

2493.

BOARD OF EDUCATION—MAY FIX COMPENSATION OF CLERK ON BASIS OF PERCENTAGE OF ALL FUNDS DISBURSED—NO AUTHORITY TO TRANSFER PART OF SINKING FUND TO TUITION OF CONTINGENT FUND.

SYLLABUS:

1. *A board of education may, under the provisions of section 4721, G. C., fix the compensation of its clerk upon the basis of a percentage of all funds of a school district disbursed during his employment and such remuneration need not be upon a stipulated salary basis. Such an arrangement, once having been entered into, it is believed such clerk would have a valid claim against such board of education for the full amount as computed on such percentage basis.*

2. *A board of education has no authority to transfer any part of the sinking fund of the school district to the tuition or contingent fund of such district.*

COLUMBUS, OHIO, May 15, 1925.

HON. CLARENCE J. CROSSLAND, *Prosecuting Attorney, Zanesville, Ohio.*

DEAR SIR:—This will acknowledge receipt of yours of recent date in which you submit the following inquiries:

1. May a school district board of education employ a clerk upon other than a stipulated salary basis?

Is a contract previously entered into between the board of education of a school district and a person engaged as clerk of such board, whereby such clerk is to receive as compensation two per cent of all funds of such school district which are disbursed during his employment, valid and binding upon such board of education?

May a board of education legally pay a clerk previously so employed, a balance claimed by such clerk as due him by virtue of such arrangement of percentage compensation which said balance is entirely in excess of what would have been due on a stipulated salary employment?

2. May money in the sinking fund of the school district, in excess of the amount required in such sinking fund, for the purpose for which it was placed therein, be transferred from the sinking fund to either the tuition fund, or to the contingent fund, or partly to each?

In answer to your first inquiry, your attention is directed to a recent decision of the Ohio supreme court in the case of *Board of Education of the City School District of the City of Cleveland vs. Featherstone*, 110 O. S., 669, in which the judgment of the court of appeals of Cuyahoga county is affirmed, and wherein it was held in substance that the election of the defendant in error by the board of education of the city school district as clerk of the board did not confer upon him any function of sovereignty or constitute him an officer within the provisions of section 20 of article II of the constitution of Ohio, and it was further held that the board of education under the power conferred by section 4781, General Code, having in good faith fixed and paid his compensation at various amounts for various periods of his employment, such payments were legal.

In connection with this case your attention is directed to the discussion in the opinion of the court of appeals of Cuyahoga county, which was affirmed by the

supreme court. In the discussion by Levine, judge, after quoting sections 4747 and 4781, General Code, the following statement is found:

"It will be noticed, from a reading of same, that the clerk is appointed by the board of education. The time of his appointment is not to exceed two years, but need not necessarily be two years. It may be for a much shorter term. The compensation of the clerk is fixed by the board. It was apparently intended that discretion be vested in the board of education to determine what would constitute a fair and proper compensation for the services of its clerk.

"The duties of a clerk of a board of education are of a clerical or ministerial character. He is nowhere clothed with a part of the sovereignty of the state. It was properly said in the case of state of Ohio vs. Cottle, N. P. (N. S.) 145, that the clerk is but the bookkeeper of the board of education, having charge of its records and accounts.

"The law does not require that the board of education fix the compensation of its clerk and make the same operative during the whole term of his appointment. He is merely an employee of the board, and it is deemed the part of wisdom to lodge discretion in the hands of his employer to fix his compensation in accordance with the duties he is called upon to perform, and the work which he is required to do.

"There is a clear distinction between the case of state ex rel. Clark vs. Cook and the case at bar. Not only is it not conceded that the clerk of the board of education is a public officer, but it is successfully maintained that, viewing him in the light of the duties he is called upon to perform, which do not in any way entail an exercise of any part of the sovereign power, that he is merely what his name designates, a person called upon to perform purely clerical duties. The statute which requires the board of education to fix his remuneration, denominates the same not a 'salary,' but instead 'compensation.' It does not fix any minimum compensation such as is found in the provision relating to the salary of the county superintendent.

"What constitutes compensation? It means an equivalent for the value of the service rendered. The board may fix the equivalent for services rendered. The duties to be performed, and the work which the clerk is called upon to do, must be considered in fixing an equivalent for the value of same. Changed conditions which entail the expenditure of a great deal more time because of the increased details which he is called upon to do and perform may render the compensation formerly fixed far less than an equivalent for the value of the services rendered.

"It may, therefore, be reasonably inferred that the use of the term 'compensation' as found in section 4781, and the utter silence of the statute as to the amount of compensation, was not accidental, but intentional. That the legislature intended to vest discretion in the board of education to fix the remuneration of the clerk and to at all times strive to make it the equivalent for the value of the services rendered by him and that as circumstances change the compensation may be changed, in order to make it the equivalent for the value of services rendered."

