

1434.

BOARD OF EDUCATION—POWER TO EMPLOY JANITOR FOR REASONABLE LENGTH OF TIME—DUTY TO FIX EMPLOYEE'S SALARY AT DEFINITE MONETARY RATE—RURAL BOARD MAY ALLOW LOT PASTURING—BARBED WIRE FENCING OF LOT IN MUNICIPALITY, LEGAL.

## SYLLABUS:

1. *It is within the power of a board of education to employ school janitors for such a reasonable length of time as in the opinion of the board of education is proper, if done in good faith and in the public interest.*

2. *Salaries of employees of a board of education should be fixed at a definite stated amount, in terms of money.*

3. *It is within the power of a rural board of education to permit the pasturing of a school lot under the control of the board, if limited by proper rules and regulations in such a manner as to not interfere with the proper use of the school grounds for school purposes.*

4. *It is not unlawful to enclose a school lot with a barbed wire fence in municipal corporations, unless prohibited by ordinance.*

COLUMBUS, OHIO, January 21, 1930.

HON. JOHN K. SAWYERS, JR., *Prosecuting Attorney, Woodsfield, Ohio.*

DEAR SIR:—This will acknowledge receipt of your inquiry which reads as follows:

“Considerable controversy has arisen, or is to arise, in the Washington Township Rural District Board of Education relative to the resolution or resolutions having to do with the selection of a janitor for the Graysville High School. Herewith are enclosed the minutes, in part, of the said Board of Education for April 28, 1928, and for November 30, 1929.

You will note by reference to the first named minutes that one W. T. B., on April 28, 1928, was selected as janitor for a period of one year. That would make his date of employment expire the latter part of April, 1929. There appears nothing on the record relative to his employment or the employment of any other janitor for said high school until November 30, 1929, when the same W. T. B. was selected for a period of three years and given the privilege of pasturing the school lot.

I am apprized unofficially that W. T. B. has been acting as janitor ever since his appointment on April 28, 1928. Apparently there was some kind of an understanding had with B. at the expiration of his appointment in April, 1929, whereby he served as janitor and drew his salary without any formal appointment or resolution appointing him.

The first question that arises is whether or not the said W. T. B. could legally serve as janitor without a resolution of appointment between the latter part of April, 1929, and the present date under the circumstances narrated herein.

The second question is whether or not his selection by the outgoing Board of Education for a period of three years, together with the unusual provision that he is to be given the privilege of pasturing the school lot, is legal.

There seems to be no question but what the outgoing board, or members thereof, have deliberately taken the foregoing action to embarrass the in-going board, or in-going members thereof.

I understand that there is a barb wire fence around the school lot which is located in an incorporated village. I take it that this fence is not in accordance with the law, and would like your opinion, in passing, on that question."

A portion of the transcript of the minutes of a session of the Washington Township Rural School District Board of Education, held November 3, 1929, is enclosed with your letter. This transcript shows that a motion duly seconded was adopted by the affirmative vote of four members of the board on said date, to the effect that W. T. B. be hired as janitor for the Graysville High School for three years, at \$40.00 per month. Under the terms of employment, it was provided that it was part of his duty, as janitor, to keep the school lot cleared of all rubbish, and that he should have the right to pasture the school lot.

Boards of education are limited in the exercise of their public functions to the exercise of such powers as are expressly granted or necessarily implied therefrom. They are, however, empowered by statute, in broad terms, to make such rules and regulations as are deemed necessary for the government of the employees and pupils of the schools. Section 4750, General Code. They are also granted broad powers to "provide the necessary apparatus and make all other necessary provisions for the schools under its control." Section 7620, General Code.

