

heating plant bonds dated November 15, 1936, bearing interest at the rate of 4% per annum.

From this examination, in the light of the law under authority of which these bonds have been authorized, I am of the opinion that bonds issued under these proceedings constitute a valid and legal obligation of said school district.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

186.

BOARD OF EDUCATION, COUNTY — DISTRICT HEALTH COMMISSIONER—AGE AND SCHOOLING CERTIFICATE —SCHOOL PHYSICIAN EXAMINATION FOR AGE AND SCHOOLING CERTIFICATE, WHEN—SUPERINTENDENT OF SCHOOLS, TERM, LIMITATION—HEALTH COMMISSIONER FEES, WHEN—COUNTY ATTENDANCE OFFICER, NOT CONSTITUTIONAL OFFICER, SALARY CHANGE.

SYLLABUS:

1. *A county board of education cannot designate the district health commissioner to make such a physical examination for an "age and schooling certificate" as is provided for in Section 7766-1, General Code.*
2. *If a board of education has employed a school physician as provided for in Section 7692, General Code, the superintendent of schools can designate the school physician to make such an examination for an "age and schooling certificate" as is provided for in Section 7766-1, General Code. If the board of education has not employed a school physician as provided for in Section 7692, General Code, or the board of education has delegated its "powers and duties" to the board of health, the superintendent of schools can designate the health commissioner to make such an examination. The term "superintendent of schools" as used in Section 7766, General Code, is limited to the city superintendent of schools, exempted village superintendent of schools, county superintendent of schools, a person designated by such superintendent, and if, at any time there is no such superintendent the president of the board of education.*
3. *If the board of education has not employed a school physician as provided for in Section 7692, General Code, or the board of educa-*

tion has delegated its "powers and duties" to the board of health, the health commissioner is required to either make the examination as provided for in Section 7766-1, General Code, personally, or designate another physician to make it, upon said health commissioner being designated by the superintendent of schools to make said examination.

4. If the board of education has not employed a school physician as provided for in Section 7692, General Code, or the board of education has delegated its "powers and duties" to the board of health and the superintendent of schools has designated the health commissioner to make an examination as provided for in Section 7766-1, General Code, the health commissioner cannot collect a fee or any additional compensation from the board of education for making such an examination.

5. A county attendance officer is not an officer as contemplated in Article II, Section 20, of the Constitution of Ohio, and therefore, the county board of education may increase or decrease his salary during his term of employment.

COLUMBUS, OHIO, March 1, 1937.

HON. LAMOINE HANDLEY, *Prosecuting Attorney, Carrollton, Ohio.*

DEAR SIR: This will acknowledge receipt of your recent communication requesting my opinion in answer to the following questions:

(1) May a county board of education designate the county health commissioner for such physical examinations as are required in issuing age and schooling certificates?

(2) If so, by what method, and under what Section of the Code is such designation or appointment made?

(3) Would the county board of health or its health commissioner have the right to refuse to act in such capacity for such school board?

(4) Could such county health commissioner, if appointed, legally charge and collect a fee from such county school board for such services?

(5) Has a county board of education authority to increase or decrease the salary of the county attendance or truant officer during his term of office?"

Concerning your first question, it is my opinion that a county board of education cannot designate the "county health commissioner for such physical examinations as are required in issuing age and schooling certificates." The only sections of the General Code which provide for the issuing of an "age and schooling certificate" are Sections 7764-3 to Sec-

tion 7767-2, inclusive. The sections pertinent to the issuing of an "age and schooling certificate" read in part, as follows:

Sec. 7765. "Excepting as provided in Section 7765-2 of the General Code, no minor of compulsory school age shall be employed or be in the employment of any person, firm or corporation in any of the occupations mentioned in Section 12993 of the General Code unless such minor presents to such person, firm or corporation, a proper age and schooling certificate, as a condition of employment."

Sec. 7766. "An age and schooling certificate may be issued only by the superintendent of schools and only upon satisfactory proof that the child to whom the certificate is issued is over sixteen years of age and has satisfactorily passed a test for the completion of the work of the seventh grade. * * *

Any such age and schooling certificate may be issued only upon satisfactory proof that the employment contemplated by the child is not prohibited by any law regulating the employment of such children; * * *

Sec. 7766-1. "The superintendent of schools shall not issue such certificate until he has received, examined, approved and filed the following papers duly executed:

* * * * *

(4) A certificate from the school physician or physician designated by him, or if there be no school physician, from the district health commissioner or physician designated by him, showing after a thorough examination that the child is physically fit to be employed in such occupations as are not prohibited by law for a boy or girl, as the case may be, under eighteen years of age."

