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1. TEXTBOOK—APPROVAL OF TEXTBOOK COMMISSION—MAXIMUM PRICE—SALE OR PURCHASE—BOARDS OF EDUCATION—CONDITION PRECEDENT—CONTRACT WITH PUBLISHER BY SUPERINTENDENT OF PUBLIC INSTRUCTION—SECTION 4854 G. C.
2. FAILURE OF TEXTBOOK COMMISSION TO FIX MAXIMUM PRICE AT WHICH TEXTBOOK MAY BE SOLD TO OR PURCHASED BY BOARDS OF EDUCATION—INVALIDATES ANY ACTION BY SUPERINTENDENT OR PUBLISHER OF TEXTBOOK.
3. AMENDED SUBSTITUTE SENATE BILL 278, 98 GENERAL ASSEMBLY, DOES AWAY WITH REQUIREMENT MAXIMUM PRICE OF TEXTBOOKS MUST BE FIXED BY COMMISSION—AUTHORITY VESTED IN SUPERINTENDENT OF PUBLIC INSTRUCTION.

SYLLABUS:

1. The approval of the textbook commission of the maximum price at which a textbook may be sold to or purchased by the various boards of education in this state is a condition precedent to the Superintendent of Public Instruction entering into a contract with a publisher under Section 4854, General Code, as it now exists.

2. Failure of the textbook commission to fix the maximum price at which a textbook may be sold to or purchased by the various boards of education in this state makes any action on the part of the Superintendent of Public Instruction or a publisher of a textbook fixing the price of a textbook invalid.

3. Amended Substitute Senate Bill No. 278 enacted by the 98th General Assembly, effective October 25, 1949 does away with the requirement that the maximum price of textbooks must be fixed by the textbook commission and vests the authority to fix such maximum price in the Superintendent of Public Instruction.

Columbus, Ohio, October 18, 1949

Hon. Clyde Hissong, Superintendent of Public Instruction
Department of Education, Columbus, Ohio

Dear Sir:

Your request for my opinion is as follows:

“As a result of the enactment into law of Substitute Senate Bill 278 by the 98th General Assembly, I find it necessary to

request your opinion as to the application of General Code Section 4854 when that section, as amended by Substitute Senate Bill 278, becomes effective.

Section 4854 in its present form provides that whenever a textbook and the price thereof is filed with the Superintendent of Public Instruction, as provided in Section 4854-1 of the General Code, a commission consisting of the Governor, the Secretary of State, the Auditor of State, the Attorney General and the Superintendent of Public Instruction shall immediately fix the maximum price at which such book may be sold to or purchased by boards of education, and that the Superintendent of Public Instruction shall immediately notify the publisher of such book of the maximum price fixed. Section 4854 in its present form further provides that if the publisher so notified accepts in writing the price fixed and agrees in writing to furnish such book during a period of five years at that price, then such written acceptance and agreement shall entitle the publisher to offer the book so filed for sale to boards of education.

“The textbook commission provided for in existing Section 4854 has not functioned for a number of years. During this period of time my predecessors and myself have attempted, in the absence of any action by the commission, to carry out the intent of the textbook law.

“As required by law, all publishers offering textbooks for sale to boards of education in Ohio have filed in this office copies of such books together with the wholesale list prices thereof. Since the textbook commission did not function, it was not possible to follow the procedure prescribed by Section 4854, namely that of notifying the publisher as to a maximum price fixed by the commission and then receiving from the publisher an acceptance of a price so fixed. During all of the years that the textbook commission has not functioned, it has been the policy of this office to hold that upon the filing of a textbook and the list price thereof such book was to be offered for sale for a period of five years at a price not exceeding 75% of the list price, such five-year period to begin as of the date of the filing of the list price.

“It will be noted that under the procedure that has been followed during the years the textbook commission has not functioned there has not been a written agreement or contract such as is contemplated by Section 4854 in its present form.

“Under the provisions of Section 4854, as amended by Substitute Senate Bill 278, the textbook commission is abolished and the period of time for which a fixed price for a textbook shall remain in force is reduced from five years to two years.

I should like to have your opinion as to what effect Section 4854, as amended by Substitute Senate Bill 278, will have, when it

becomes law, on the textbook prices now on file in this office. Will a price that has been filed within the last five years remain in force on and after the effective date of the new law and until a five year period following the filing has elapsed, or shall the Superintendent of Public Instruction, when the new law becomes effective, request publishers of textbooks to refile prices for all books to be offered for sale to boards of education in Ohio?"

The answer to your request requires a reference to the following legislative enactments:

Section 4854, General Code, in its present form reads as follows:

"When and so often as any book and the price thereof is filed in the office of the superintendent of public instruction as provided in Section 4854-1 of the General Code, a commission consisting of the governor, secretary of state, auditor of state, attorney general and superintendent of public instruction immediately shall fix the maximum price at which such books may be sold to or purchased by boards of education, as hereinafter provided, which price must not exceed seventy-five per cent of the published list wholesale price thereof. The superintendent of public instruction immediately shall notify the publisher of such book so filed, of the maximum price fixed. If the publisher so notified, notifies the superintendent in writing that he accepts the price fixed, and agrees in writing to furnish such book during a period of five years at that price, such written acceptance and agreement shall entitle the publisher to offer the book so filed for sale to such boards of education. It shall be a part of the terms and conditions of any such contracts that such publisher or publishers will reduce such net prices in Ohio whenever reductions are made elsewhere in the United States, and that said publisher or publishers shall file in the office of the state superintendent of public instruction within ten days, a sworn statement of such reductions made elsewhere, so that at no time shall any book so filed and listed be sold in Ohio at a higher net price than such book is sold for elsewhere in the United States under like conditions under contract or sales made subsequent to this filing. For failure to so file, such publisher or publishers shall forfeit and pay to the state of Ohio five hundred dollars for each failure to be recovered in the name of the state, in an action to be brought by the attorney general in the court of common pleas of Franklin county, or in any other place where service can be made. The amount, when collected, must be paid into the state treasury to the credit of the general revenue fund of the state."