Specific authority is granted by statute for boards of education to provide necessary employees. Section 7690, General Code, reads in part as follows:

"Each city, village or rural board of education shall have the management and control of all of the public schools of whatever name or character in the district, except as provided in laws relating to county normal schools. It may elect, to serve under proper rules and regulations, a superintendent or principal of schools and other employes, including, if deemed best, a superintendent of buildings, and may fix their salaries. \* \* \* "

It is, of course, quite necessary that a high school building be provided with janitorial services, and in doing so it is necessary to employ some one, who is usually called a janitor, to perform these services.

It will be observed from the terms of the statute that the language is quite broad and reposes in the board of education the discretion of making what are considered proper rules and regulations for the government of the employes and the fixing of their salaries. The statute does not specify any particular length of time for which such employes shall be employed, and I know of no law limiting boards of education in the hiring of such employes as janitors to the hiring of them for one year, or two years, or any particular length of time.

The statutes apparently leave to boards of education wide discretion in the employing of school janitors and in the making of rules and regulations governing the carrying out of the terms of the statute authorizing such employment.

Some years ago the board of education of Cincinnati provided certain rules for schoolhouse janitors and engineers, under which regulations a janitor was employed for each school building. Under this arrangement the janitor had general supervision and responsibility for the school building, yard, machinery and equipment committed to his charge. It was his duty to employ and pay out of the compensation allowed him all necessary assistants and provide all necessary supplies in the way of buckets, soap, brooms, etc., that might be required in cleaning and caring for the said property. With reference thereto the Court of Appeals for Hamilton County, in the case of *State ex rel. Bartholomew vs. Witt, Treasurer*, 3 Ohio App., 414, said:

"Section 7690, General Code, authorizes the board to appoint janitors and fix their salaries. This, no doubt, may be done either in the customary way of

appointing each person serving in such capacity and fixing a monthly or yearly salary for his particular service, or in the manner which has been provided by the plan adopted by the Cincinnati board. Whether or not such a plan is contrary to public policy is addressed rather to the General Assembly than to the court, and finding, as we have said, no inhibition against such an arrangement in the law, we arrive at the conclusion that the method of employing janitors adopted by the Cincinnati board is legal. Under the law as we view it, it is possible that the board of education might provide for this service by an independent contract or by direct employment."

I quote from the above case to show the wide discretion reposed in boards of education in the employment of janitors, as the same is viewed by the courts.

Two questions arise in connection with the action of the Washington Township Rural District Board of Education in attempting to employ W. T. B. for a period of three years on November 30, 1929. First, does the authority to provide employes, given by Section 7690, General Code, include the power to contract with such employes for a definite length of time, or do such employes, unless other provision is made therefor, hold their positions at the pleasure of the appointing power only? Second, if it is determined that a contract for janitorial service may be made by a board of education for a definite length of time, may such a contract be made for three years by a board of education, especially in view of the fact that the operation of the contract, being for three years, would extend beyond the life of the board making it.

With reference to the first question, it is a general rule that public employes, in the absence of a duly authorized specific contract providing otherwise, hold their positions at the pleasure of the appointing power and during the life of that appointing power. Throop on Public Offices, Section 304; Opinions of the Attorney General for 1920, p. 898.

The statutes, however, seem to contemplate the making of contracts with the employes of a board of education and make no exception of those employes whose term of employment is not fixed or limited by statute, nor is the board limited in the making of those contracts to the making of them for any specific length of time.

Section 7699, General Code, provides as follows:

"Upon the appointment of any person to any position under the control of the board of education, the clerk promptly must notify such person verbally or in writing of his appointment, the conditions thereof, and request and secure from him within a reasonable time to be determined by the board, his acceptance or rejection of such appointment. An acceptance of it within the time thus determined shall constitute a contract binding both parties thereto until such time as it may be dissolved, expires, or the appointee be dismissed for cause."

From the terms of the foregoing statute, read in connection with Section 7690, General Code, it seems clear that a board of education is empowered to contract with a janitor for a definite length of time, and, in the absence of an abuse of discretion in doing so, may lawfully make such a contract for any reasonable time if done in good faith and in the public interest.

