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EDUCATION—RETAINING OF LEGAL COUNSEL, CLERK OF BOARD OF EDUCATION—PROSECUTING ATTORNEY—RATIFICATION OF CLERK'S ACTION BY SUBSEQUENT BOARD ACTION—TRANSFER OF TERRITORY.

SYLLABUS:

1. Where a suit is brought against a local board of education and its clerk, involving his official duties, such board and such clerk have the right to call upon the prosecuting attorney to represent them in such action; but such board has authority to employ other or additional legal counsel for such defense.

2. The clerk of a school district is without authority, unless authorized by the board of such district, to employ at the expense of his district, an attorney to represent him or his board in a suit brought against them.

3. A board of education of a school district whose clerk has, without previous authority from the board, employed an attorney to represent him and such board, in a suit brought against them involving their official duties, may, by subsequent action, ratify the action of such clerk, and may pay the expense thereby incurred; and where the entire territory of such district has subsequently been transferred to another district, the board of education of such transferee district would have the same right of ratification and payment.

Columbus Ohio, September 5, 1958

Hon. Theodore Lutz, Prosecuting Attorney
Richland County, Mansfield, Ohio

Dear Sir:

I have before me your communication in which you request my opinion relative to the obligation of a local board of education to pay a claim for attorney's fees growing out of certain litigation. Your letter of request is too long for incorporation in this opinion, and I will endeavor to summarize the salient points as follows:

On or about April 3, 1957, the county board of education of Richland County adopted a resolution transferring all of the territory of Plymouth local school district to a school district in Huron County and in the same legislation, transferred Shiloh local school district to another district in Huron County.

At the time this action was taken you requested from me an opinion as to the legality of including these two transfers in one proceeding, and on June 19, 1957, I rendered to you Opinion No. 644, Opinions of the Attorney General for 1957, p. 213, holding that such procedure was not authorized by the law and was invalid. Notwithstanding this ruling, the Huron County Board of Education undertook to absorb the districts so transferred. The Clerk of the Shiloh district, Ronald R. Howard, in seeking to observe and follow the opinion foresaid, refused to surrender his books and to transfer the funds and property of the Shiloh district to the Huron County district to which the attempted transfer had been made.

Thereupon, on September 5, 1957, the county board of education of Huron County and the local district to which the transfer was made, brought an action in the Supreme Court of Ohio, against said clerk and the board of Richland County praying for a writ of Mandamus to compel such transfer and payment. Upon hearing, the court denied the writ and dismissed the petition, holding :

“Such attempted transfer and all subsequent proceedings taken pursuant thereto, are invalid.”

This judgment was rendered December 11, 1957. Thereupon, the county board of Richland County transferred said Shiloh district to Plymouth local school district of Richland County and the said clerk, Ronald R. Howard, thereupon delivered the monies and properties of the Shiloh district to the Plymouth local district.

When the action aforesaid was brought in the Supreme Court, Mr. Howard employed an attorney to represent him and the Shiloh district of which he was clerk. Your communication does not reveal why Mr. Howard and his board were not represented by you as prosecuting attorney nor does it appear that the Shiloh board authorized their clerk to employ an attorney.

Out of this situation you have presented the following question :

“May we have your advice upon the question of whether or not Plymouth local school district may pay the debt incurred by the clerk, Ronald R. Howard, for attorney’s fees and incidental expenses in his representation of the Shilo local school district in the Supreme Court.”

I find provisions in two widely separated portions of the Revised Code, relating to the duties of the prosecuting attorney, as legal representative

of boards of education. Section 309.09, Revised Code, provides in part as follows :

“The prosecuting attorney shall be the legal adviser of the board of county commissioners, board of elections, and all other county officers and boards, including all tax supported public libraries except those organized as a part of a city school district or of a municipal corporation.”