Section 4854 General Code as amended by Amended Substitute Senate Bill No. 278 of the 98th General Assembly, effective October 25, 1949, reads as follows:

“When and so often as any book and the price thereof is filed in the office of the superintendent of public instruction as provided in section 4854-1 of the General Code, the superintendent of public instruction immediately shall fix the maximum price at which such books may be sold to or purchased by boards of education, as hereinafter provided, which price must not exceed seventy-five per cent of the published list wholesale price thereof. The superintendent of public instruction immediately shall notify the publisher of such books so filed, of the maximum price fixed. If the publisher so notified, notifies the superintendent in writing that he accepts the price fixed, and agrees in writing to furnish such book during a period of two years at that price, such written acceptance and agreement shall entitle the publisher to offer the book so filed for sale to such boards of education. It shall be a part of the terms and conditions of any such contracts that such publisher or publishers will reduce such net prices in Ohio whenever reductions are made elsewhere in the United States, and that said publisher or publishers shall file in the office of the state superintendent of public instruction within ten days, a sworn statement of such reductions made elsewhere, so that at no time shall any book so filed and listed be sold in Ohio at a higher net price than such book is sold for elsewhere in the United States under like conditions under contract or sales made subsequent to this filing. For failure to so file, such publisher or publishers shall forfeit and pay to the state of Ohio five hundred dollars for each failure, to be recovered in the name of the state, in an action to be brought by the attorney general in the court of common pleas of Franklin county, or in any other place where service can be made. The amount, when collected, must be paid into the state treasury to the credit of the general revenue fund of the state.”

Section 4854 in its present form requires a commission composed of certain state officers, together with the Superintendent of Public Instruction to fix the maximum price at which a school textbook may be sold to or purchased by the various boards of education throughout the state. This section places a mandatory duty upon the commission and the superintendent. The statute further provides that when the commission fixes the price, the Superintendent shall notify the publisher and if the publisher notifies the Superintendent that he accepts the price as fixed and agrees in writing to furnish such book during a period of five years at the price fixed, such written acceptance entitles the publisher to offer the book so filed to the various boards of education.

The agreement and the acceptance on the part of the publisher is in the nature of a contract and as a part of the terms and conditions of such

contract the publisher agrees to reduce the price of the book whenever reductions are made elsewhere in the United States.

The approval of the Commission set out in Section 4854 in its present form is a condition precedent to the Superintendent's entering into a contract with the publisher. This is clear from the mandatory form of the statute and the use of the word "shall". Thus in 37 O. Jur., 326, the following appears :

" 'Must' is a stronger word to indicate an intention that the provision is mandatory than the word 'shall,' and it is accordingly so interpreted, except where the intention of the legislature, as gathered from the entire act, appears to be otherwise. *But even the use of the word 'shall' is usually interpreted to make the provision in which it is contained mandatory, especially if frequently repeated.*" (Emphasis added.)

According to your letter the textbook commission has not functioned for some time nor has there been any written agreement or contract that is required under Section 4854. As I understand the procedure, the publisher merely submits the price of the book and upon filing such price the book is sold in the same manner as if the commission had approved it and a contract had been entered into. Therefore the question presents itself, namely, what is the effect of such filing of the price, and is there a contract?

It is well settled that where a statute prescribes the mode by which power conferred upon a public officer or board shall be exercised, the mode specified is also the measure of power granted. For example, the execution of a power to convey land by public officers must be in strict pursuance of the power, or no title is conveyed. See 32 O. Jur., 934.

It follows from the above stated proposition that the filing of the price of the textbook is of no effect and that such filing is a nullity. It also follows that since the proper procedure was not followed there exists no contract and that the price now on file in your office has no validity in law.

In 32 O. Jur. 941, the proposition is stated as follows :

"It is well settled that where the statute prescribes the mode by which power conferred upon a public officer or board shall be exercised, the mode specified is also the measure of power granted ; it is likewise well established that a contract made otherwise than as expressly prescribed and limited by statute is not binding or obligatory as a contract. * * *"

Amended Substitute Senate Bill No. 278 amending Section 4854 of the General Code, recently passed by the 98th General Assembly is essentially the same as Section 4854 as it now exists. One important exception is that the Commission will no longer be in existence when the new amended act goes into effect, and the duties formerly required of the Commission will be those of the Superintendent. The Superintendent will then have authority to contract without the approval of the Commission.

Therefore, since the price now on file with the superintendent is of no legal significance it will be necessary for the publisher to refile the price in the office of the superintendent and if filed before the effective date of Amended Substitute Senate Bill No. 278, the commission must immediately fix the maximum price and the superintendent must immediately notify the publisher. If the price is filed on or after the effective date of Amended Substitute Senate Bill No. 278, then the superintendent must immediately carry out the procedure.

Respectfully,

HERBERT S. DUFFY,
Attorney General.