It is significant that the time for which certain employes of a board of education may be employed is limited by statute, while no similar provisions are made with reference to school janitors. For instance, the length of time for which teachers may be employed is limited by Section 7691, General Code; a similar provision is made with reference to the employment of school physicians by Section 7692, General Code; with reference to the employment of superintendents in city school districts by Sec-

tion 7702, General Code; and for the employment of directors of schools in city school districts by Section 7694, General Code.

Conceding that a board of education may lawfully contract for janitorial services for a definite length of time, the question arises whether such a contract may be made which, by its terms, extends beyond the life of the board making it. The general rule with reference to this subject is stated in Page on Contracts, paragraph 1901, as follows:

“Unless in good faith, for a reasonable time, and for the public interest, a contract extending beyond the term of the officials making it, is void.”

Much the same rule is found in Dillon on Municipal Corporations, paragraph 1307, as follows:

“When a city has statutory authority to enter into contracts for a supply of water and gas for its own use and for the use of its inhabitants, the manner in which its statutory power shall be exercised and the terms of any contract which it may enter into, including the number of years during which it is to continue, rest within the discretion of the municipal authorities; and the courts will not review it or set it aside in the absence of fraud or an abuse or excess of authority, or unless the contract is so unreasonable, inequitable, or unfair as to justify the interference of a court on the established principles of law or equity. In the absence of charter or statute provision there is no rule of law which requires the municipal authorities to confine the exercise of their discretion in contracting for water or light to the term of office of the council or other officers making the contracts; or to a contract for a single fiscal or calendar year. It has been said that the courts look with disfavor upon contracts involving the payment of moneys extending over a long period of time as tending to create a monopoly and involving undue restraint of the legislative powers of the successors of municipal boards and officers. But the great weight of authority clearly recognizes the validity of such contracts when they are not *ultra vires*, and they will not be disturbed if it appears that at the time when the contract was entered into it was fair and reasonable and warranted by the necessities of the case, or was then advantageous to the municipality.”

In Cyc., Volume II, p. 469, it is said:

“Although it has been held in some cases that the contract of a county board may be valid and binding, even though performance of some part may be impossible until after the expiration of the term of the majority of the board as it then existed, yet the general rule is that contracts extending beyond the term of the existing board and the employment of agents or servants of the county for such a period, thus tying the hands of the succeeding board and depriving the latter of their proper powers, are void as contrary to public policy, at least in the absence of a showing of necessity, of good faith and public interest.”

In Page on Contracts, in the same paragraph from which the above quotation is taken, it is said:

“Unless specifically restrained by statute, a public corporation may make a contract which by its terms is to last for a long period of time. Contracts

for water and lighting are the common examples of contracts of this sort. The time must, however, be reasonable."

This subject was considered in an opinion of my predecessor, reported in Opinions of the Attorney General for 1927, at page 1472, wherein it was held:

"Boards of education may in their discretion contract for the transportation of pupils for an entire school year or for a longer period if they deem it advisable, provided the general provisions of law with reference to the making of contracts by boards of education are complied with."

A similar question arose with reference to the making of a contract by a village council for engineering services in connection with local improvements, with respect to which the then Attorney General held:

"Where a contract of this character covers a period beyond the term of those in office at the time it was entered into, the validity of the contract is dependent upon its reasonableness in view of all the circumstances." Opinions of the Attorney General for 1928, page 752.

While the foregoing observations of Page and Dillon, and the Attorney General's opinions above referred to, have particular reference to classes of contracts involving considerations not pertinent to a contract with a school janitor, yet I cannot say, in the absence of any specific holding to the contrary, that the principles there applied may not as well be applied to any contract made by a board of education, including those made for janitorial services. Whether or not such contracts are valid involves, in my opinion, considerations of good faith, reasonableness and public interest which preclude my making a categorical answer to the question.

