

163

EDUCATION—SURPLUS PROPERTY; FEDERAL—DISTRIBUTED TO SCHOOL DISTRICT, §3301.47 ET SEQ., R.C.—UNLAWFUL APPROPRIATION, ACTION TO RECLAIM—PROPER PARTIES TO SUCH ACTION—68 OAG 1959, p.—, MODIFIED AND FOLLOWED.

SYLLABUS:

Where surplus federal property has been distributed to a school district for its use, pursuant to the provision of Sections 3301.41 to 3301.47, inclusive, Revised Code, action for recovery of such property if it has been unlawfully dissipated, should be brought by and in the name of the board of education of such district; but such action should not be instituted by said board during the pendency of an action by the federal government, or the state board of education, acting for it, to recover such property under a provision for reversion for wrongful use, reserved to such federal government in the original conveyance of such property. Opinion No. 68, issued January 30, 1959, insofar as inconsistent with the above conclusion is modified. Except as modified, said Opinion No. 68 is re-affirmed and followed.

Columbus, Ohio, March 4, 1959

Hon. Geo. Cleveland Smythe, Prosecuting Attorney
Delaware County, Delaware, Ohio

Dear Sir:

I have before me your request for my opinion relative to matters covered by my former Opinion No. 68, addressed to you under date of January 30, 1959. I note that you differ in several respects as to my conclusions there expressed, and invite my attention to matters contained in Section 3301.42, *et seq.*, Revised Code, relating to the disposition of personal property belonging to the federal government.

In your original letter of inquiry you set out, as your first question, a factual situation together with a question as to your duties as prosecuting attorney, which I here repeat, reading as follows:

“Where federal personal property has been distributed to a local school district under Sections 3301.41 to 3301.47, R.C., and some of said personal property has been redistributed, without authority, to private citizens and board members for their private

use, what is the duty, if any, of the Prosecuting Attorney for the county in which said local school district is situated:

- (a) To investigate said matter?
- (b) To take action for purpose of recapturing said property?
- (c) To attempt collection on behalf of the local board for reimbursement to the Department of Education for charges levied in connection with said unauthorized transfers?"

Your second question read as follows:

"Is any criminal statute violated by such irregularities? If said irregularities occurred before the effective date of said Act, what is the situation?"

In reply to subdivision (a) of your first question, I advised you that it is your clear duty to investigate, and if you find a violation of the criminal laws, to prosecute the offenders. That seemed to me so obvious that I did not think it necessary to indulge in argument or cite authorities. In your later letter, I do not discover any question raised as to the soundness of that conclusion.

In connection with that feature of your problem, I called your attention to Section 2919.03, Revised Code, which reads as follows:

"No person, being elected or appointed to an office of public trust or profit, or an agent or employee of such officer or of a board shall *embezzle or convert to his own use*, or conceal with such intent, *anything of value that comes into his possession by virtue of such office or employment.*" (Emphasis added)

The conduct of the board members as described by you, to-wit, that federal surplus property distributed to the board had been "re-distributed without authority to board members for their private use" certainly constitutes a violation of Section 2919.03, *supra*. That property was "something of value," and it certainly came into the possession of the members of the board "by virtue of their office" and they did, according to your statement, "convert it to their own use."

You now say in your second letter that:

"Section 2919.03, R. C., does not apply for the reason that individual board members that got some of the property did not acquire it by virtue of such office."

I confess my inability to understand how you could have reached that conclusion; and it does not in the least shake my conviction that the conduct described in your original letter is a clear violation of the criminal statute above referred to.

In your second communication you call attention to the fact that provisions of Section 3301.42 and 3301.43, Revised Code, authorize and require the state board of education to make such investigation and surveys as are necessary to determine whether transferees are utilizing property distributed to them in conformance with the reservations and restrictions contained in any instrument of conveyance, and to make reports and recommendations to the federal government for the purpose of recapturing such property. The provision of Section 3301.43, Revised Code, is as follows:

“The department, following conveyance, shall conduct such surveys, make such investigations and such inspections as may be necessary to determine whether transferees are utilizing such property in conformance with the reservations and restrictions contained in any federal or state document *or federal instrument of conveyance* and shall make reports and recommendations to the federal government for the purpose of reconveying such property for use to eligible applicants or for the purpose of recapturing such property for the United States of America.” (Emphasis added)

I recognize the presence of those provisions in the statute, but my Opinion No. 68, *supra*, did not deal with them simply for the reason that your inquiry was directed to your duties as prosecuting attorney and legal representative of the board of education, and not to the duties of some other agency. I see nothing in the language of the statute authorizing the state board of education to conduct such investigation which is in denial or limitation of any right or duty of the prosecuting attorney, when he has reason to believe that actions of a fraudulent and criminal nature are taking place in a board of which he is the legal advisor.

