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JANITOR—BOARD OF EDUCATION UNAUTHORIZED TO ERECT RESIDENCE FOR SCHOOL JANITOR—MAY LEASE RESIDENCE WHEN—REBUILDING AFTER DESTRUCTION BY FIRE.

SYLLABUS:

1. *A board of education is without authority to expend its funds for the erection of a residence for the use of a school janitor employed by the board.*
2. *Where a board of education comes into possession of property upon which there is a building suitable for residence purposes and which cannot be utilized by the board for strictly school purposes, and cannot at the time be advantageously sold or disposed of by the board, the said building may be leased temporarily, and rental accepted therefor.*
3. *In the event such building is destroyed by fire, it is not within the power of the board of education to rebuild the same for residence purposes.*

COLUMBUS, OHIO, May 11, 1934.

HON. GEORGE L. LAFFERTY, *Prosecuting Attorney, Lisbon, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion concerning the following:

“About eighteen years ago this Board of Education bought land upon which to erect a centralized school. On this land at the time, was a house and barn, and for some years they had at times as many as fourteen horse drawn vehicles bringing the children to school, and the barn was used to stable these horses during the day. The house on the land has for about seventeen or eighteen years been used by the janitor, rent free, but the rent being reflected in his salary. The Board of Education of this district feels that they have quite an advantage by being able to have a janitor resident on the school property, the house being probably less than 100 feet from the school building proper, the centralized school being out in the open country with few houses in the immediate vicinity thereof.

Sometime during February of this year the house above referred to burned down, and the school board has collected \$2,000 insurance money. The board desires to know the following:

1. May they rebuild this dwelling?
2. If it is lawful to rebuild the dwelling, may they pay for the construction thereof with the \$2,000 insurance money?
3. If the \$2,000 is insufficient to rebuild said dwelling, out of what fund may they lawfully pay the excess amount?
4. If the building is really built, is it lawful for them to carry fire insurance thereon, and continue to use the same for the residence of a janitor, charging him rent, of course, which rent he either actually pays or is taken into consideration in fixing his salary?

General Code 7620, provides among the general powers and duties of a board of education that it may ‘make all the other necessary provisions for the schools under its control’.

Is the fact that this school is located out in the open country and that by having a resident janitor on the property, the school property is

better cared for and the activities in the school more carefully supervised, to be considered as an incidental power of the board of education coming within the above statutory provisions as 'other necessary provisions'?"

It has been pointed out in previous opinions of this office that, speaking generally, boards of education have no power to lease or rent property which is held by them for school purposes, except as the same may be done in pursuance of the authority extended to them by Sections 7622 et seq., of the General Code, which authority authorizes the use of school buildings for incidental community purposes. Strictly speaking, these statutes do not authorize the leasing or renting of school property for any of the purposes mentioned such as the holding of literary exercises, grange meetings, political meetings and other community purposes.

In the case of *Weir vs. Day*, 35 O. S. 143, the first branch of the syllabus is as follows:

"Under the act of May 1, 1873, entitled 'An Act for the reorganization and maintenance of common schools' (70 O. L. 195) boards of education are invested with the title to the property of their respective districts in trust for the use of the public schools, and the appropriation of such property to any other use is unauthorized."

The doctrine of the above case is as true today as it was when it was decided, and it may as truly be said under the law as it exists today as under the act of 1873, that boards of education hold the property of their school districts as trustees for the citizens of their districts purely for school purposes. In later years the scope of school purposes has been somewhat broadened. More stress is being laid on recreational activities than formerly, and the use of property, the title to which is vested in a board of education for school purposes, for playground and recreational purposes, and as community centers generally, is commonly understood to be legitimate and proper school purposes as much so as classroom work conducted in the school buildings. The legislature has recognized this by the enactment of Sections 7622 et seq. of the General Code.

At no time has any authority been extended by statute to boards of education to rent or lease school property, except for gas and oil purposes. (Section 7620-2, General Code.) A former Attorney General, in an opinion which is reported in the Annual Report of the Attorney General for 1913, page 1508, said:

"Section 4749, General Code, which enumerates the power of the board of education with reference to acquiring, holding, possessing and disposing of real and personal property, does not include any provision for the leasing of such property by the board, and as the statutes nowhere prescribe the manner of executing such a lease, the board cannot be held to possess such power."

It was also held by a former Attorney General that real estate owned by a board of education could not be leased for oil or gas purposes in the absence of a specific statute authorizing it. See Opinions of the Attorney General for 1918, page 1352. Again, in 1931, it was held:

"In the absence of specific statutory authority therefor, boards of education do not possess the power to rent or lease school property held by them in their corporate capacity in trust for the use of the public schools." (See Opinions of the Attorney General for 1931, page 127.)

I believe the above principle of law is well settled and inasmuch as a board of education does not possess the power to rent or lease property for residence purposes it certainly does not have the power to expend school funds to construct a building for the admitted purpose of so renting it. The proposed arrangement spoken of in your letter, constitutes a leasing or renting of the building in question, to the school janitor just as much as though it were to be rented to some other person. You expressly state that the rental of the building is to be either actually paid by the janitor or taken into consideration in the fixing of his salary.

A former Attorney General held categorically, and I believe correctly, that:

"A board of education is without authority to expend its funds for the erection of a residence for the use of a janitor employed by the board." (See Opinions of the Attorney General, for 1923, page 198.)

It sometimes happens that a board of education comes into possession of property which it is not convenient to use for strictly school purposes, and which can not be advantageously sold at the time. It, of course, is the duty of the board under such circumstances, to hold the property so acquired, until such time as it may be advantageously sold or utilized for strictly school purposes. As an incident to the holding of such property, the board may temporarily lease it but if, before the board feels that the property can be advantageously sold or otherwise properly utilized for school purposes, the property burns or is destroyed, no authority exists for reconstructing it for the ostensible purpose of again leasing it.

The right to temporarily lease such property by a board of education is recognized in a former opinion of this office. In Opinions of the Attorney General for 1931, page 127, it is said:

"When a board of education incidentally becomes possessed of buildings which are not needed for school purposes, and which cannot immediately be advantageously disposed of, they may lawfully permit those buildings to be occupied for uses which are not strictly school purposes and may lawfully accept rental for such uses. Such occupancy, however, should be temporary, and until such time as the building may be sold in compliance with Section 4749, General Code."

The use of the building in question, for the school janitor's residence, as described in your letter, was fully justified prior to its destruction by fire, but the board cannot legally, in my opinion, expend any of its funds to rebuild the building as a residence for the janitor.

Respectfully,
JOHN W. BRICKER,
Attorney General.