The fact that the janitor in this case had worked for several months without any specific contract, and a formal contract was made, the performance of which extended far beyond the term of a part of the members of the board of education, would tend to create some suspicion that the action was not taken in good faith. However, that is a question involving a knowledge of local conditions, upon which I cannot and should not attempt to pass.

Strictly speaking, of course, the records of the board of education should show the hiring of an employe and the fixing of his salary before the employe would have the status of a *de jure* employe.

In the case here under consideration, it appears that Mr. B. served as janitor from the latter part of April, 1929, until November of that year, without any specific contract, or at least the minutes of the board do not show the passage of a resolution of appointment. It is probable that he served in the capacity of janitor merely with a verbal understanding with the members of the board to that effect. At any rate, he performed such services to the satisfaction of the board, and I take it the board approved the payroll for the payment of his salary, and that he has been paid. He at least was a *de facto* employe, and the services having been rendered and his salary paid, no complaint can now be made as to what has been done.

The permission granted to Mr. B. to pasture the school lot is, perhaps, somewhat unusual, but it must be borne in mind that the board of education has complete control of the school property and is authorized, within its sound discretion, to make such rules and regulations with respect to the management of the property as in its opinion is proper. If the board determines that the pasturing of the school property is the proper way to keep the school lot cleared of grass and weeds, and the pasturing of the lot does not interfere with the proper use of the property for school purposes,

I could not say that such a regulation and the granting of permission to pasture the lot is an abuse of discretion on the part of the board.

By the terms of Section 7620, General Code, school boards are charged with the duty of keeping in good repair fences enclosing the school houses. The statute makes no mention of the kind of fence which should be built, and I know of no law prohibiting the board from enclosing the school lot with a barbed wire fence if it sees fit to do so. In many incorporated municipalities local ordinances prohibit building barbed wire fences within the municipality, or certain districts of the municipality, but there is no general law applicable to the question. By the terms of Section 5909, General Code, persons and corporations are prohibited from constructing a partition fence from barbed wire unless written consent of the adjoining owner be first obtained. However, it is provided by the terms of Section 5808, General Code, that the provisions of law with reference to partition fences do not apply to the enclosure of lots in municipal corporations or of lands laid out into lots outside of municipal corporations. So far as the power of a board of education is concerned, within the limitation of statutory authority, there is no inhibition upon the construction by it of a barbed wire fence or any other particular type of fence to enclose a schoolhouse.

Whether or not the construction and maintenance of a barbed wire fence to enclose a schoolhouse is an abuse of discretion, because of the inherent dangers of such a fence, is a question upon which the court has never passed, so far as I know. Such a question involves in its determination questions of fact which cannot properly be passed upon except by a court with all the facts before it.

In conclusion, I am of the opinion that the board of education acted within its power in paying Mr. B. for services rendered from April to November, even though his appointment as janitor had not been made by formal resolution of the board, and that the contract with Mr. B. for janitorial services for the period of three years from November 29th is not an abuse of the powers of the board, if made in good faith and in the public interest.

I am also of the opinion that the granting of permission to Mr. B. to pasture the school lot is a proper subject for regulation by the board. However, it cannot be said that the granting of permission to Mr. B. to pasture the school lot is a part of his compensation as an employe of the board, as the statute authorizes the board to fix a salary only, and contemplates, in my opinion, that the salary be fixed in terms of money. The granting of permission to pasture the lot is a mere regulation which may be revoked by the adoption of a regulation inconsistent with the permission so granted.

I am further of the opinion that, so far as any statutory inhibition thereupon is concerned, a board of education may lawfully enclose a schoolhouse within a municipality with a barbed wire fence. The construction and maintenance of such fences within municipalities are sometimes regulated by municipal ordinances. There remains also the question of whether or not in a proper proceeding, with all the facts before it, the court might hold a barbed wire fence enclosing a schoolhouse to be a nuisance and its construction and maintenance by a board of education to be an abuse of discretion on the part of the board.

Respectfully,

GILBERT BETTMAN,  
*Attorney General.*