In your present communication, referring to Section 3301.42, *et seq.*, Revised Code, you say:

“The statutes first cited above refer to this property as ‘federal personal property.’ Has it ever ceased having that status? Is it still ‘federal personal property’ in the hands of the unauthorized recipients? If it is, does not the sole right to recapture rest with the department of education as provided in Sections 3301.42 and 3301.43, R.C.?”

I cannot agree that property which has been distributed to a local board of education under the provisions of Sections 3301.42, *et seq.*, *supra*, is merely loaned, and remains solely the property of the United States government. It is true that there is found in said Section 3301.35, Revised Code, provisions which contemplate a loan of said property to a body politic or political subdivision. That section insofar as pertinent reads as follows:

“Federal personal property transferred to a body politic and corporate or a political subdivision or transferred for use *or redistribution* by a public office or a district or regional or similar authority, for the purpose of complying with the applicable provisions of the regulations of the governor promulgated by authority of section 5915.05 of the Revised Code, *may also be loaned* on a nonprofit basis, by assignment, to approved organized and supporting agencies and auxiliaries.” (Emphasis added)

Plainly the property here under consideration was not merely loaned to the school district. In other parts of the law, the words “conveyance” and “revert” and “reverter” are repeatedly used. A right of reversion contemplates an outright conveyance of property, with either a provision for its reversion to the grantor upon the happening of a certain event, or a provision for reversion upon the breach of a certain covenant. That the legal estate may be in the grantee of a conveyance, and at the same time a qualified fee remain in the grantor, is asserted and discussed in 10 Ohio Jurisprudence, 359, with cases cited.

The distribution of property to the board of education referred to in your original communication bears no evidence of being merely a loan to the district, and I have assumed that it was an outright conveyance, subject doubtless to a right on the part of the federal government or the state department of education as its representative, to reclaim the property in the event that it was used or disposed of in a manner contrary to the terms of the conveyance.

That does not, however, in my opinion, destroy the right of the board of education to take appropriate legal action to recover the property if, while in its lawful possession pursuant to conveyance from the federal government, such property was unlawfully dissipated.

This in my judgment would be true even if the state department of education has the right, as the federal government undoubtedly has, to take action for recovery of property conveyed under the statute in question where conditions have been broken.

I believe, however, that I should modify my former opinion No. 68, *supra*, in respect to legal proceedings for the recovery of the property which has been wrongfully dissipated while in the hands of the board of education, to the extent that such proceedings would require the cooperation of the board of education. As I understand the situation, the guilty members of the board are no longer in office, and the present board of education are entirely cooperative. Accordingly, any legal action for recovery of the property would be in their name and by their sanction.

It must be admitted that you could not individually, or as prosecutor, obtain a writ of replevin. Section 1919.01, Revised Code, requires as a basis for such action an affidavit of the plaintiff, his agent or attorney showing:

“(A) A description of the property claimed;

“(B) That the plaintiff is the owner, or has a special ownership or interest in such property, stating the facts in relation thereto, and that the plaintiff is entitled to the immediate possession of such property;”

It results from the above quoted provision that the plaintiff in such action must be the owner, or have a special ownership or interest in such property. That could only be the board of education.

The section just quoted throws further light on the question of the “ownership” of the property in question. Although, as has been suggested, the federal government may have a reversionary interest in this property, the board of education certainly has a “special ownership or interest” in the same, and the right of possession of the same.

I would make this statement by way of further modification, to-wit; if property has been distributed to a board of education pursuant to the provisions of Section 3301.42, *et seq.*, Revised Code, for its use, and such property has been unlawfully appropriated by members of the board of education, or otherwise disposed of in violation of the conditions under which it was received, and the state department of education or the federal government shall have begun proceedings for its restitution and recovery, such board of education and the prosecuting attorney as its legal representative should withhold action for recovery of such property pending the prosecution and determination of such prior proceedings.

Except for the above modification, I must adhere to my former opinion. Accordingly, it is my opinion and you are advised that where surplus

federal property has been distributed to a school district for its use, pursuant to the provision of Sections 3301.41 to 3301.47, inclusive, Revised Code, action for recovery of such property if it has been unlawfully dissipated, should be brought by and in the name of the board of education of such district; but such action should not be instituted by said board during the pendency of an action by the federal government, or the state board of education, acting for it, to recover such property under a provision for reversion for wrongful use, reserved to such federal government in the original conveyance of such property. Opinion No. 68, issued January 30, 1959, insofar as inconsistent with the above conclusion is modified. Except as modified, said Opinion No. 68 is re-affirmed and followed.

Respectfully,

MARK McELROY

Attorney General