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BAND UNIFORMS—PUPILS PLAYING IN SCHOOL BAND—
ACTIVITY FUNDS—NECESSARY APPARATUS—EQUIPMENT
—BOARDS OF EDUCATION—NO AUTHORITY TO PURCHASE
SUCH EQUIPMENT FROM FUNDS RAISED BY TAXATION.

SYLLABUS:

Boards of education are without authority to purchase from funds raised by taxation, band uniforms for the use of pupils playing in the school band.

Columbus, Ohio, June 2, 1954

Hon. Morris O. Gibby, Prosecuting Attorney
Harrison County, Cadiz, Ohio

Dear Sir:

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

“The following question has come up. One of the public schools in our county desires to purchase band uniforms and equipment for its pupils, to be used in a school band, the school band being part of the school functions. Would the school board be making a legal expenditure of its moneys if it so spent on such an expenditure?”

The extent to which public schools, formerly devoted strictly to the fundamentals, have been extended to include training in related subjects and in activities which are clearly extra-curricular, is shown by the provisions of Section 3313.53, Revised Code, which after authorizing schools for manual training and other practical arts contains the following provision:

“Such board may pay from the public school funds, as other school expenses are paid, the expenses of establishing and maintaining such departments and schools and of directing, supervising, and coaching the *pupil-activity programs in music, language, arts, speech, government, athletics, and any others directly related to the curriculum.*” (Emphasis added.)

I direct attention also to Section 3313.37, Revised Code, which reads as follows :

“The board of education of any school district, except a county school district, may build, enlarge, repair, and furnish the necessary school houses, purchase or lease sites therefor, or rights of way thereto, or purchase or lease real estate to be used as playgrounds for children or rent suitable schoolrooms, either within or without the district, and provide *the necessary apparatus* and make *all other necessary provisions* for the schools under its control.” (Emphasis added.)

The essence of the question which you present would seem to be whether the uniforms for a school band are to be considered as “necessary apparatus” or whether they could be included within the phrase, “all other necessary provisions.”

We begin, of course, with the fundamental proposition that was expressed in *State ex rel. Clarke v. Cook*, 103 Ohio St., 465:

“Boards of education, and other similar governmental bodies, are limited in the exercise of their powers to such as are clearly and distinctly granted. (*State, ex rel. Locher, Pros. Atty. v. Menning*, 95 Ohio St., 97, approved and followed.)”

However, it is also well settled that a board has also much implied powers as are *necessary* to carry into effect the powers specifically granted.

Let it be noted that the only thing expressly authorized by the above quoted statute relative to the “pupil activities,” is to provide for “directing, supervising and coaching.”

In the case of Board of Education v. Ferguson, 68 Oh. App., 514, one of the questions presented was whether a board of education which had organized open air schools for children found to be susceptible to tuberculosis, had the authority to provide such pupils with sleeping garments to protect them against the cold in the open air schools. It was held that the board was without authority under the law to provide such sleeping garments, as stated in the head note pertaining to that subject, reading as follows:

“The provisions of Section 7620, General Code relate to the physical properties constituting schools and not to those persons who attend them, and do not authorize a board of education to provide special care, attention and treatment for those pupils who are diseased or are susceptible to disease. The term ‘apparatus’ as used in this section is not broad enough to include the purchase of special sleeping garments.”

Section 7620, General Code, then in force, was substantially the same as Section 3313.37, Revised Code, above quoted. In discussing the meaning of “apparatus” the court indicated that the term could only include such materials, implements or utensils as are appropriate for teaching and illustrating the particular subjects for which the board was authorized to provide. As to “all other necessary provisions,” the court said that that term referred to the “physical properties constituting schools, and not to those persons who attend the schools.” In other words to the lands, buildings and furnishings.

