

873

EDUCATION, BOARD OF—WHERE MEMBER OF BOARD HAS PECUNIARY INTEREST IN CONTRACT ENTERED INTO AND EXPENDITURES MADE, DUTY OF BUREAU TO INCORPORATE FACTS IN REPORT OF EXAMINATION MADE PURSUANT TO SECTIONS 284, 286 G. C.

SYLLABUS:

Where a contract has been entered into by a board of education in which contract a member of the board has a pecuniary interest and expenditures have been made pursuant to such contract, it is the duty of the Bureau of Inspection and Supervision of Public Offices to report such facts in the report of its examination made pursuant to Sections 284 and 286 of the General Code.

Columbus, Ohio, April 15, 1946

Bureau of Inspection and Supervision of Public Offices  
Columbus, Ohio

Gentlemen:

I have before me your communication requesting my opinion, and reading as follows:

“Section 4834-6, General Code, with the exception noted therein, contains the following provision:

‘No member of the board shall have directly or indirectly any pecuniary interest in any contract of the board or be employed in any manner for compensation by the board of which he is a member except as clerk.’

In making examinations of the records of school districts, the examiners of this bureau are continually encountering situations where members of the board of education are either the owner of a business which sells supplies, etc. to the board, or a member is in the employ of a business concern which has dealings with the board of education.

There have been numerous opinions written by the Attorneys General that contracts cannot be entered into where a board member has a pecuniary interest, yet such opinions do not indicate whether a penalty is to be inflicted where such section is violated.

May we respectfully request your opinion on the following question:

Where contracts have been entered into by the board of education and some member has a pecuniary interest in the contract, does the Bureau of Inspection and Supervision of Public Offices have the authority to make a finding for recovery against such member and/or the recipient of the money, for all payments of public funds made on such contracts?"

You are correct in your statement that there have been numerous opinions by the Attorneys General to the effect that contracts cannot be entered into by a board of education where a board member has a pecuniary interest. These opinions have generally characterized such contracts as illegal and void.

Many of these opinions dealt with Section 4757 of the General Code, which was the predecessor of Section 4834-6, quoted in your letter, and substantially identical therewith. It seems unnecessary to go into a listing of these opinions or a discussion of the particular circumstances under which they arose. I think we may start with the assumption that contracts made in defiance of these statutes are illegal and void.

Referring to a board of education, it is stated in 36 O. Jur., 203:

"The statutory restrictions upon the board's contracting power are both explicit and clearly stated and cannot be disregarded. \* \* \*

Since the board has no power to bind the school district to a contract not authorized by law, its performance may be enjoined at the suit of a taxpayer who may always ask for an injunction restraining the misapplication of school funds."

In the same treatise at page 384 it is said:

"It is a well recognized rule that a board of education may not bind the public beyond the scope of its powers. If contracts unauthorized by statute are made, they are void and unenforceable, and the board of education may protect itself by the plea of ultra vires."

See also State, ex rel. v. Cook, 103 O. S. 465.

It will be noted that the above statements are predicated on the *mere absence* of power in the board of education to make a given contract. The principle that a board of education is purely a creature of the statute and has only such powers as the law has seen fit to give it is so familiar that

it does not seem necessary to elaborate it. If a contract made by a board of education is to be characterized as illegal and void merely for lack of legislative authority to make it, or because of the informal manner in which it is made, how much more emphatically may we characterize as illegal a contract which is made in open defiance of a clear prohibition contained in the law.

Your bureau is given certain powers and duties relative to the examination of the records and accounts of the various departments of the State and of its various public institutions and taxing districts.

Section 277, General Code, gives the Auditor of State as chief inspector and supervisor the authority to prescribe and require the installation of a system of accounting and reporting for all of such public offices.

Section 278, General Code, provides, in part, as follows :

“The system shall provide forms of accounts showing the sources from which the public revenue is received, the amount collected from each source, the amount expended for each purpose, and the use and disposition of other public property.”

Section 284, General Code, provides :

“The bureau of inspection and supervision of public offices, shall examine each public office. Such examination of township, village and school district offices shall be made at least once in every two years and all other examinations shall be made at least once a year, except that the offices of justices of the peace shall be examined at such times as the bureau shall determine. On examination, inquiry shall be made into the *methods, accuracy and legality* of the accounts, records, files and reports of the office, whether *the laws, ordinances* and orders pertaining to the office have been observed, and whether the requirements of the bureau have been complied with.” (Emphasis added.)

Section 286, General Code, provides, in part, as follows :

“The report of the examination shall set forth, in such detail as may be deemed proper by the bureau, the result of the examination with respect to each and every matter and thing inquired into and shall be made and signed by the state examiner in charge of the examination or by a deputy inspector, and shall be filed in the office of the bureau of inspection and supervision of public offices and certified copies thereof filed as follows: one in the office of the auditing department of the taxing district reported

upon, and one in the office of the attorney general, prosecuting attorney, city solicitor, or mayor of a village as hereinafter provided.”

The same section contains the following :

“If the report sets forth that any public money has been illegally expended, or that any public money collected has not been accounted for, or that any public money due has not been collected, or that any public property has been converted or misappropriated, the officer receiving such certified copy of such report, other than the auditing department of the taxing district, may, within ninety days after the receipt of such certified copy of such report, institute or cause to be instituted, and each of said officers is hereby authorized and required so to do, civil actions in the proper court in the name of the political subdivision or taxing district to which such public money is due or such public property belongs, for the recovery of the same and shall prosecute, or cause to be prosecuted the same to final determination.”

It will be noted that until we reach the portion of Section 286 last quoted no explicit reference is made in the law governing the procedure of your bureau to “illegal expenditures,” but the plain inference from the language just quoted is that your examiners will specifically report all illegal expenditures of public moneys. You raise the question as to your authority “to make a finding for recovery against such member and/or the recipient of the money.” I do not find in the law any reference to a “finding for recovery” to be made by your bureau. The proceeding for recovery, in cases where it may be had and the parties against whom action should be brought are for determination by the prosecuting officers named in the law. Your duty begins and ends with the matters on which you are required by law to report, which manifestly include a statement as to any expenditures of public funds which you believe to be illegal.

In my opinion a contract made by a board of education with a member of the board or in which a member has directly or indirectly any pecuniary interest is an illegal contract and the expenditure of money thereunder constitutes an illegal expenditure. It would, therefore, appear to be clearly your duty to make a report of such expenditures and file it as required by Section 286, *supra*.

Accordingly, and in specific answer to your inquiry, it is my opinion that where a contract has been entered into by a board of education in which contract a member of the board has a pecuniary interest and expenditures have been made pursuant to such contract, it is your duty to report such facts in the report of your examination made pursuant to Sections 284 and 286 of the General Code.

Respectfully,

HUGH S. JENKINS,  
Attorney General