

Note from the Attorney General's Office:

1963 Op. Att'y Gen. No. 63-455 was overruled by
1970 Op. Att'y Gen. No. 70-084.

455

SYLLABUS:

A local board of education may not contract with a caterer to:

(1) Prepare meals outside the school premises and sell them in the school lunch facility;

(2) Prepare and sell meals in the school lunch room facility;

(3) Furnish management services in the nature of a consultant.

Enforcement by the State Board of Education should be by appropriate rule or regulation.

Columbus, Ohio, August 14, 1963

Hon. E. E. Holt
Superintendent of Public Instruction
Ohio Department of Education
Ohio Departments Building
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“The boards of education of several school districts in Ohio have contracted with catering firms for such firms to conduct the school lunch program. I am informed that several catering companies are making plans to enter into arrangements with other boards of education for the same purpose. Where caterers conduct the school lunch program it is done in one of the following three manners:

“(1) Meals are prepared outside the school premises, carried into the school and sold and consumed at the school lunch facility;

“(2) Meals are prepared by the caterer with the caterer’s personnel in the school lunch room facility and are there sold and consumed;

“(3) The caterer furnishes management services to the boards of education by placing an individual in the lunch room facility who supervises and directs the operation there.

“I would appreciate receiving your opinion on the question of whether a board of education may contract with a private catering firm to conduct the school lunch room program?

“Section 3313.81 of the Revised Code relating to the operation of lunch rooms provides that the enforcement of that section shall be under the jurisdiction of the State Board of Education. In the event that your answer to the above question is that it is unlawful for a board of education to contract with a catering firm for the operation of the school lunch program, what steps should the State Board of Education take, if any, to enforce the ruling?

“Although it may not be germane to the above questions I thought you would be interested in knowing that the school lunch section of the Department of Education is responsible for carrying out the “National School Lunch

and Special Milk Program" under a contract with the United States Department of Agriculture."

I interpret question No. 3 of your request to mean management services in the nature of a consultant.

Section 3313.81, Revised Code, authorizes the operation of school lunchrooms. This section states:

"The board of education of any city, exempted village, or local school districts may establish lunchrooms, provide facilities and equipment, and pay operating costs in the schools under its control for the preparation and serving of lunches, and other meals or refreshments to the pupils, the teachers, and to other employees therein, and to other persons taking part in or patronizing any activity in connection with the schools, provided that such privileges and facilities shall apply to all pupils and teachers and no restrictions or limitations shall operate against any such pupil or teacher in the use of such facilities except for reasons applicable to all alike.

"Such facilities shall be under the management and control of the board and the operation of such facilities for school lunch purposes shall not be for profit. In the operation of such facilities for school lunch purposes there shall be established a lunchroom fund in the clerk's cash journal, which shall be separate from all other funds of the board. All receipts and disbursements in connection with the operation of lunchrooms for school lunch purposes and the maintenance, improvement and purchase of equipment of lunchrooms shall be paid directly into and disbursed from the lunchroom fund which shall be kept in a legally designated depository of the board. Revenues for the operation, maintenance, improvement and purchase of equipment shall be provided by the lunchroom fund, appropriations transferred from the general fund, and from other proper sources.

"The board may also make provision by appropriations transferred from the general fund of the district or otherwise for serving free lunches to such children as it determines are in need thereof.

"The enforcement of this section shall be under jurisdiction of the state board of education."

Boards of education had no authority to operate lunchrooms either directly or indirectly prior to the enactment of Section 4839.6, General Code, now Section 3313.81, Revised Code. See *Hauschild v. Board of Education*, 2 Ohio Law Abs., 377.

Boards of Education have only such powers as are conferred by statute. *Verhey v. Board of Education of City School Districts of Cleveland*, 135 Ohio St., 246, and *Board of Education of Marion Local School District v. Board of Education of Marion County*, 167 Ohio St., 543.

Authority to operate lunchrooms by boards of education is, therefore, limited to that authority granted by Section 3313.81, Revised Code. Such section states quite clearly that the operation of such lunchrooms *shall be under the management and control* of the board of education and shall not be operated for profit. No mention is made of authority to contract for the operation of the lunch program or to contract for a consultant to supervise such operation.

Therefore, in my opinion, a local board of education is without authority to contract with a private caterer to: (1) prepare meals outside the school premises and sell them in the school lunchroom facilities; (2) prepare and sell meals by caterer personnel using the lunchroom facility, or (3) to employ a caterer in the nature of a consultant to manage the operation of the lunch program.

Section 3313.81, Revised Code, provides that enforcement of such section shall be under the jurisdiction of the state board of education. Section 3317.14, Revised Code, permits the withholding of funds to a school district, the board of education of which has not conformed with the law. The phrase "has not conformed with the law" as used in this section has been interpreted to mean law in the abstract sense and is not limited to the provisions of Chapter 3317. See Opinion No. 6810, Opinions of the Attorney General for 1956. Therefore, the State Board of Education could, by appropriate rule or regulation, withhold funds. Another possible means of enforcement could be the reporting of such unauthorized activity to the Bureau of Inspection and Supervision of Public Offices for investigation of unauthorized expenditure of public funds.

A provision of the agreement with the United States Department of Agriculture states:

"The State Agency agrees to accept Federal funds for expenditure in accordance with the National School Lunch Program Regulations and any amendments thereto,

and to comply with all the provisions of said Regulations and amendments thereto.”

Section 210.8 (c) of the Rules and Regulations of the United States Department of Agriculture states:

“(c) Schools shall be selected for participation in the Program on the basis of need and attendance: *Provided, however,* that any school which operates its food or milk service under a contractual arrangement with a concessionaire or food service management company or under a similar arrangement is not eligible for participation in the Program, even though the school itself obtains no profit from the operation of the food or milk service program.”

A local board of education not complying with the provisions of Section 3313.81, Revised Code, by permitting its lunch program to be operated by a caterer, would not be entitled to participate in the operation of the national school lunch program in Ohio. The State Board of Education would be in violation of its contract with the United States Department of Agriculture if participation by such boards were permitted.

In answer to your specific questions, it is my opinion and you are so advised that a local board of education may not contract with a caterer to:

- (1) Prepare meals outside the school premises and sell them in the school lunch facility;
- (2) Prepare and sell meals in the school lunch room facility;
- (3) Furnish management services in the nature of a consultant.

Enforcement by the State Board of Education should be by appropriate rule or regulation.

Respectfully,
WILLIAM B. SAXBE
Attorney General