In Opinion No. 3546, Opinions of the Attorney General for 1938, page 2556, it was held:

“A board of education has authority to adopt the teaching of instrumental music, as a graded course of study in its schools, and to furnish to its pupils the *instruments necessary for use in such instrumental course of study*. If a board of education adopts instrumental music as a graded course of study in the schools, it has authority to accept as a gift, the band instruments from a band association for the use of the pupils and thereafter purchase all musical instruments and supplies for the pupils at the cost of the board of education. The board may also provide for practicing and playing in the school band as part of the work of such instrumental musical course.” (Emphasis added.)

A similar holding is found in Opinion No. 1495, Opinions of the Attorney General for 1930, page 216. The question presented there was

whether the board could purchase the instruments which were essential to a successful school band or orchestra. In the course of the opinion, it was said:

“It must be conceded that there is no express authority for a board of education to purchase instruments for the teaching of instrumental music. In my opinion, however, the power to prescribe a course of study in instrumental music carries with it the power to provide the means to carry the power into effect.”

In Opinion No. 3293, Opinions of the Attorney General for 1948, page 279, the question of the power of the board of education to purchase football uniforms and other accessories was presented. It was held:

“Where a board of education establishes football practice and playing among the students in its school, as a part of its physical education program, and permits the organization of groups or teams for that purpose, it may not lawfully use public funds to purchase such items of equipment as helmets, shoulder pads and uniforms to be worn by the students participating.”

In the course of that opinion reference was made to the ruling in the case of Board of Education v. Ferguson, supra, and it was said:

“It seems to me that this ruling against the use of school funds to pay for sleeping garments for the children in open air schools, must be applied to those accessories mentioned in your letter which are commonly worn by football players. It may be strongly urged that football is a rough game and that it is hard on the bodies and clothing of the players. But that does not in my opinion make these protective articles of wearing apparel a part of the ‘apparatus’ incident to the prescribed course of physical training. If these articles are to be purchased, cleated shoes and sweaters are equally permissible. If we sanction this expenditure of public school funds for playing clothes for the boys who desire to play football, I can see no escape from the conclusion that the school board should also furnish baseball suits and shoes for those engaging in baseball, and sweaters, shorts and tennis shoes for the girls who get their physical education course through tennis, hockey or badminton.”

It was further said:

“It is by no means easy to draw a distinction between those things which are a necessary part of the ‘apparatus’ or furnishings of a school and those which are for the personal benefit or comfort of pupils while engaging in the various school activities.

In the instances which I have cited, where purchases were sanctioned, the articles in question were directly a part of the equipment necessary to the conduct of the activities which the law contemplated. The purchase of musical instruments such as pianos and band instruments was certainly necessary if the school was to offer a course in instrumental music. The purchase of machines and tools would clearly be a part of the equipment of a school of mechanical arts. But it would be hard to justify the purchase of uniforms for the band or overalls for the shop students as being part of the 'apparatus' necessary for the conduct of these schools."

I concur in the reasoning contained in that opinion, as applying to the question which you present.

I do not underestimate the value of good music in a school, or that a well trained school band playing or marching contributes greatly to the morale of the entire student body. I recognize that year by year such organizations, along with highly skilled athletic teams have become very important adjuncts to our schools and colleges. In many cases participants in the competitive sports, as well as members of the band, are provided with playing suits, uniforms and other equipment by "activity funds," produced by the students, with the cooperation of the school management. But I cannot bring myself to see that these things can be brought within any reasonable concept of "necessary apparatus" for the conduct of the public schools. Hence, their purchase from school funds appears to be sanctioned neither by any express or implied power.

Your letter mentions "band uniforms and equipment." Since you do not mention "band instruments," I have assumed that "equipment" must be intended to cover any other articles that may accompany or form a part of the uniforms.

It is accordingly my opinion and you are advised that boards of education are without authority to purchase, from funds raised by taxation, band uniforms for the use of pupils playing in the school band.

Respectfully,

C. WILLIAM O'NEILL
Attorney General