The above quoted provision does not appear to refer specifically to boards of education, but Section 309.10, Revised Code, which was originally a part of the same act, 98 O.L., 160, contains the following language :

“Sections 309.08 and 309.09 of the Revised Code *do not prevent a school board from employing counsel to represent it*, but such counsel, when so employed, shall be paid by such school board from the school fund. * * *” (Emphasis added)

In Section 3313.35, Revised Code, we find the following :

“Except in city school districts, the prosecuting attorney of the county board shall be the legal adviser of all boards of education of the county in which he is serving. He shall prosecute all actions against a member or officer of a board for malfeasance in office, and he shall be the legal counsel of such boards *or the officers thereof in all civil actions brought by or against them* and shall conduct such actions in his official capacity. * * *”
(Emphasis added)

These provisions of the law make it clear that the prosecuting attorney is the attorney for all boards of education and their officers, except in the case of city school districts, which by other provisions of the law receive that service from the city solicitor.

In spite of these provisions of the law, which place the duty of acting as attorney for school districts such as those mentioned in your letter upon the prosecuting attorney, it seems well settled that the board of education is authorized to employ additional counsel either to assist or act in place of the prosecuting attorney, or to take his place in case for any reason he fails or refuses to represent the board. This was made clear in the case of *Knepper v. French*, 125 Ohio St., 613. In this case the members of the county board of education were made defendants in an action by an attorney to recover attorney's fees. It appeared that the board had elected to employ an outside attorney rather than to avail itself of the services of the prosecuting attorney. The court referred to Sections of

the General Code then in force which were the predecessors of the sections from which I have quoted, and held that all of the statutes referred to were *in pari materia*, and held that the action of the board in employing counsel other than the prosecuting attorney was lawful and that the plaintiff had a right to recover for his services. The above case of *Knepper v. French, supra*, was cited in support of Opinion No. 1392, Opinions of the Attorney General for 1933, p. 1250; also in Opinion No. 3644, Opinions of the Attorney General for 1954, p. 135.

If, therefore, the employment of an attorney by the clerk of the Shiloh local school district of Richland County to represent him and his board, was made pursuant to proper authorization of the board of education of that district, then I would have no hesitancy in holding that the said district would be responsible for the indebtedness so incurred.

From the language of your letter, however, there is no suggestion that the action of the clerk was taken pursuant to any authorization given by the Shiloh local school board. It is clear as a matter of law that a board of education can only act *as a board*, and its action must appear by its minutes; and neither a member of the board nor any of its members or employees can bind it by informal agreement. See 42 American Jurisprudence, p. 389, where it said:

“The powers and duties of boards and commissions may not be exercised by the individual members separately. Their acts are official only when done by the members convened in session, upon a concurrence of at least a majority, and with at least a quorum present. * * *”

Section 3313.18, Revised Code, requires resolutions of a board of education to be adopted by the vote of a majority of the members and by an “aye and no” vote. Section 3313.26, Revised Code, requires the clerk of the board “to record the proceedings of each meeting in a book to be provided by the board for that purpose, which shall be a public record.”

If therefore, the clerk of the Shiloh board, without authorization from his board, employed an attorney to represent him and the board in the suit referred to, I must hold that the board would not be liable for the expense incurred, and this although it would appear that his action was highly commendable.

However, his board might have ratified his action and might lawfully have paid the expense. It is said in 42 Ohio Jurisprudence, p. 944:

“Any act or contract that a body politic may lawfully make they may lawfully ratify and adopt, when made in their name without authority; and when adopted it has its effect from the time it was made, and the same effect as though no agent had intervened. * * *”

We are confronted however, with the fact that the Shiloh district for which Mr. Howard was clerk has ceased to exist, that district having been transferred to the Plymouth district. In my opinion, the Plymouth district has by reason of such transfer succeeded to all the assets and liabilities of the Shiloh district, and its board would have all the power that the Shiloh board had in dealing with the matter in question.

Accordingly, it is my opinion and you are advised:

1. Where a suit is brought against a local board of education and its clerk, involving his official duties, such board and such clerk have the right to call upon the prosecuting attorney to represent them in such action; but such board has authority to employ other or additional legal counsel for such defense.

2. The clerk of a school district is without authority, unless authorized by the board of such district, to employ at the expense of his district an attorney to represent him or his board in a suit brought against them.

3. A board of education of a school district whose clerk without previous authority from the board has employed an attorney to represent him and such board in a suit brought against them involving their official duties may, by subsequent action, ratify the action of such clerk, and may pay the expense thereby incurred; and where the entire territory of such district has subsequently been transferred to another district, the board of education of such transferee district would have the same right of ratification and payment.

Respectfully,
WILLIAM SAXBE
Attorney General