It will be observed from a reading of the statutes herein set forth, that such certificate "*may be issued only by the superintendent of schools.*" The language of the statutes clearly and plainly vests exclusive authority in the superintendent of schools to issue "age and schooling certificates."

In a former Opinion of this office, No. 2192, found in Opinions of the Attorney General for 1934, Vol. 1, page 60, it was held:

"A superintendent of schools is neither authorized nor permitted to issue an age and schooling certificate under the authority of Sections 7764-3, et seq. of the General Code of Ohio, unless and until he has received, examined, approved and filed the certificate from the school physician or physician designated

by him, or if there be no school physician from the district health commissioner, or physician designated by him showing after a thorough examination that the child is physically fit to be employed in such occupations as are not prohibited by law for a boy or girl, as the case may be, under eighteen years of age."

In the body of this opinion it is stated that the statute expressly prohibits the superintendent of schools from issuing such a certificate unless he has on file the certificate of one of the physicians named in the statute; that "the language of the statute is clear and is not susceptible of any other construction than its plain language imports." Also in point is an earlier opinion of this office, No. 2137, found in Opinions of the Attorney General for 1930, Vol. II, page 1199. I concur with both of these above cited opinions.

This leads us to the question of what procedure it is necessary for a superintendent of schools to take in order "to receive" a certificate from one of the physicians mentioned in Section 7766-1, General Code.

Sections 7764-3 to 7767-2, inclusive, of the General Code do not make any express provisions requiring the superintendent of schools to designate the school physician or the district health commissioner to make examinations and forward the results of the same to him. The statute, Section 7766-1, General Code, imposes upon the superintendent the duty of issuing an age and schooling certificate after he has received a certificate from one of the physicians named in the statute "showing after a thorough examination that the child is physically fit." An obligation rests upon the physician named in the statute, to make a thorough examination. The statute in question provides that if there is a school physician, said physician may make the examination or designate another physician to make the same; and if there be no school physician the district health commissioner may make the examination or may designate another physician to make the same. In other words, the school physician and the district health commissioner are given authority to designate another physician if they so desire, in order to perform the duty imposed upon them by the statute, to make the "thorough examination." The superintendent is charged with the duty of issuing the "age and schooling" certificate upon receiving "a certificate from the school physician or physician designated by him, or if there be no school physician, from the district health commissioner or physician designated by him." The statute impliedly gives the superintendent power to designate the school physician or, if there be no school physician, the district health commissioner. To hold otherwise would be to construe the statute as giving both the school physician and the district

health commissioner the power to designate a physician in order to complete the duty imposed upon each of them, and would not give the superintendent the authority of designation necessary to perform the duty imposed upon him. In fact any interpretation other than the one set forth would manifestly be contrary to the decisions of Ohio courts on statutory construction. The law is well established that where duties are expressly imposed by statute, authority to carry them out is reasonably implied. However, I believe that this question involves a consideration of Sections 7692, 7692-1 and 7721-2, General Code, relating to medical supervision in the schools. These sections provide in part, as follows:

Sec. 7692. "Each and every board of education in this state may appoint at least one school physician and at least one school dentist; provided two or more school districts may unite and employ one such physician and at least one such dentist whose duties shall be such as are prescribed in this act. Said school physician shall hold a license to practice medicine in Ohio. * * *

Such board may delegate the duties and powers herein provided for to the board of health or officer performing the functions of a board of health within the school district, if such board or officer is willing to assume the same. Boards of education shall cooperate with boards of health in the preventing of epidemics."

Sec. 7692-1. "School physicians may make examinations and diagnosis of all children referred to them at the beginning of every school year and at other times if deemed desirable. They may make such further examination of teachers, janitors and school buildings as in their opinion the protection of health of the pupils and teachers may require. * * *"

Sec. 7721-2. "Boards of education shall, in the institution and conduct of physical education, take due knowledge of the health supervision of school children maintained by boards of health or by boards of education and shall provide for the proper coordination of such work with the work in physical education. Where the board of education has not employed a school physician, the board of health shall conduct the health examination of all school children in the health district and shall report the findings of such examination and make such recommendations to the parents or guardians as are deemed necessary. * * *"

Observing the hereinabove last quoted sections, it is my opinion that if the board of education has appointed a school physician in accordance with the provisions of Section 7692, General Code, the superintendent of schools has authority to designate the school physician to make an examination for an "age and schooling certificate." The superintendent of schools is responsible for the conduct and control of the school. A school physician appointed by a board of education is one of the staff of the school and the superintendent is charged with the duty of seeing that the physician performs his duties the same as he is charged with this same duty in regard to teachers, janitors, building superintendents, etc.

