

OPINION NO. 1066

Syllabus:

In the absence of fraud or a gross abuse of discretion, it is within the power of the board of education of a school district to determine the overall cost of a building program on which architect's percentage fees are based.

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To: Roger W. Tracy, Auditor of State, Columbus, Ohio
By: William B. Saxbe, Attorney General, May 21, 1964

You have requested my formal opinion on whether architect's fees based on the cost of a school building project may be predicated upon an overall cost which includes such items as pianos, musical instruments, folding chairs, movable desks and tables, movable filing cabinets, draperies, loose kitchen equipment, etc., in addition to and not a physical part of the building being constructed.

As you pointed out in your request, a board of education is a body politic and corporate with the authority of contracting and being contracted with (Section 3313.17, Revised Code), and a board of education of any school district, except a county school district, may build, enlarge, repair and furnish the necessary school houses and provide the necessary apparatus and make all other necessary provisions for the schools under its control. (Section 3313.37, Revised Code).

Further, although there is no specific provision in the Code authorizing the retaining of an architect, the authority to "build, enlarge, repair and furnish the necessary school houses," particularly when read in conjunction with the procedure for bidding in Section 3313.46, Revised Code, necessarily implies such authority; without an architect's plans and specifications there would be no realistic basis for bids.

It is well established that in the absence of fraud or a gross abuse of discretion the courts cannot control the discretionary powers vested in a board of education by statute. Board of Education v. Minor, 23 Ohio St., 211; City of Cleveland v. Public Library Board, 94 Ohio St., 311. Or, as it is phrased in the headnote of Lurie v. Board of Education, 12 O.O., 358, "The award of a contract is a matter exclusively within the discretion of a municipal board of education, and the court will not substitute its judgment for that of the board unless the plaintiff proves an abuse of discretion by a preponderance of the evidence."

It is, of course, axiomatic that if the courts refuse to so interfere, it would be at least unbecoming of other entities of the government to attempt to adopt a different standard. Both the court decisions which have dealt with architectural services, and definitions developed by the State Board of Examiners of Architects of the State of Ohio, indicates that such services normally involve expert knowledge and skill but this of itself does not dispose of our present problem.

There being no statutory formula for arriving at a determination of what is a reasonable fee, it becomes necessary to resort to a determination of whether over the years customs have become established which fill this statutory void. I find this to be the case.

Several methods of establishing the architect's compensation or fees are commonly used:

1. Percentage of the cost of work by which the fee is an agreed percentage of the total construction costs. When total construction costs cannot be determined, the fee is computed on a bona fide bid, or on a reasonable cost estimated at current market costs. In connection with this

method, the American Institute of Architects with which the Architects Society of Ohio is affiliated has for some time published a listing of recommended fees consisting of six schedules with base rates ranging from 6% to 10%. Schedule B, which deals with schools provides:

| <u>Building Cost</u> | <u>Fee Rates</u> |
|----------------------|------------------|
| \$ 100,000..... | 6.0% |
| 200,000..... | 6.0% |
| 300,000..... | 6.0% |
| 500,000..... | 6.0% |
| 1,000,000..... | 6.0% |
| 2,000,000..... | 6.0% |
| 5,000,000..... | 5.0% |

For alterations to above type add 50% to fee shown above.

2. Production costs plus a fee. Under this method of compensation the architect is reimbursed the total of his direct expenses plus a proportionate amount of overhead, and in addition he is paid either:

- a. An agreed percentage of these total production costs, or
- b. An agreed fixed amount or fee when a definitely established program of work permits a reasonable accurate estimate of the extent and duration of the architect's services.

3. Lump Sum. On the lump sum basis, which is used only for a definitely established program of work, the fee is an agreed lump sum and is not subject to change because of any variations between the actual cost of construction and the estimated cost.

4. Per-Diem Rate. When this method of compensation is used, the rate will vary according to the individual case and the architect is also reimbursed the cost of travel and other out-of-pocket expenses incurred in the performance of his services. Time consumed in travel is properly charged at the per-diem rate and consultation attendance at court or expert testimony for any fraction of a day is considered a full day.

For special services where an architect is not otherwise retained, consultation fees for professional advice are charged in proportion to the importance of the question involved and the services rendered.

Schedule of Proper Minimum Fees.

Compensation for architectural services should be related to the architect's cost of

furnishing these services and properly varies with the magnitude and complexity of a project. As the architect's cost seldom varies in direct proportion to the construction cost a sliding scale of minimum fee rates based upon actual experience proves the most equitable. Experience also indicates that various projects can generally be classified by types into groups to which different fee rates are applicable.

The schedules of fees, expressed as percentages of the total cost of the work to the client, are for complete "Normal Services" including the structural, mechanical, and electrical engineering customarily required. These fee rates are recommended as the minimum charges adequate for the rendering of proper service. Fees higher than the minimum scheduled are in order and are proper in all cases where site conditions or requirements of the program render the building problem more complex than the average of its kind, resulting in an increase in the architect's costs; or where the reputation and ability of the architect command a larger professional fee; or where the building project is relatively small.

For work let on additional separate contracts the fee should be increased by 5% of such contracts.

I have further determined that whether furnishings are included in the total cost as a basis for determining fees usually depends upon the individual circumstances. In the past boards of education have, on occasion, found that they could expedite occupancy and even save money by having an architect supervise the purchasing of equipment as well as supervise the actual building. But it cannot be said as a matter of law that such purchases should or should not be included in the total cost.

From the above it becomes evident that good judgment and discretion on the part of a board of education are the key elements in the negotiation of a contract.

It is therefore my opinion and you are advised that although architectural services normally involve expert knowledge and skill, it is, in the absence of fraud or a gross abuse of discretion, within the power of the board of education of a school district to determine the overall cost of a building program on which architect's percentage fees are based.