

2355.

BOARD OF EDUCATION—TRANSPORTATION OF PUPILS—DURATION
IN DISCRETION OF BOARD OF EDUCATION—ATTACHING OF
CERTIFICATE OF FISCAL OFFICER SHOWING EXISTENCE OF
APPROPRIATE FUND NECESSARY.

SYLLABUS:

1. Boards of education may in their discretion contract for the transportation of pupils for an entire school year or for a longer period if they deem it advisable, provided the general provisions of law with reference to the making of contracts by boards of education are complied with.

2. A contract for the transportation of pupils, may be made by a board of education a part of which contract is to be performed in an ensuing fiscal year to that in which the contract is made. Said contract should have attached thereto a certificate of the fiscal officer of the district, that the amount of money required to meet that portion of the contract which is to be performed during the fiscal year in which the contract is made, has been lawfully appropriated for such purpose, and is in the treasury, or in process of collection, to the credit of an appropriate fund, free from any previous encumbrances.

COLUMBUS, OHIO, July 16, 1928.

HON. JOHN W. LOREE, *Prosecuting Attorney, Celina, Ohio.*

DEAR SIR:—I am in receipt of your request for my opinion which reads as follows:

“The Board of Education of Center Township Rural Schools have presented to me a question as to whether or not it can lawfully contract with a bus driver to haul their school youth to school for the period of five years. They desire an opinion from your Department thereon.

The Board of Education is without bus equipment of its own, and desires to let a contract for the hauling of their youth to school at Neptune, Ohio, in said district for a period longer than one year. The Board informs me that it cannot get an advantageous contract for one year only, because no one will purchase and equip a bus in which to haul the youth, with only one year's certain service, for fear he may not have his contract renewed and then have to dispose of his equipment for much less than its cost.

The Board thinks the term Contract as used in Section 5625-33, G. C., shall not be applicable ‘to current payrolls of regular employees and officers.’ That when the bus drivers are employed they will be put on the pay-rolls and that the following language in the section authorizes such contract for a period longer than one year.

‘The Term Contract as used in this Section shall not be construed as exclusive of current pay-rolls for regular employees and officers.’ ”

Without quoting the several provisions of law empowering boards of education to furnish transportation for pupils who attend the public schools, for our present purpose it is sufficient to say that boards of education are authorized by statute to furnish such transportation and, under certain circumstances, are required to do so.

There are no specific directions to, or limitations upon, boards of education as to how this transportation shall be furnished. The means of furnishing transportation is left to the discretion of the board, and in the absence of abuse of this discretion, the

board may furnish the transportation in any way it sees fit, providing the general provisions of law with reference to making contracts and expending public funds are complied with.

In Opinion No. 2271 rendered under date of June 25, 1928, and addressed to the Prosecuting Attorney of Allen County, it was held:

“A board of education may use its discretion as to whether or not it will provide necessary transportation for pupils in the district by letting contracts therefor or by purchasing vehicles and hiring drivers.”

In making contracts involving the expenditure of public funds, boards of education must comply with the terms of Section 5625-33, General Code, as enacted by the 87th General Assembly (112 O. L. 406), which reads in part as follows:

“No subdivision or taxing unit shall:

* * * * *

(d) Make any contract or give any order involving the expenditure of money unless there is attached thereto a certificate of the fiscal officer of the subdivision that the amount required to meet the same (or in the case of a continuing contract to be performed in whole, or in part, in an ensuing fiscal year, the amount required to meet the same in the fiscal year in which the contract is made), has been lawfully appropriated for such purpose and is in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances. * * *

The term ‘contract’ as used in this section, shall be construed as exclusive of current pay-rolls of regular employes and officers.” * * *

If a board determines to purchase vehicles and hire drivers, such drivers would clearly become “regular employes” as the term is used in Section 5625-33, supra, and payments to these drivers for their services would be a part of the current pay-roll and thus within the exception to the requirement of an auditor’s certificate to the effect that the money had been lawfully appropriated for such purpose and is in the treasury, or in process of collection, to the credit of an appropriate fund, free from any previous encumbrances. If, however, the board does not furnish the equipment and employ drivers but contracts with someone to furnish the equipment and drive the same, such person does not, in my opinion, become a “regular employe” but is a contractor, and the agreement with him becomes a contract different than that with regular employes, and payments under this contract could not be classed as current pay-rolls, although payments thereunder might be made at regular intervals corresponding to the times when current pay-rolls are made up. Therefore, such contracts would not come within the exception described as current pay-rolls and would require the auditor’s certificate in order to make them valid.

It will be noted, however, that the statute provides that in case of a continuing contract, to be performed in whole or in part in an ensuing fiscal year, the certificate of the auditor need only show that the amount required to meet the same in the fiscal year in which the contract is made, has been lawfully appropriated for such purpose and is in the treasury, or in process of collection, to the credit of an appropriate fund, free from any previous encumbrances. Therefore, if a contract were made for transportation for a longer period than during the current fiscal year in which the contract was made, it would be valid so far as the auditor’s certificate is concerned, if there were attached thereto a certificate of the auditor or fiscal officer that sufficient moneys were in the treasury, or in process of collection to the credit of an appropriate fund, free

from any previous encumbrances, to meet that part of the contract which was to be performed in the fiscal year in which the contract was made.