The duty of the school physician as set forth in Section 7692-1, supra, is to make "examinations and diagnosis of all children referred to them at the beginning of every school year, and at other times if deemed desirable." The purpose of providing for "age and schooling certificates" was to protect and promote the health of children of tender years. This is clearly shown from a reading of Sections 7766 and 7766-1, General Code. Section 7766, General Code, requires that the child seeking the certificate "is over sixteen years of age and has satisfactorily passed a test for the completion of the work of the seventh grade." Section 7766-1, General Code, requires that he must pass a *thorough examination*, showing that he is physically fit to be employed in such occupations as are not prohibited by law. We observe that a child may have the proper age and schooling as required by statute in order to receive a certificate, but if he cannot pass the examination to receive the physician's certificate he cannot secure an "age and schooling certificate." His securing the same depends upon the physician's certificate which, as stated above, must be "received, examined, approved and filed with the superintendent."

The legislature knew the harmful effect that might result from permitting a child under sixteen years of age to work if he was not physically fit. To prevent this it realized the necessity of a thorough examination of the child before he could leave school and be employed, and enacted Section 7766 and Section 7766-1, General Code.

Sections 7766 (1921) and 7766-1 (1921), General Code, were enacted before Sections 7721-2 (1923), 7692 (1929) and 7692-1 (1929), General Code. The last three statutes provide for medical examination and supervision of pupils. Section 7692-1, provides for school physicians making "examinations and diagnosis of all children referred to them at the beginning of every school year, and at other times if deemed desirable." This part of the statute must be construed as giving authority to the superintendent to refer to the school physician "for examination and diagnosis" any and all school children at the beginning

of the year or any other time the superintendent deems it desirable to have an examination. To hold otherwise defeats the intention and purpose of the statute which is to protect the health of the children. The duty of supervising the health of the pupils is mandatory. This duty of supervision is a continuous one during the school year, the same as any other duty of supervision with which the board is charged.

Section 7692-1, General Code, as stated above, specifies the duty of the school physician. However, his duty of making examinations does not arise until the school child is referred to him for the same. The superintendent being responsible for the control and conduct of the school would naturally be the official who would refer the child to the physician for examination. It is obvious that any examination that must be had of a pupil would be made by the school physician. The statute makes no provision for any certain type of examination. It uses the terms "examinations" and all "children." It is clear that the school physician must make all examinations of all school children who would be referred to him by the superintendent, which examinations pertain to protecting the health of such children. Therefore, in my opinion, when the board of education has appointed a school physician as provided in Section 7692, *supra*, the superintendent of schools may designate the school physician to make the examination as provided for in Section 7766-1, *supra*.

Section 7692, General Code is not mandatory that each and every board of education appoint a school physician. In fact the law clearly states that the board (meaning the board of education) "may delegate the duties and powers herein provided for the board of health or officer performing the functions of a board of health within the school district." Therefore, the question arises as to who makes the examination provided for in Section 7766-1, General Code, when the board of education has not appointed a school physician. In a former opinion of this office, No. 5167, Opinions of the Attorney General for 1936, it was held:

"Where the board of education of a school district has not employed a school physician, it is the mandatory duty of the board of health for the health district in which the school district is located to conduct health examinations of all school children in said district and to report the findings of such examination and to make such recommendations to the parents or guardians as are deemed necessary for the correction of such defects as may need correction, as provided by Section 7721-2, of the General Code of Ohio."

The language of Sections 7692 and 7721-2, *supra*, is very clear that where the board of education does not employ a school physician or delegate its duties and powers to the board of health, the board of health must assume the medical and dental supervision of all school children.

Section 1261-26, General Code, provides:

“In addition to the duties now required of boards of health, it shall be the duty of each district board of health to study and record the prevalence of disease within its district and provide for the prompt diagnosis and control of communicable diseases. The district board of health may also provide for the medical and dental supervision of school children, for the free treatment of cases of venereal diseases, for the inspection of schools. * * *”

Section 1261-19, General Code, provides:

“Within thirty days after the appointment of the members of the district board of health in a general health district, they shall organize by selecting one of the members as president and another member as president pro tempore. The district board of health shall appoint a district health commissioner upon such terms and for such period of time, not exceeding two years as may be prescribed by the district board. Said appointee shall be a licensed physician and shall be secretary of the board and shall devote such time to the duties of his office as may be fixed by contract with the district board of health. The district health commissioner shall be the executive officer of the district board of health and shall carry out all orders of the district board of health and of the state department of health. * * *”

It is my opinion that in a case where the board of education does not employ a physician but delegates its duties and powers to the board of health, the mandatory duty imposed upon boards of health by virtue of Sections 7692, 7721-2 and 1261-2 *supra*, to conduct health examinations of all school children in the district and report the findings of such examinations includes any and all examinations that the board of education has authority to have made, had it employed a physician or had it not delegated such duties and powers.

