

powers by adopting a rule, than a state commission may in like manner amend the Constitution or laws of the state providing for its creation and defining its powers. Jurisdiction conferred by the Constitution is not subject to legislative control; nor is jurisdiction conferred by law upon boards or commissions subject to extension by them. (*Italics ours.*)

The rule of law announced in that case and the reasons therefor apply with like force to Section 3 of Rule VII adopted by the Civil Service Commission of the State of Ohio, since the rule attempts to clothe the Civil Service Commission with a power which the legislature did not see fit to expressly confer upon it and which also modifies the provisions contained in Section 486-13, General Code, relative to the certification of eligible lists, a modification or restriction which finds no basis either in Section 486-13, General Code, or any other provision of the Civil Service Laws of the State of Ohio.

Respectfully,

JOHN W. BRICKER,  
*Attorney General.*

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5807.

BOARD OF EDUCATION—NOT VIOLATIVE OF SECTION 12932, G. C. FOR PRESIDENT OR CLERK OF BOARD OF EDUCATION TO SIGN CONTRACT TO EMPLOY SISTER AS TEACHER WHERE HE DOES NOT VOTE OR PARTICIPATE IN MAKING CONTRACT—SALE OF FORFEITED LANDS—PURCHASER SECURES FEE SIMPLE TITLE.

*SYLLABUS:*

1. *It is not a violation of Section 12932, of the General Code of Ohio, for the president of a board of education or for the clerk of a board of education who is also a member of such board, to sign a contract to employ a teacher to whom he or she is related as father or brother, mother or sister, provided such president or clerk does not vote for such employment or participate in the making of such contract otherwise than by signing a written contract which may be drawn up between the parties or performing whatever ministerial duties as may devolve upon him as such president or clerk in connection with the making of the said contract.*

2. *Under the terms of Section 5762, General Code, the certificate of sale which is given to the purchaser of lands which have been forfeited to the State of Ohio, conveys the lien only of the state for taxes and*

*penalties charged on said lands at the time they were sold. The deed given to such purchaser by the county auditor pursuant to the provisions of said section conveys to the purchaser a fee simple title to said lands.*

COLUMBUS, OHIO, July 6, 1936.

HON. HAROLD K. BOSTWICK, *Prosecuting Attorney, Chardon, Ohio.*

DEAR SIR: This will acknowledge receipt of your request for my opinion, which reads as follows:

“The Board of Education of Burton Township has requested me to ask your opinion in regard to the following facts:

A Meeting of the Board of Education is had for the purpose of hiring teachers. One of the members of the board does not appear at the meeting. Can the other members of the board who are present vote to hire a teacher who is a sister of the board member who does not attend the meeting, without violating Section 12932, General Code?

If the member of the board who does not appear at the meeting, and therefore, does not vote, is the president of the board, but he signs the contract of employment with his sister, as president of the board, is there a violation of said section?

If the member of the board who does not appear at the meeting, and therefore does not vote, is also the clerk of the board as well as a member, but signs the contract of employment with his sister as clerk of the board, is this a violation of said section?

I would personally like your opinion in the following matter on delinquent taxes: Assume that a certain piece of property is delinquent for taxes and subject to foreclosure, and that the provisions of law applicable, prior to Section 5718-1, have all been complied with, the auditor then complies with Section 5718-1, and the board therein mentioned orders parcel A omitted from foreclosure. Then under Section 5718-2, parcel A becomes forfeited to the state and is sold as provided by law.

Now, my question is, did the purchaser of parcel A, by his auditor's deed, get an indefeasible estate in fee simple free from all adverse interest, encumbrance and liens, or did he get an assignment of the state's lien for unpaid taxes?

Section 5762, states in substance: ‘The deed shall be prima facie evidence of title in the purchaser’; and Section 5744, says

in substance: 'Every tract of land omitted from foreclosure proceedings, and duly advertised as provided in this chapter, shall be forfeited to the state. Thenceforth all the right, title, claim and interest of the former owner or owners thereof shall be considered as transferred to and vested in the state, to be disposed of as the General Assembly may direct.' What about Section 5766, which states in substance that 'all the purchaser gets is a lien for the amount of unpaid taxes, costs, etc.'?

