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THE WIFE OF A BOARD OF EDUCATION MEMBER MAY BE APPOINTED JANITOR—§§3313.33, 3319.21 R.C., OPINION 5811, O.A.G., 1955.

SYLLABUS:

The wife of a member of a board of education may be appointed as a janitor by the board, as Sections 3313.33 and 3319.21, Revised Code, do not prohibit such an employment. Opinion No. 5811, Opinions of the Attorney General for 1955, page 499, approved and followed.

Columbus, Ohio, March 5, 1962

Hon. Robert H. Huffer, Prosecuting Attorney
Pickaway County, Circleville, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“I request your opinion as to the following matters.

“May the wife of a school board member be employed as a janitor by said school board? Part of the compensation for said janitor is a rent free house. The member also resides in said rent free house.

“I feel this matter is covered by Ohio Revised Code 3313.33; and would further like your opinion to the effect that if 3313.33 is violated by the school board member, does such violation fall under 3313.86 making the violation a felony?”

Section 3313.33, Revised Code, to which you refer, reads as follows:

“Conveyances made by the board of education shall be executed by the president and clerk thereof. *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. No contract shall be binding upon any board unless it is made or authorized at a regular or special meeting of such board.

“This section does not apply where a member of the board, being a shareholder of a corporation but not being an officer or director thereof, owns not in excess of five per cent of the stock of such corporation. If a stockholder desires to avail himself of the exception, before entering upon such contract such person shall first file with the clerk an affidavit stating his exact status and connection with said corporation.” (Emphasis added)

Also of interest is Section 3319.21, Revised Code, reading:

“Whenever a local director or *member of a board of education* votes for or participates in the making of a contract with a person as a teacher or instructor in a public school to whom he is related as father, brother, mother, or sister, *or acts in any matter in which he is pecuniarily interested*, such contract, or such act in such matter, is void.

“This section does not apply where a director or a member of such board, being a shareholder of a corporation but not being an officer or director thereof, owns not in excess of five per cent of the stock of such corporation and the value of the stock so owned does not exceed five hundred dollars. If a stockholder desires to avail himself of the exception provided in this section, before entering upon such contract such person shall first file with the clerk of the board an affidavit stating his exact status and connection with said corporation.” (Emphasis added)

I believe that there is no question but what the employment of a janitor should be considered a contract within the purview of Section 3313.33, *supra* (See Section 3313.081, Revised Code). Thus, it remains to be determined whether the member of the board would have a pecuniary interest in the contract if his wife is employed as janitor.

In considering the then existing Sections 4757 and 12932, General Code, now Sections 3313.33 and 3319.21, Revised Code, the then Attorney General, in Opinion No. 3200, Opinions of the Attorney General for 1931, page 624, held that a contract made with the adult son of a member of a board of education for the transportation of pupils, where the father has no direct financial interest in the contract, is not illegal.

But in the case of *In re Leach* (C.P.) 19 0.0., 263, employment of a minor son of a member of the board of education was held illegal under

the provisions of a statute similar to Section 3313.33, *supra*, on the basis that the son had not been emancipated and that the father had a right to his wages. Also see Opinion No. 302, Opinions of the Attorney General for 1923, page 236, to the same effect.

In Opinion No. 5811, Opinions of the Attorney General for 1955, page 499, the question concerned was similar to that here considered, that is, an employment contract with the wife of a member of the board. The first paragraph of the syllabus of that opinion reads:

“1. The wife of a member of a board of education may lawfully be elected as clerk of said board and may also be appointed as secretary to a school superintendent.”

The basis for the above conclusion is found on pages 501 and 502 of the opinion, where it is stated:

“The question you present as to the employment of the wife of a member, as clerk of the board, seems to have been conclusively settled by the decision of the Supreme Court in Board of Education v. Boal, 104 Ohio St., 482. In that case the wife of a member of the board of education was employed as a teacher in the district, and in an action brought by a taxpayer to enjoin the treasurer from paying her salary, the court held that such employment was legal. The court discussed Section 4757, General Code, which was the predecessor of Section 3313.33, *supra*, and also Section 12932, General Code, which was the predecessor of Section 3319.21, *supra*, and held that since neither of these statutes prohibited the employment of the wife of a member of the board her employment was legal.

“The opinion of the court seems to me to lay down a general principle independent of the statutes, upon which the decision may be said to rest. Judge Matthias, speaking for the court, at page 494 of the opinion said:

“The rights of a married woman in this state have been extended by express provisions of our laws, and she now has the full power to contract, and the unlimited right to have and enjoy the benefits of her contracts and the fruits of her employment. These modern statutes relating to the property rights of married women are generally intended to cut off the common-law rights of the husband to the personal estate of the wife. They have been construed to constitute as her separate estate a separate business or trade which she may carry on, and all the property incident thereto. Under the provisions referred to, the earnings of a married woman, or property acquired by her labor, constitute her separate property, and no part thereof or interest therein can in any wise be claimed by the husband as against her. 13 Ruling Case Law, 1149, Section 173.

“If the power to contract in her own right, or the enjoyment of the fruits of her employment, is to be denied or limited, such denial or abridgment thereof must be found in some express provision of the legislation of the state. It cannot be imposed by action of the court.’

“Although that case involved employment of the wife as a teacher, I cannot see any reason why the principle of it should not be applied to employment as clerk of the board or as secretary to the superintendent.”

In the case of *Board of Education v. Boal*, referred to in Opinion No. 5811, *supra*, the court apparently found no pecuniary interest, direct or indirect, where the wife of the board member was appointed as a teacher, even though the allowance of salary to the wife would have seemed to be of some benefit to the husband. In the present case, there would appear to be some evidence of a pecuniary interest since the board member resides in the rent free house, and actually cannot be excluded from his wife’s dwelling except upon a decree or order of injunction made by a court of competent jurisdiction (Section 3103.04, Revised Code). There is not, however, sufficient evidence to distinguish the present case from *Board of Education v. Boal*, which decision has not been modified by any later cases.

Accordingly, it is my opinion and you are advised that the wife of a member of a board of education may be appointed as a janitor by the board, as Sections 3313.33 and 3319.21, Revised Code, do not prohibit such an employment. Opinion No. 5811, Opinions of the Attorney General for 1955, page 499, approved and followed.

Respectfully,
MARK MCELROY
Attorney General