It is obvious that from the above noted provisions of Section 1261-19, *supra*, the district health commissioner is the “executive officer” of the

district board of health. As such officer he is charged with seeing that all duties imposed upon the district board of health are performed. It follows from the fact that the board of health assumes the duties of the board of education in making examinations of all school children that the district health commissioner in like manner assumes the duties of a school physician as if said board of education had employed one.

I am therefore of the opinion that the examination provided for in Section 7766-1, General Code, is such an examination that the superintendent can refer to the school physician to make, if said board of education has employed a school physician; and that where the board of education has not employed a school physician or has delegated its duties and powers to the board of health, the superintendent can designate the district health commissioner to make such an examination. The statute makes it compulsory that the district health commissioner be a licensed physician. However, under Section 7766-1, *supra*, the health commissioner can designate another physician to make such examination.

The statute limits the issuance of an "age and schooling certificate" by "superintendents of schools." It is advisable to interpret what superintendents are included in this term.

Section 4679, General Code, provides:

"The school districts of the state shall be styled, respectively, city school districts, exempted village school districts, village school districts, rural school districts and county school districts."

Section 7763-3, General Code, provides:

"The term 'superintendent of schools' as used in this chapter, shall be interpreted to mean, in the respective classes of school districts, the city, exempted village or county superintendent of schools, or person designated by such superintendent of schools; provided that if at any time there is no such superintendent in a given district the president of the board of education shall perform these duties."

These two statutes plainly show that an "age and schooling certificate" can be issued only by a superintendent of a city school, superintendent of an exempted village school, county superintendent, or person designated by such superintendent, and in the absence of any such superintendent in a given district, by the president of the board of education.

There are excluded from this group the superintendent of a village school district and the rural school district. Although the law does not provide for superintendents of village and rural school districts it frequently occurs that district boards of education appoint teachers and permit them to act in a supervisory capacity and use the title "superintendent". The following authorities clearly show that they do not have general powers as school superintendents and therefore could not possibly issue an "age and schooling certificate."

In the case of *County Board of Education of Athens County vs. Bert M. Thompson*, 25 O.N.P. (N.S.) 431, it is said at page 444:

"In order that there may be no conflict of authority between the county school superintendent and his assistants on the one part, and the village and rural district superintendents on the other, the Legislature has limited the operations of such village and rural district superintendents. *These latter shall not have general powers as school superintendents, but they shall serve only under proper rules and regulations. These rules and regulations must be provided by the boards of education of such village and rural districts for school superintendents for their respective schools.*" (Italics ours.)

In a former opinion of this office, Opinions of the Attorney General for 1932, Volume II, page 830, it was held:

"Boards of education, other than city and exempted village boards are without authority to employ superintendents with power to exercise independent supervision over the schools of their respective districts, since the General Assembly has provided for county supervision of schools by a county superintendent and such assistant county superintendents as may be elected by the county board of education."

In the body of the opinion it is said, referring to the case of *Lee vs. Brewster Village School District*, 29 O.N.P. (N.S.), 134:

"The court, in the above case, held that a rural board of education may employ a local 'supervisor'. If they choose to call him a 'superintendent' that does not make him one, * * * The fact that they call him a 'superintendent' does not make his employment illegal, although in reality he is not a superintendent."

It is my opinion that in the case of an application being made for an "age and schooling certificate" in a village or rural school district the same should be issued by the county superintendent. Therefore, in answer to your first question it is my opinion that, a superintendent of schools may designate the school physician to make such an examination for an "age and schooling certificate", as provided for in Section 7766-1, General Code, if the board of education has employed a school physician, but if the board of education has not employed a school physician or has delegated its powers and duties to the board of health, the superintendent can designate the district health commissioner to make such an examination. The term "superintendent of schools" as used in Section 7766, General Code, is limited to the city, exempted village or county superintendent of schools or a person designated by such superintendent, and if at any time there is no such superintendent in a given district, to the president of the board of education.

Your second question is as follows:

"If so, by what method and under what section of the Code is such designation or appointment made?"

The answer to your first question states that a county board of education cannot designate the district health commissioner for such physical examinations as are required in issuing "age and schooling certificates." Therefore, your second question requires no answer. However, the answer to your first question states that the superintendent of schools is the proper authority for issuing such certificates and discusses therein who the superintendent may designate to make such examinations and the procedure to be followed in making such designation.

