

Note from the Attorney General's Office:

1959 Op. Att'y Gen. No. 59-68 was modified by 1959 Op. Att'y Gen. No. 59-163.

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EDUCATION—PROPERTY OF FEDERAL GOVERNMENT
TRANSFERRED TO LOCAL SCHOOL DISTRICT, §§3301.41 TO
3301.47 R.C.—UNLAWFUL DISTRIBUTION TO MEMBERS OF
BOARD OF EDUCATION—DUTY OF PROSECUTING ATTOR-
NEY—§2919.03 R.C.

SYLLABUS:

1. When personal property belonging to the federal government has been given to a local school district pursuant to the provisions of Sections 3301.41 to 3301.47, inclusive, Revised Code, and such property has been unlawfully distributed to members of the board of education of such district or to other persons, it is the duty of the prosecuting attorney

- (a) To make an investigation of such transactions and initiate proceedings for any violations of the criminal laws of the state.
- (b) To take necessary action to recover property belonging to the school district and unlawfully disposed of.
- (c) To take action for collection of moneys expended from the treasury of the district for fees and charges paid on account of unlawful transfers of property of the district.

2. Criminal conduct by members or employees of a board of education with reference to property of their district which is the proper subject of prosecution, is not confined to property transferred to the district by the federal government pursuant to Section 3301.41, *et seq.*, Revised Code.

Columbus, Ohio, January 30, 1959

Hon. Geo. Cleveland Smythe, Prosecuting Attorney
Delaware County, Delaware, Ohio

Dear Sir:

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

“Where federal personal property has been distributed to a local school district under Sections 3301.41 to 3301.47, R.C., and some of said personal property has been redistributed, without authority, to private citizens and board members for their private use, what is the duty, if any, of the Prosecuting Attorney for the county in which said local school district is situated:

- 1. To investigate said matter.

2. To take action for purpose of recapturing said property.
3. To attempt collection on behalf of the local board for reimbursement to the Department of Education for charges levied in connection with said unauthorized transfers?

“Is any criminal statute violated by such irregularities? If said irregularities occurred before the effective date of said Act, what is the situation?”

Sections 3301.41 to 3301.47, inclusive, Revised Code, effective September 13, 1957, relate to the acquisition and disposition of federal surplus property which is transferred by the “Federal government, pursuant to the Federal Property and Administrative Services Act of 1949.” By the terms of said Section 3301.41, *et seq.*, such property is placed under the control of the State Department of Education, with authority to distribute the same to various eligible state civil defense, health and educational institutions and organizations and various public boards and commissions, political subdivisions, *etc.*

The recipients of such property are required by Section 3301.44, Revised Code, to pay to the department of education such service charges or fees as the department may require in connection with the acquisition and transfer of such property.

Under the provisions of Section 3301.45, Revised Code, the governing body of any public authority, office or organization is authorized to accept federal personal property for re-distribution in the state to any eligible class, division or unit of government authorized by said Department of Education, but it is provided in this section :

“Those entities receiving property that may be or is to be retransferred or loaned, shall, as the department may require, be held accountable for the use of such property and for maintaining records thereof.”

Section 3301.47, Revised Code, reads in part as follows :

“For the purpose of executing its authority, under the provisions of sections 3301.41 to 3301.47, inclusive, of the Revised Code, and in order to continuously conform with current federal property disposal acts and applicable rules and regulations of federal departments, agencies, boards and commissions, the department of education by action of the state board of education may, notwithstanding the provisions of Chapter 119. of the Revised Code, adopt, amend or rescind rules, regulations and

orders and prescribe requirements and standards deemed necessary and suitable for the administration of sections 3301.41 to 3301.47, inclusive, of the Revised Code, which are not inconsistent with the applicable parts of the regulations issued by the governor under section 5915.05 of the Revised Code. Such board rules and regulations as are adopted shall become effective upon approval by the governor and being filed in the office of the secretary of state.”

Chapter 119. of the Revised Code, referred to in the paragraph last quoted, relates to “administrative procedure.” Section 5915.05, Revised Code, mentioned in such quotation has reference to the regulations promulgated by the governor with respect to the establishment of a civil defense organization.

