY CIVIL SERVICE COMMISSIONER ELECTED TO  
COUNCIL—ELIGIBLE FOR LATTER OFFICE IF HE RESIGNS FROM  
CIVIL SERVICE PRIOR TO BEGINNING OF TERM.

**SYLLABUS:**

1. *The inhibition against a councilman holding other public office or employment, found in Section 4207 of the General Code, relates to his term as councilman and not to some office or employment he held at the time of his election which was relinquished before he took office as councilman.*

2. *Where a person serving as member of a municipal civil service commission at the time of his election as councilman, resigns such position prior to the beginning of his term as councilman, he becomes eligible to take his seat in council.*

COLUMBUS, OHIO, December 24, 1929.

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

GENTLEMEN:—I am in receipt of your request for my opinion, which reads as follows:

“At the November 1929 election, the electors of the city of ----- elected a person as councilman at large who, at the time of such election and at the present time, is a member of the City Civil Service Commission.