The answer to your third question is, that the county board of health or its health commissioner has the right to refuse to act in such capacity as the county board of education has no authority to designate the county health commissioner to make such physical examination as was explained in the answer to your first question. However, let us assume that the proper authority, the county superintendent designated the district health commissioner to make the physical examination for an "age and schooling certificate" as required by Section 7766-1, General Code, and that the board of education of the school attended by the pupil who was applying for this certificate had not appointed a school physician or had delegated its "duties and powers" as provided for in Section 7692, General Code.

It is my opinion, on these assumed facts, that the district health commissioner cannot refuse to either make the examination personally,

or designate a physician to make it. I arrive at this conclusion by the same reasoning stated hereinabove in the answer to your first question; that, if a board of education does not appoint a physician or delegate its duties and powers to the board of health it becomes the mandatory duty of the board of health to conduct health examinations of all school children, that this includes any and all examinations that the board of education has authority to make had it appointed a physician and retained its duties and powers; that the examination required for the issuance of an "age and schooling certificate" is such that the superintendent can designate or refer to the school physician; that therefore, the board of health having either assumed or become charged with the "duties and powers" of the board of education, the superintendent can designate the district health commissioner to make this examination, and that the district health commissioner cannot refuse to act either by making the examination personally, or designating a physician to make the same. By virtue of the operation of Sections 7692, 7692-1 and 7721-2, General Code, the board of health automatically assumes the duties and powers of the board of education and the district health commissioner the duties of the school physician.

Your fourth question is: "Could such county health commissioner, if appointed, legally charge and collect a fee from such county school board for such services?" In answer to this question I shall assume that the county superintendent appointed the county health commissioner to make the examination. In this connection, I do not think it necessary to further discuss the fact that if the board of education does not appoint a physician, or delegates its duties and powers to the board of health, it becomes the mandatory duty of the board of health to conduct health examinations of school children and that the examination provided for in Section 7766-1, supra, is included among the examinations that the board of health must make through its district health commissioner or a physician designated by him. It must be observed that the duty of making this examination by the district health commissioner or designating a physician to make it, creates no new office, but simply attaches another duty which the district health commissioner must perform in addition to the duties imposed on him and which he, as "executive officer" of the board of health is responsible in seeing that same are performed.

In *State vs. Council of Massillon*, 2 O.C.C. (N.S.), 167, the court, in discussing the district health commissioner, said:

"He is the servant of the board of health, that makes the appointment. He is under their absolute control and direction;

and in addition to that, they fix his salary. His salary is at the will of the board of health."

According to this decision, the district health commissioner in the performance of his duties is subject to the absolute control of the board of health. Any duties he may perform are the duties of his board, and his compensation for the same is his salary from the board of health. It must be further observed that when the board of education delegates its duties that it is no longer charged with the performance of the same. Therefore, it is reasonable to say that it cannot pay for the performance of any such duty. The board of health assuming this duty, it becomes part of its work. There can be no separation. This examination becomes the work of the district health commissioner. He receives a salary for his work. To permit him to say that this examination or any other certain act or work he performs is not included in the work for which he is paid would result in his receiving payment twice for this examination or any other certain work which he may select, and say is not part of his duties.

There is no statute that expressly provides that if the district health commissioner is designated to make such examination as provided for in Section 7766-1, General Code, he can collect extra compensation. The law is clearly established that in order for a public officer to charge and collect additional compensation or fees the statute must expressly provide for the same. The following authorities substantiate this contention. In 32 Ohio Jurisprudence, Section 152, page 1011, it is stated:

"It is well settled in Ohio that a public officer is not entitled to receive pay for services out of the public treasury unless there is some statute authorizing the same. In other words, compensation is not allowed by implication. Services performed for the public where no provision is made by statute for payment, are regarded as a mere gratuity or as being compensated by the fees, privileges and emoluments accruing to such officer in matters pertaining to his office. The fact that a duty is imposed upon a public officer will not be enough to charge the public with an obligation to pay for its performance, for the legislature may deem the duties imposed to be fully compensated by the privilege and other emoluments belonging to the office or by fees to be charged and collected for services connected with such duty or services and hence, provides no direct compensation therefor to be paid out of the public treasury." In the same volume, at page 283, it is stated:

"Fees are not allowed upon an implication and public services required of or rendered by such an officer within the scope of his official duty, or germane and incident thereto, for which the law gives no specific compensation, must be considered as gratuitous, or as compensated by his salary. * * *

In *State vs. Lewis*, 8 O.N.P., 84, it is stated:

"There is no doubt that an officer who receives a stated salary cannot recover further compensation for extra duties, germane to his office imposed upon him by the legislature, or even for incidental or collateral services which properly belong to, or form a part of his main office."