It appears to me that the receipt by a board of education of property donated by the Federal Government and distributed by the state department of education, pursuant to said Section 3101.41, *et seq.*, places upon the recipient the responsibility of holding and conserving such property as a public trust and dedicating it exclusively to such uses as pertain to the administration of their duties as public officers. Accordingly, if as you say, some of such property has been re-distributed without authority to private citizens and to board members for their private use, such action is plainly a breach of duty on the part of such officers and should subject them not only to personal liability, but in the case of violation of any criminal statutes, to criminal prosecution.

Accordingly, in answer to your specific questions as to your duties in the matter, it is my opinion:

1. Plainly it would be your duty to investigate and prosecute any criminal conduct on the part of any school official within your county. I do not consider that any extended discussion or citations of authority on this proposition is called for.

2. As to civil actions, since Section 3313.35, Revised Code, provides that the prosecuting attorney “shall be the legal counsel of such boards (except city districts) and conduct all actions by or against them,” it would appear to be your duty, as prosecuting attorney, to take appropriate action to recover property of the district which has been unlawfully disposed of by a board of education or by its members or employees. This ordinarily would be by way of replevin, together with such additional equitable procedure as might be required to force a disclosure as to the situs of such property and the persons into whose possession it has come.

Ordinarily, such action would be taken by a prosecuting attorney on request of the board. But since your statement of facts presupposes criminal conduct on the part of the board members, it appears to me that a zealous prosecuting attorney would not wait for such request, but in the public interest, would take the initiative.

3. I assume that your reference to "charges levied in connection with said unauthorized transfers," relates to the charges which are referred to in Section 3301.44, Revised Code, to-wit, service charges or fees fixed by the department of education in connection with the transfer, conveyance, or recapture of such property, which charges have been incurred by reason of the unlawful transfers of the property in question. In my opinion such charges, if paid out of the funds of the school district, should be recovered against the parties responsible therefor.

If any federal laws or regulations have been violated, that would appear to be a matter for the attention of the United States district attorney.

You inquire whether any criminal statutes of Ohio have been violated by such irregularities. I call your attention to Section 2919.03, Revised Code, which reads in part as follows:

"No person, being elected or appointed to an office of public trust or profit, or an agent or employee of such officer or of a board shall embezzle or convert to his own use, or conceal with such intent, *anything of value* that comes into his possession by virtue of such office or employment." (Emphasis added)

This statute would plainly apply to any member or employee of a board of education. The penalty for such violation, if the value of the property is less than sixty dollars, is a fine of not more than three hundred dollars or imprisonment for not more than 90 days, or both. If the value of such property is more than sixty dollars, the penalty is imprisonment for not less than one, nor more than 10 years.

I do not find a criminal statute directly covering the unlawful giving of such property to others. However, I call your attention to Section 2919.06, Revised Code, making it unlawful to sell public property with intent to defraud. If therefore, a member of the board of education or any of its employees has used the device of sale or gift to others for his own enrichment, a prosecution might be had under the section last referred to.

You raise the question whether if such irregularities occurred before the effective date of Section 3301.41, *et seq.*, supra, a different situation would be presented. It is my opinion that both the criminal statutes above mentioned and any civil action for recovery would be applicable to any illicit appropriation or sale of such property in the hands of a public officer or board at any time, and would not be dependent on the enactment or application of the statutes above referred to relative to the distribution of federal property.

As to your final question, it is obvious that boards of education may acquire property by purchase or by gift. Section 3301.41, *et seq.*, Revised Code, are not exclusive as to such acquisition. Accordingly, an unlawful appropriation or disposition of such property, however acquired, if it is in violation of the criminal laws of the state, should be the subject of prosecution.

In specific answer to the questions submitted, it is my opinion and you are advised:

1. When personal property belonging to the federal government has been given to a local school district pursuant to the provisions of Sections 3301.41 to 3301.47, inclusive, Revised Code, and such property has been unlawfully distributed to members of the board of education of such district or to other persons, it is the duty of the prosecuting attorney:

(a) To make an investigation of such transactions and initiate proceedings for any violations of the criminal laws of the state.

(b) To take necessary action to recover property belonging to the school district and unlawfully disposed of.

(c) To take action for collection of moneys expended from the treasury of the district for fees and charges paid on account of unlawful transfers of property of the district.

2. Criminal conduct by members or employees of a board of education with reference to property of their district which is the proper subject of prosecution, is not confined to property transferred to the district by the federal government, pursuant to Section 3301.41, *et seq.*, Revised Code.

Respectfully,

MARK McELROY

Attorney General