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SCHOOL BUS — BOARD OF EDUCATION MAY LEASE FOR THREE YEARS—SECTION 7731 G. C.—OPTION TO PURCHASE FOR SPECIFIED AMOUNT, DESIGNATED DATE, DOES NOT INVALIDATE LEASE — RENTAL SPECIFIED MUST BE BONA FIDE, COMMENSURATE AND IN KEEPING WITH BENEFIT DERIVED FROM USE OF BUS.

SYLLABUS:

A board of education in carrying out its statutory duty under Section 7731, General Code, may lease a school bus for a period of three years. Such a lease is not rendered invalid for the reason that it contains a clause granting to the lessee the right of option to purchase the bus so leased upon designated dates and for a specified amount. The rental specified in such lease must, however, be bona fide, commensurate and in keeping with the benefit derived by the board of education from the use of such bus.

Columbus, Ohio, August 12, 1940.

Hon. John W. Howell, Prosecuting Attorney,
Gallipolis, Ohio.

Dear Sir:

This will acknowledge receipt of your recent request for my opinion on the following:

“Has a Board of Education authority to lease school buses for periods of three years, with option to purchase from the owner, lessor?”

I do not find any express statutory authority for this procedure, and it is my opinion that a board of education does not have the adherent power to make such a contract. The matter of providing for payment of the rental might raise a practical question from the standpoint of tax limitations.

The form of leases which have been exhibited to me all provide for a lease for three years, the annual rental generally being one-fourth of the value of the school bus. Title is retained by the lessor, who has the right to repossess the bus upon default by the lessee. The lessee assumes all responsibility for upkeep, repairs, insurance, license fees, liability, etc.

For your information, a form of lease is herewith inclosed.”

Section 7731, General Code, setting forth as to when boards of education shall provide transportation, states:

“In all city, exempted village, rural and village school districts where resident elementary school pupils live more than two miles from the school to which they are assigned the board of education shall provide transportation for such pupils to and from school except when in the judgment of such board of education, confirmed, in the case of a school district of the county school district, by the judgment of the county board of education, or, in the case of a city or exempted village school district, by the judgment of the probate judge, such transportation is unnecessary.

When transportation of pupils is provided the conveyance shall be run on a time schedule that shall be adopted and put in force by the board of education not later than ten days after the beginning of the school term and it must pass within one-half mile of the residence of such pupils or the private entrance thereto, unless the board of education determines that transportation within said distance of one-half mile of said residence or the private entrance thereto is unnecessary and impracticable. When local boards of

education neglect or refuse to provide transportation for pupils the county board of education may provide such transportation and the cost thereof shall be paid as provided in Section 7610-1, General Code."

Section 7732, General Code, granting authority to purchase and setting forth a partial payment plan for the purchase of school busses by boards of education, provides:

"Boards of education, in the purchase of school buses and other equipment used in transporting children to and from school and to other functions as authorized by the boards of education shall be authorized to make such purchases on the following terms, to-wit; not less than one-fourth of the purchase price thereof shall be paid in cash; not less than an additional one-fourth of the purchase price thereof shall be paid within one year from the date of purchase; not less than an additional one-fourth of the purchase price thereof shall be paid within two years from the date of purchase; and the remaining balance if any of the purchase price thereof shall be paid within three years from the date of purchase. Such boards of education shall be authorized to issue the notes of the school district signed by the president and clerk of the board of education, and specifying the terms of the purchase including deferred payments as provided above, which notes may bear interest at a rate not exceeding four per cent. per annum. In the legislation under which such notes are authorized, the board of education shall make provision for levying and collecting annually by taxation amounts sufficient to pay the interest and the specified portion of the principal; provided, however, that revenues, derived from local taxes or otherwise, for the purpose of providing transportation of children or for defraying the current operating expenses of such district, may be applied to the payment of such interest and the retirement of such notes."

By the terms of Section 7731, *supra*, boards of education are required, under certain circumstances, to provide transportation for pupils attending schools. Since a statutory duty is placed upon boards of education by Section 7731, *supra*, it must be assumed that this section grants to boards of education an implied power to provide the means of discharging its duty.

In Opinions of the Attorney General for the year 1927, Vol. II, at page 1472, it was held:

"Boards of education may in their discretion contract for the transportation of pupils for an entire school year or for a longer period if they deem it advisable, provided the general provisions of law with reference to the making of contracts by boards of education are complied with."

At page 1473, of that opinion, it is stated:

“ *** There is no statutory limitation on how this transportation shall be provided other than the regulations set out in Sections 7731-1, 7731-2, and 7731-3, of the General Code, wherein requirements are made as to the designation of depots for gathering the children, the kind of vehicle to be provided, and the qualifications of the drivers of these vehicles.