In *Rogers, a Taxpayer, vs. City of Cincinnati*, 6 O. App., 218, the court said:

"A public officer cannot receive any additional compensation by reason of the fact that additional duties are imposed on him or assumed by him, unless the legislature has expressly provided that such additional compensation may be paid."

The only section of the Code that provides for the board of education to pay compensation to employes of the board of health, is Section 7693, General Code, which reads as follows:

"The board of education of any school district, may provide and pay compensation to the employes of the board of health in addition to that provided by the city, township or other municipality."

The salary of the district health commissioner is paid in the following manner: One-half from the "district health fund" on warrant of the county auditor; one-half by the auditor of state drawing a voucher on the treasurer of state, payable out of the general fund.

Section 4677, General Code, provides that the word "municipality" shall mean a municipal corporation. A reading of said Section 7693, General Code, shows that it applies only in the case of an employe of the board of health receiving his salary from the city, township or any municipal corporation. The salary of the district health commissioner is not paid by the "city, township or other municipality."

A number of authorities in Ohio demand a strict construction of a statute similar to Section 7693, which provides for the payment of additional compensation. Your own county furnishes a much cited case.

State of Ohio, for the use of Carroll County, by D. O. Rutan, et al., vs. George S. Tinlin, et al., 11 O.C.C. (N.S.), 305:

“Public officers are not entitled to compensation in addition to their salary for services required of them by statute, unless the statute provides therefor in express terms.”

In *State ex rel. Enos vs. Stone, et al.*, 92 O.S., 63, at page 66, it is said:

“The general assembly has in certain cases provided for additional salary beyond the amount allowed by the general salary act, but the language of the section providing for such allowance is so clear and unmistakable as to the intention of the General Assembly that there can be no doubt about it.”

In 32 Ohio Jurisprudence, page 1013, it is stated:

“The statutes relating to compensation are strictly construed.”

In 17 O.N.P. (N.S.), 373, it is held:

“Salary statutes and laws for the compensation of public officials, and their deputies, or assistants, must be strictly construed against the claimant.”

In Opinion No. 2466, found in Opinions of the Attorney General for 1928, Volume III, page 1967, it was held in answer to this question:

“May a county board, under the provisions of Section 7693, G. C., pay part of the compensation of a nurse employed by the board of health under the provisions of Section 1261-26, General Code?”

“A county board of education is not authorized to pay part of the compensation of a nurse employed by a board of health under the provisions of Section 1261-26, General Code.”

The then Attorney General arrived at this conclusion in the following manner:

“* * * the powers of the county board consist * * * of exercising supervisory control over territorial boundaries of

rural and village districts * * * and the selection of a county superintendent of schools and assistant county superintendents, through whom the county board exercises general supervisory control over academic functions * * * and the teaching force
* * *

that

“* * * county board of education does not * * * perform the details incident to the administrative and fiscal management of the district schools * * *

that

“* * * county school districts and county boards of education are not of the same class as local districts and boards. The functions of the two classes of districts are not similar. The Legislature having provided for medical examination and inspection of the schools, by granting to local boards the power to provide for such examination and inspection, the statutes should not, in my opinion, be construed so as to include county boards of education within the term ‘each and every board of education in this state’, as the same is used in Section 7692, General Code, and county districts should not be included within the term ‘board of education of any school district’, as the same is used in Section 7693, General Code.

I agree with the reasoning contained in this opinion, which construed Section 7693, General Code, as not including a county board of education as a “board of education of any school district.” I am therefore of the opinion that if a district health commissioner is designated by a county superintendent of schools to make an examination of a pupil for an “age and schooling certificate” as provided for in Section 7766-1, General Code, said district commissioner cannot charge and collect a fee from the county board of health for such examination.

In answer to your fifth question, as to the authority of a county board of education to increase or decrease the salary of the county attendance or truant officer during his term of office, Section 7766-1, General Code, is the only provision in the law that relates to the employment of a county attendance officer. This section provides as follows:

“Every county board of education shall employ a county attendance officer, and may employ or appoint such assistants

as the board may deem advisable. The compensation and necessary traveling expenses of such attendance officer and assistants shall be paid out of the county board of education fund. With the consent and approval of the judge of the juvenile court, a probation officer of the court may be designated as the county attendance officer or as an assistant. The compensation of the probation officers of the juvenile court so designated shall be fixed and paid in the same manner as salaries of other probation officers of the juvenile court; their traveling expenses as attendance officers which would not be incurred as probation officers shall be paid out of the county board of education fund. In addition to the compensation herein provided the county board of education may pay such additional compensation as it may deem advisable, to any probation officer designated as attendance officer and such additional amount shall be paid from the county board of education fund. The county attendance officer and assistants shall work under the direction of the county superintendent of schools. The authority of such attendance officer and assistants shall extend to all the village and rural school districts which form the county school district. But this section shall not be interpreted to confine their authority to investigate employment to that within the county school district."

