

4264:

JANITORS—BOARD OF EDUCATION MAY EMPLOY SUCH FOR A PERIOD NOT TO EXCEED TIME FOR WHICH MAJORITY OF BOARD ELECTED.

SYLLABUS:

A board of education in a rural or village school district, in its discretion, may, in any case, employ janitors for a period of time which does not extend beyond the time for which a majority of the board has been elected, or for an entire school year, even though a majority of the board will be retired by reason of the expiration of the period for which they have been elected during that school year. Under some circumstances, janitors may be employed for a longer term than the life of the board contracting for such employment when it appears that the contract was made in good faith and in furtherance of the public good.

COLUMBUS, OHIO, April 21, 1932.

HON. HARRY I. KAYLOR, *Prosecuting Attorney, Kenton, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion, which reads as follows:

“Under Section 7699 of the General Code, the right is given to a board of education to appoint employes thereunder, such as janitor or other employes. For how long a period or term can the board of education appoint such employe?”

Since the adoption of the School Code of 1873 provision has been made by statute specifically authorizing school boards to appoint certain employes. As enacted in 1873 (70 O. L., 195, Section 53) the provision with reference thereto read in part as follows:

“The board of education of each school district shall have the management and control of the public schools of the district * * with full power in respect to such schools to appoint a superintendent and assistant superintendent of schools, a superintendent of buildings, teachers, janitors and other employes.”

This statute contained the further provision:

“Provided, that no person shall be appointed for a longer time than that for which a member of the board of education is elected.”

Upon the revision of the statutes in 1880, the above provisions became part of Section 4017 of the Revised Statutes. Said Section 4017, Revised Statutes, was amended in some respects, a number of times. In 1890 (87 O. L. 372); in 1892 (89 O. L. 96), (89 O. L. 202); in 1894 (91 O. L. 113), (91 O. L. 422); in 1898 (93 O. L. 48) and again in 1904 (97 O. L. 366). At each time of the amendment of the statute until 1904, the provision limiting the term of an appointee of a board of education to no longer a term than that “for which a member of the board is elected” was retained. Upon the amendment of the statute in 1904, a

specific limitation upon the term for which teachers might be appointed was fixed therein, but no limitation was placed upon the term of other appointees.

While the provision limiting the term of appointees for no longer a time than that for which a member of the board was elected was in force, the Supreme Court of Ohio in a case involving the appointment of a janitor, construed the clause, "longer time than that for which a member of the board is elected" to mean the time for which every member of the board is elected thus permitting an appointment for a term extending to the end of the term of the members of the board having the longest time to serve. See *Board vs. Walker*, 71 O. S. 169.

Said Section 4017, Revised Statutes as amended in 1904, supra, was codified in 1910 as Sections 7690 to 7701, General Code. So far as the question here under consideration is concerned, there has been no subsequent amendment of these statutes. The provision authorizing the appointment of employes of a board of education such as janitors, is now contained in Section 7690, General Code. Upon examination of this statute and cognate sections of the Code it will be found that no limitation whatever is fixed by statute upon the time for which a janitor may be appointed or employed. If any such limitation exists, it must be because of general law or public policy.

Courts in various jurisdictions have not always been in accord on the question of the power of public boards or officers to bind their successors on contracts entered into by them, the performance of which is to extend beyond the terms for which they had been elected. A distinction is made by the courts between contracts entered into by public boards or officers when in the exercise of governmental or legislative powers and when exercising proprietary or business powers. See *Kerlin Brothers Company vs. Toledo*, 20 O. C. C., 603. Some cases turn on the question of whether or not the public board whose contracts are being scrutinized is one composed of members whose terms of office do not expire concurrently, that is, whether or not the board may be regarded as a continuous legal entity and its contracts considered as being contracts of such a continuous legal entity and not contracts of the individual members of the board. See *Tate vs. School District No. 11 (Mo.)*, 23 S. W., 2d., 1013. See also 22 R. C. L., 555. In any case, the question of reasonableness of the contract, the good faith of the parties, and the requirements of the situation are elements that enter into a determination of whether or not the contracts are good. For the purposes of this opinion it is not necessary to pursue this general subject further. It will be sufficient to direct your attention to the following authorities where a large number of cases involving different classes of contracts of this kind are collated: Corpus Juris, Counties, Section 234; Municipal Corporations, Section 2168; Officers, Section 289; 11 Ohio Jurisprudence, Counties, Section 37; 24 Ruling Case Law, 613; 29 L. R. A. (N. S.) 657 note, 70 A. L. R. 802 note.