Aside from these specific regulations, the statutes are silent as to the manner by which boards of education shall provide transportation for the pupils.”

In an opinion rendered by the then Attorney General in 1930, a question almost identical with the one presented here was considered. In said opinion (Opinions of the Attorney General for 1930, Vol. II, p. 1133), it was held:

“A board of education may legally lease a school bus for a two or three year period if in its judgment such action is for the best interest of the schools under its control. Such a contract of lease may contain a provision granting the board the option to purchase at expiration of lease. However, such a lease must provide for the payment of a rental commensurate with the use of such bus, and such a contract may not be in fact a contract of purchase under the guise of a lease.”

At pages 1134 and 1135 of that opinion it is stated:

“Without undertaking to review the various sections of the General Code which relate to the powers of boards of education, it may be stated that there are no express provisions which authorize such a board to either purchase or lease school busses. However, it is a well established rule that such boards have such implied power as is necessary to carry into effect the express powers granted to it. It is well known that the statutes make it the duty under certain circumstances for such boards to provide for the transportation of pupils; therefore it would seem that it may either contract for such purpose, or it may purchase busses and operate them itself, or if it chooses it is believed it may lease the same. However, each of the three methods above mentioned is complete in itself and where any one is employed, the board of education must proceed in good faith.

There would appear to be no authority to purchase a school bus or other equipment on the installment plan. While such method is universally employed by individuals, it has not been the practice insofar as public officials are concerned. The power to purchase an article implies the power to pay for the same. In some instances the Legislature has expressly authorized the purchasing upon the installment plan, such as in the case of township trustees in the purchase of road machinery equipment. However, the fact that the Legislature has specifically authorized such purchases in certain instances would indicate that in other instances the power does not ex-

ist. Of course, it is recognized that the practice is different with reference to leases. That is, the common practice in connection with leases is to provide for payment at stipulated intervals.

It is clearly the law that a board of education has no power to purchase a school bus unless the certificate required under Section 5625-33, General Code, is obtained to cover the entire purchase price. In the case you present, it is clear that the board under consideration desires to purchase a bus and does not have the available money. It follows that it may not do indirectly that which it cannot do directly. Of course, a board of education may lease a bus, with an option to purchase, if the stipulated rentals are commensurate with the use of the bus and it is not a purchase under the guise of a lease."

From the above, it appears that boards of education have an implied power to lease school busses for transporting children but that such lease must in fact be a lease and not a subterfuge created to effect, for practical purposes, a purchase which would otherwise be invalid. To test whether or not a lease is in fact a bona fide lease, the rentals paid for the use of the bus must be commensurate with the benefits derived from such use, and in all respects reflects the use of sound discretion on the part of such boards of education.

You state in your letter that generally the annual rental provided for in the lease is one-fourth the value of the bus. It is therefore obvious that at the end of the three year period prescribed in the lease the board of education would have paid in rentals to the lessor three-fourths of the value of the bus.

The contract of lease you present does not, however, set out the amount of money the board of education must pay on the dates specified when it has the power to exercise its right of option to purchase, thus it would be impossible to definitely state whether the rental to be specified would be commensurate with the use of such bus.

Since the rendition of the opinions above cited, the 93rd General Assembly enacted Section 7732, General Code, which became effective July 10, 1939.

A further question is now presented as to whether or not the enactment of said section affects the conclusions above set forth. It will be observed that the provisions thereof grant to boards of education express power to purchase school busses, together with a further power to purchase such

equipment on a partial or installment payment plan, subject to certain definite limitations. Prior to the enactment thereof no doubt existed as to the implied power of boards of education to purchase school busses. Nothing appears in said section which indicates that the Legislature intended to divest boards of education of their implied powers to provide such means of transportation as in their judgment they deemed best and it must therefore be concluded that thereunder boards of education merely acquired additional powers to those already existent. Therefore, inasmuch as Section 7732, General Code, has not in any way affected any of the implied powers of boards of education existing prior to the enactment thereof, the 1930 Opinion of the Attorney General above quoted would still be applicable to the instant case.

In specific answer to your inquiry it is my opinion that a board of education in carrying out its statutory duty under Section 7731, General Code, may lease a school bus for a period of three years. Such a lease is not rendered invalid for the reason that it contains a clause granting to the lessee the right of option to purchase the bus so leased upon designated dates and for a specified amount. The rental specified in such lease must, however, be bona fide, commensurate and in keeping with the benefit derived by the board of education from the use of such bus.

Respectfully,

THOMAS J. HERBERT,
Attorney General.