You will observe that the above section also makes provision for the designation of the probation officer of the juvenile court as "the county attendance officer." I am assuming that your inquiry is in regard to a county attendance officer who has been employed by the county board of education and I shall answer your question on that assumption. However, if the probation officer of the juvenile court has been designated "attendance officer," I refer you to a former opinion of this office, Opinions of the Attorney General for 1921, Volume II, page 961, which held:

"The compensation of a probation officer may be increased or decreased at any time by the appointing judge, not to exceed the amounts appearing in Section 1662, General Code, and such compensation is paid from the county treasury."

It is my opinion that this is the law in the case of the probation officer acting as attendance officer.

The prohibition against changing a salary during "a term of office" is contained in Article II, Section 20, Constitution of Ohio, which provides:

"The general assembly, in cases not provided for in the constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished."

The question arises, is a county attendance officer such a public or county officer as is contemplated by the above provision of the Constitution?

There is no rule to determine whether a certain position is or is not a "public office." Probably the best statement containing the requisite elements of a "public office" is found in the case of *State, ex rel. Attorney General vs. Jennings, et al.*, 57 Ohio State, 415, which provides:

"(a) The incumbent must exercise certain independent public duties, a part of the sovereignty of the state.

(b) Such exercise by the incumbent must be in virtue of his election or appointment to the office.

(c) In the exercise of the duties so imposed, he cannot be subject to the direction and control of a superior officer."

State vs. John H. Gibson, 1 O. N. P. (N. S.) 565, sets forth the following test:

"In order to constitute such person an officer within the constitution, he must perform some sovereign functions continuously and not transiently or incidentally. His position must have the attributes of tender and duration peculiar to public office, and should be not merely an employment for a definite and particular purpose."

State, ex rel. J. A. B. Sroft, a Taxpayer, vs. William Vance, et al., 18 O. N. P. (N. S.), 198, at page 202, sets up this test:

"Are his duties prescribed by law without any direction or control over them by the appointing power, and to be exercised in a governmental function in the interest of the public as

contradistinguished from those created by contract and subject to control and direction of an employer?"

The duties of an attendance officer are set forth in Sections 7769-2 and 7770, General Code, which read as follows:

Sec. 7769-2. "An attendance officer or assistant may investigate any case of non-attendance at school or part-time school of a child under eighteen years of age or supposed to be under eighteen years of age resident in the district for which he is employed as attendance officer or assistant or found in the district or enrolled in any school within the district and of any child above eighteen years of age if enrolled in any school within the district, and may take such action in accordance with law as the superintendent of schools may direct or as he himself may deem proper in the absence of specific directions."

Sec. 7770. "The attendance officer and assistants shall be vested with police powers and the authority to serve warrants, and shall have authority to enter workshops, factories, stores, and all other places where children are employed and do whatever may be necessary in the way of investigation or otherwise to enforce the laws relating to compulsory education and the employment of minors. The attendance officer or assistant may also take into custody any youth of compulsory school age not legally employed on an age and schooling certificate who is not attending school and shall conduct such youth to the school he has been attending or should rightfully attend."

A consideration of Sections 7769-1, 7769-2 and 7770, General Code, and applying what the hereinabove mentioned cases have held as tests in determining what is and what is not a public officer discloses that a county attendance officer does not exercise certain independent public duties but that the duties prescribed in Section 7770, *supra*, are merely ministerial; that the statute, Section 7769-1, provides that the county attendance officer "shall work under the direction of the county superintendent of schools"; that the position of county attendance officer has no attributes of "tenure and duration peculiar to public office"; that he is not required to give a bond or take an oath of office; that no term or fixed tenure of employment or salary is prescribed by statute; that Section 7769-1, General Code, provides that the county board of education "shall employ a county attendance officer"; that his appointment is left entirely to the will and pleasure of the county board of education, as are matters of terms and salary; that his position is merely that of an employe; that it appears from the statutes that the

only intention of the legislature was to give the county board of education the right to employ some person to act as county attendance officer; that the county attendance officer's only authority to act is by reason of his contract of employment, oral or written, which he entered into with the county board of education, and which contract either provided for a definite term or he is to serve during the will of the county board of education; and that the relationship between the county attendance officer and the county board of education is contractual and in no sense an office, but merely an employment.