In most jurisdictions where a board appoints an officer or contracts for services and the duties of the officer or the services to be rendered are duties delegated to the supervision of the board such appointment or contract for a period beyond the term of the board is not valid. The same rule applies to confidential relations such as counsel for the board and similar appointments. In some jurisdictions, however, the rule is the other way. See 70 A. L. R., 799 and 802.

In the case of *Franklin County vs. Ranck*, 9 O. C. C. 301, which involved the validity of a contract for the employment of a janitor for the county court house for the period of a year, the contract having been made on the day preceding the expiration of the term of one of the members of the board, the court said:

"In the absence of some necessity or special circumstances showing

that the public good required it, such a contract as the one under consideration, made by an expiring board, and which has the effect to forestall the action of its successor for a year, is not only evidence of unseemly conduct on the part of the members of the board, but, in its object, operation, and tendency, is calculated to be prejudicial to the public interests and against public policy and void."

Under this decision such a contract is prima facie invalid, but its validity will be upheld when it appears that the contract is beneficial to the county.

In a case decided by the Supreme Court of Ohio, *State ex rel. vs. Lutz, Auditor*, 111 O. S., 333, the court said at page 338:

"The policy of the law is rather against the power of one board of county commissioners to make contracts so indefinite in time that the same may extend beyond the life of the board, and thus bind another or future board, although in some cases such a contract may be valid and binding even though the performance of some part may be impossible until after the expiration of the term of the majority of the board as it existed when the contract was made. Yet the general rule is that such contracts, extending beyond the term of the existing board, and employment of agents or servants of the county for such period, thus tying the hands of a succeeding board, are not looked upon with favor unless the necessity or some special circumstances show that the public good requires such contracts to be made."

The contract under consideration in the above case was one for professional services in connection with sewer construction. It was made for an indefinite time and its performance extended beyond the terms of at least some of the members of the board who made it. The court did not go so far as to say that the contract was void, but only that its terms, as to compensation, were subject to subsequent legislation with respect to it, and that such subsequent legislation changing the terms of the contract as to compensation was not an impairment of the contract within the protection of the constitutional guarantee against impairment of contracts.

In determining the powers of a board of education with respect to making contracts of this kind, it is well to note that contracts with janitors and other school employes are usually made for a school term or for a school year, which year does not correspond with the calendar year. Changes in the personnel of boards of education occur every two years, on the first Monday in January, which is the middle of a school year. It would not be said, in my opinion, that the employment of a janitor for an entire school year or school term would be beyond the power of a board of education, even though a majority of that board went out of office on the first Monday in January during the school year or school term, and there might be circumstances when it would not be said to be unreasonable, and not for the public good, if a contract were made with a janitor extending even beyond the next two year period, when again a part of the members of the board would be retired before the expiration of the contract.

While such a contract as that last mentioned would not be looked upon with favor, yet I could not say, as a matter of law, that the contract would be held to be void or illegal if it should appear that it was entered into in good faith and that the public good would be subserved by reason thereof.

It will thus be seen that it is impossible to lay down a hard and fast rule

with reference to this question. The question must be determined entirely on the reasonableness of the length of time for which the contract is made in the light of the necessities of the situation and the special circumstances existing. If the length of time for which the janitor is appointed or employed extends beyond the life of the board, that is, beyond the time for which a majority of the board has been elected, it must appear that the contract has been entered into in good faith and not for the purpose of tying the hands of the succeeding board, but in the interests of the public good.

In my opinion, a board of education in a rural or village school district, in its discretion, may, in any case, employ janitors for a period of time which does not extend beyond the time for which a majority of the board has been elected, or for an entire school year, even though a majority of the board will be retired by reason of the expiration of the period for which they have been elected, during that school year. Under some circumstances, janitors may be employed for a longer term than the life of the board contracting for such employment, when it appears that the contract was made in good faith and in furtherance of the public good.

Respectfully,

GILBERT BETTMAN,
Attorney General.

4265.

APPROVAL, NOTES OF TORONTO CITY SCHOOL DISTRICT, JEFFERSON COUNTY, OHIO—\$25,000.00.

COLUMBUS, OHIO, April 22, 1932.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

4266.

APPROVAL, BONDS OF BEDFORD CITY SCHOOL DISTRICT, CUYA-HOGA COUNTY, OHIO—\$1,000.00.

COLUMBUS, OHIO, April 22, 1932.

Industrial Commission of Ohio, Columbus, Ohio.

4267.

APPROVAL, BONDS OF HOLMES COUNTY, OHIO—\$1,600.00.

COLUMBUS, OHIO, April 22, 1932.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.