Provision is made by Section 5625-36, General Code, to the effect that when contracts are made which run beyond the termination of the fiscal year in which they are made, the amount of the obligation remaining unfulfilled at the end of a fiscal year, and which will become payable during the next fiscal year, shall be included in the annual appropriation measure for such next year as a fixed charge. Said Section 5625-36, General Code, reads in part as follows:

"In the case of contracts or leases running beyond the termination of the fiscal year in which they are made, the fiscal officer shall make a certification for the amount required to meet the obligation of such contract or lease maturing in such year. In all such contracts or leases the amount of the obligation remaining unfulfilled at the end of a fiscal year, and which will become payable during the next fiscal year, shall be included in the annual appropriation measure for such next year as a fixed charge. * * *"

A very similar question to yours was considered in opinion No. 835, rendered under date of August 6, 1927, and addressed to the Hon. J. L. Clifton, Director of Education. In that opinion the several statutory provisions with reference to the making of contracts for the transportation of pupils was discussed, and the absence of any statutory limitations as to the length of time which these contracts might be made to run, whereas certain other public contracts were limited in this respect, was pointed out: It was held in said opinion that:

"Boards of education may in their discretion contract for the transportation of pupils for an entire school year or for a longer period if they deem it advisable, provided the general provisions of law with reference to the making of contracts by boards of education are complied with."

In the course of the opinion, after discussing the provision of Section 5625-33, General Code, and pointing out their pertinence to contracts entered into by boards of education, it was said:

"It is apparent that unless there be some other limitation on the power of boards of education to contract for the transportation of pupils for a longer period than the remaining portion of the fiscal year in which the contract is made, such contracts may be made so far as the budget law is concerned.

An examination of several of the various statutes relating to the making of certain contracts to be performed in whole or in part in the fiscal years following the year in which the contract is made, such for instance as the section authorizing councils of municipal corporations to provide light, water and certain public necessities, (Section 3809, General Code), and the various sections authorizing boards of education to employ superintendents and teachers, Sections 4739, 4744, 7702 and 7705, General Code, discloses that in each one of these cases the term for which the contract is made is limited. That is, Section 3809, supra, provides that the contracts therein provided for may be entered into 'for a period not exceeding ten years', while in the other sections enumerated such language is used as 'for a term of not to exceed three years' or 'not longer than five school years', etc.

There is no express limitation as to time or the authority of boards of education to contract for the transportation of pupils."

Manifestly, however, the absence of any "express limitation" on the time a board may contract for the supplying of service does not serve to give to such board unlimited power in this respect, irrespective of public welfare, reasonableness or good faith.

It has been held that contracts made by public boards for a period of time extending beyond the term of the officials making it, unless made in good faith, in the interests of the public and for a time reasonable under the circumstances, are against public policy and void. *County Commissioners of Franklin County vs. Ranck*, 9 O. C. C. 301.

Professor Page in his work on the Law of Contracts, Section 1901, says with reference to this question:

"Unless specifically restrained by statute a public corporation may make a contract which by its terms is to last for a long period of time. Contracts for water and lighting are the common examples of contracts of this sort. The time must, however, be reasonable.

* * * * *

The power of the officers of a public corporation to enter into a contract which is to be performed after the expiration of the term of office of the officers by whom the contract was made, depends in part upon the nature of the contract. Public officers can not make a contract which relates to the exercise of administrative, governmental or legislative functions which will bind their successors unless the power so to do is granted expressly. On the other hand, contracts which are in exercise of the public powers of a public corporation are governed by the same rules as those which govern the contracts of natural persons; and such contracts bind the successors in office of the officers by whom they were made. A public officer or a board can not ordinarily appoint subordinates for terms beyond the terms of the board which appointed them. However, a county board may appoint a morgue-keeper for a period of a year, although such appointment is made just before the term of office of such board expires."

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Contracts which are entered into for the purpose of supplying the public with water, for furnishing lighting, and the like, are regarded as an exercise of the business power of the public corporation, and accordingly such contracts bind successive officers, but they must go into full effect during the term of the officers who enter into them. Under statutory authority to enter into a contract for public printing for a term of two years, a board may make such contract just before the expiration of its term of office, although such contract will last during almost the entire term of the successors of such board.

Unless in good faith, for a reasonable time, and for the public interest, a contract extending beyond the term of the officials making it, is void."

In support of the text the author cites the cases of the *City of Middleford vs. Yeats*, 72 Atl. 235; *Manley vs. Scott*, 108 Minn. 142, 29 L. R. A. N. S. 652; *Pulaski County vs. Shields*, 130 Ind. 6.

In view of the foregoing, it is my opinion that a board of education may lawfully contract for the transportation of pupils for an entire school year, or for a longer period, if it deems it advisable. Such contracts, if to be performed in whole or in part in an ensuing fiscal year to that in which they are made, should have attached thereto a certificate of the fiscal officer of the district that the amount of money required to meet that portion of the contract which is to be performed in the fiscal year in which the contract is made, has been appropriated and is in the treasury, or in process of collection, to the credit of an appropriate fund, free from any previous encumbrances.

Respectfully,

EDWARD C. TURNER,

Attorney General.