I would call your attention to the case of *County Board of Education et al vs. State*, 35 O. App., 29, which dealt with the construction of Section 4744-1, General Code. That case provided:

"The county board * * may employ an efficient stenographer * *."

This language is almost identical with that contained in Section 7769-1, General Code:

"Every county board of education shall employ * *."

In the matter of employing a stenographer, the court said:

"Neither the compensation, length of service, hours of service, nor duties of such clerk or stenographer are fixed by statute. Such clerk or stenographer is, consequently, an employee by contract only, has, as such employee, only such rights as are fixed by the contract of employment."

The law is well established that the salary of an employee may be increased or decreased during his term.

In a former opinion of this office, *Opinions of the Attorney General for 1925, Volume I, page 572*, it was held:

"The position of superintendent of a county children's home not being a public office but that of an employee, his salary may be increased or decreased at the discretion of the trustees."

In *Board of Education vs. Juergens, same vs. Featherstone*, 2 Ohio Law Abstract, 58, it was held:

"The duties of defendants were of a clerical and ministerial character. Defendants were employees of the board

and not in any sense public officers. Their compensation might therefore be altered at will."

I am of the opinion that a county attendance officer is not an officer, as contemplated in Article II, Section 20, of the Constitution of Ohio, and that the county board of education may increase or decrease his salary during his term of employment.

In answer to your questions, therefore, I am of the opinion that:

1. A county board of education cannot designate the district health commissioner to make such a physical examination for an "age and schooling certificate" as is provided for in Section 7766-1, General Code.

2. If a board of education has employed a school physician as provided for in Section 7692, General Code, the superintendent of schools can designate the school physician to make such an examination for an "age and schooling certificate" as is provided for in Section 7766-1, General Code. If the board of education has not employed a school physician as provided for in Section 7692, General Code, or the board of education has delegated its "powers and duties" to the board of health, the superintendent of schools can designate the health commissioner to make such an examination. The term "superintendent of schools" as used in Section 7766, General Code, is limited to the city superintendent of schools, exempted village superintendent of schools, county superintendent of schools, a person designated by such superintendent, and if, at any time there is no such superintendent the president of the board of education.

3. If the board of education has not employed a school physician as provided for in Section 7692, General Code, or the board of education has delegated its "powers and duties" to the board of health, the health commissioner is required to either make the examination as provided for in Section 7766-1, General Code, personally, or designate another physician to make it, upon said health commissioner being designated by the superintendent of schools to make said examination.

- (4) If the board of education has not employed a school physician as provided for in Section 7692, General Code, or the board of education has delegated its "powers and duties" to the board of health and the superintendent of schools has designated the health commissioner to make an examination as provided for in Section 7766-1, General Code, the health commissioner cannot collect a fee or any additional compensation from the board of education for making such an examination.

- (5) A county attendance officer is not an officer as contemplated in Article II, Section 20, of the Constitution of Ohio, and therefore,

the county board of education may increase or decrease his salary during his term of employment.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

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APPROVAL—CONTRACT FOR ELECTRICAL WORK FOR THE
ADDITION TO THE AUDITORIUM AT THE BOWLING
GREEN STATE UNIVERSITY—E. C. REITZ.

COLUMBUS, OHIO, March 1, 1937

HON. CARL G. WAHL, *Director, Department of Public Works, Columbus, Ohio.*

DEAR SIR: You have submitted for my approval a contract between the State of Ohio, acting by Carl G. Wahl, Superintendent of Public Works, and E. C. Reitz Company for the electrical contract for the addition to the Auditorium at Bowling Green State University, which contract calls for the expenditure of ten thousand seven hundred dollars (\$10,700.00).

Attached to each copy of the contract is a certificate of the President of Bowling Green State University that such funds are available for the payment of the University's portion of the contract, and the remainder of the fund to be furnished from P.W.A. Docket No. OH-1388-D.

There is also submitted a certified copy of the Grant Agreement Acceptance by the University of the funds under the above mentioned P.W.A. Docket. Other necessary papers and documents are submitted in this connection. The division of contract, the notice to bidders, the proof of publication, the form of proposal with the proposal bond executed by the Aetna Casualty and Surety Company, its power of attorney for its signers, its certificate of compliance with the insurance laws authorizing said surety company to transact the business of fidelity and surety insurance in Ohio, the certificate of compliance with the workmen's compensation law of Ohio, the tabulation of bids, recommendation of acceptance of the contract by the State Architect and Engineer, the direction of the Superintendent of Public Works to the State Architect and Engineer to enter into this contract, the