The sections of the General Code above referred to read as follows:

Section 4747—"The board of education of each city, village and rural school district shall organize on the first Monday of January after the election of members of such board. One member of the board shall be elected

president, one as vice-president and a person who may or may not be a member of the board shall be elected clerk. The president and vice-president shall serve for a term of one year and the clerk for a term not to exceed two years. The board shall fix the time of holding its regular meeting."

Section 4781—"The board of education of each school district shall fix the compensation of its clerk and treasurer, which shall be paid from the contingent fund of the district. If they are paid annually, the order for the payment of their salaries shall not be drawn until they present to the board of education a certificate from the county auditor stating that all reports required by law have been filed in his office. If the clerk and treasurer are paid semi-annually, quarterly, or monthly, the last payment on their salaries previous to August thirty-first, must not be made until all reports required by law have been filed with the county auditor and his certificate presented to the board of education as required herein."

Upon examination of the foregoing opinion it appears that the clerk of the board of education is not a public officer, but merely what his name indicates—"a person called upon to perform purely clerical duties." It also appears from the foregoing discussion, as well as the language of the statute (section 4781 G. C.), that the remuneration which the board of education is required to fix is not a salary but compensation and there nowhere appears in the sections above quoted or otherwise any limitation with reference to the compensation of said clerk.

Therefore, it is not believed that a board of education, in fixing the compensation of its clerk, need to fix such compensation on an annual or periodical basis, or make such payment dependent alone on the element of time consumed. As stated in the opinion of the court of appeals, *supra*, compensation means an equivalent for the value of the service rendered and the board may fix such compensation accordingly. It also appears from the above opinion that the legislature intended to vest discretion in the board of education to fix remuneration of the clerk, and at all times strive to make it the equivalent for the value of the services rendered by him, and that as circumstances change the compensation may be changed in order to make it the equivalent for the value of services rendered, and as recently stated by our supreme court, in a case where the compensation was fixed on a percentage basis:

"There may be a difference of opinion from the standpoint of public policy as to the matter of computing or determining the compensation to be paid for such services, but that has nothing to do with the questions of validity of these contracts, which is the only question at issue and the only question decided."

Therefore, I am of the opinion that a board of education may, under the provisions of section 4781, G. C., fix the compensation of its clerk upon the basis of a percentage of all funds of the school district disbursed during his employment and such remuneration need not be upon a stipulated salary basis. Such an arrangement once having been entered into, it is believed such clerk would have a valid claim against such board of education for the full amount as computed on such percentage basis.

In connection with your second inquiry, your attention is directed to the provisions of section 7614, G. C., as amended in 109 O. L. 345, which provides that the board of education of every district shall provide by a tax levy for the payment of the annual interest on its bonded indebtedness for the payment of its serial bonds as they mature and for a sinking fund for the extinguishment of its other bonded

indebtedness, and further provides for the management and control of such funds by a board of commissioners of the sinking fund of the school district in question.

Section 7615 provides for the investment of the funds of the sinking fund as well as all interest received from such investments.

Section 7618 provides that the board of education shall appropriate to the use of such a sinking fund any taxes levied for the payment of interest on its bonded indebtedness, together with the sum provided for in sections 7613 and 7614; and further provides that *such sums so appropriated shall be applied to no other purpose than the payment of such bonds, interest thereon and necessary expenses of such sinking fund commission.* It is believed this provision alone would preclude any transfer of any part of the sinking fund to either the tuition fund or the contingent fund of the board of education. In fact, the board of education has no control over the sinking fund.

In this connection your attention is also directed to the provisions of section 5654 General Code, which provides in effect that the proceeds of a special tax, loan or bond issue shall not be used for any other purpose than that for which the same was levied, issued or made, except as herein provided.

In view of the provisions of the last referred to section and the several sections with reference to the sinking fund, I am of the opinion that the board of education has no authority to transfer any part of such sinking fund to the tuition or contingent fund of the school district.

Respectfully,
C. C. CRABBE,
Attorney General.

2494.

APPROVAL, FINAL RESOLUTION, 1 ROAD IMPROVEMENT IN JEFFERSON COUNTY.

COLUMBUS, OHIO, May 15, 1925.

Department of Highways and Public Works, Columbus, Ohio.

2495.

APPROVAL, ARTICLES OF INCORPORATION, THE SOUTHERN MUTUAL BENEFIT ASSOCIATION.

COLUMBUS, OHIO, May 13, 1925.

In Re: Approval, Articles of Incorporation, The Southern Mutual Benefit Association.

HON. THAD H. BROWN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—The articles of incorporation of The Southern Mutual Benefit Association of Cleveland, Ohio, are herewith returned to you with my approval endorsed thereon.

Respectfully,
C. C. CRABBE,
Attorney General.