If the purchaser gets a fee simple title by his auditor's deed, would you say the existing laws relative to the sale of forfeited lands by the auditor are unconstitutional, in that they confiscate property without due course of law?"

Section 12932, General Code, referred to in your letter, reads as follows:

"Whoever, being 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 or she is related as father or brother, mother or sister, or acts in a matter in which he or she is pecuniarily interested, shall be fined not less than twenty-five dollars nor more than five hundred dollars or imprisoned not more than six months, or both."

The above statute is a penal statute and is therefore subject to the rule with respect to its construction that penal statutes should be strictly but reasonably construed. Its manifest purpose is to provide a penalty for any member of a board of education who votes for, or participates in the making of a contract with a person as a teacher or instructor in a public school in the district to whom the member of the board of education who is guilty of such voting or participation is related as father or brother, mother or sister.

The question of whether or not such a contract would be legal if made, is not involved in your inquiry. It is clear that the statute cannot by any construction be held to provide that a contract made by a board of education with a person as teacher or instructor in the public schools who is related as father or brother, mother or sister to one of the members of the board is illegal if the member of the board to whom the teacher is so related does not vote for or participate in the making of the contract. A contract may lawfully be made with a person as teacher or instructor in the public schools who is related as father or brother, mother or sister to one of the members of the board of education making the contract if that relative does not vote for or participate in the making of the con-

tract. The question involved here, is whether or not the signing of a contract by the president of the board or the clerk thereof, is such participation in the making of a contract as is spoken of in the statute.

There are two opinions of this office touching upon this question. The first of these was rendered in 1925, and will be found in the reported opinions of the Attorney General for that year, at page 548. The holding of the Attorney General is contained in the syllabus of said opinion which reads as follows:

“Under the provisions of section 12932 General Code the mere facts alone that a member of the board of education does not cast his vote in favor of a contract employing his son or daughter is not sufficient to place such attempted contract of employment beyond the other provisions and penalties of said section.

The signing of such a contract by a board member as president of such board would be participation in the making of such contract, and would come within the inhibition of said section.”

The second of these opinions is found in the reported Opinions of the Attorney General for 1929, at page 948. The syllabus of this opinion reads:

“Where a clerk of a board of education who is also a member of such board, signs a contract to employ a teacher of whom he is the father, when he took no action in connection with the board of education determining to make such employment, there is no violation of Section 12932 of the General Code.”

In the 1925 opinion, after the Attorney General had concluded that a board member who is president of such board might not participate in the making of a contract by the board by signing the contract, stated;

“A board member being clerk of such board would be ‘participating’ in making such a contract when as such clerk he calls the roll and records the action of the other members, although not actually voting for such contract himself.”

In the course of the 1929 opinion the Attorney General refers to the 1925 opinion, and attempts to distinguish between the question of the president of the board participating in the making of a contract by his signing thereof, and a clerk participating by performing his ministerial duties as clerk. In the course of this opinion the Attorney General said:

“In any event consideration must be given to the fact that a clerk may or may not be a member of the board. In the instant case, if the clerk had not been a member of the board no question could have arisen. In other words, as clerk he could have signed the same contract without any question arising as to its validity notwithstanding that he was the father of the teacher employed; but when the clerk is also a member of the board, and he votes for the employment of the teacher, he acts in the capacity of a member of the board. On the other hand, when he signs a contract in pursuance of a resolution of the board, he acts in the capacity of clerk in the performance of a ministerial duty, and it is believed that in the event that he was directed by the board of education to execute a given contract, he would have no discretion as to whether or not he should execute the same. That is to say, it is the duty of the clerk to carry out the directions of the board, and it is believed that the fact he is a member of such board would not change his duties as clerk, especially in these instances where he did not participate in the action of the board.

It will therefore be seen that the case you present is distinguishable from the case under consideration by the Attorney General in the 1925 opinion hereinbefore referred to. I am frank to say that there is considerable doubt as to the former opinion being basically sound for the reason that in all probability the duties of the president of the board of education can be separated from his duties as a member of the board of education. However, for the purposes of this opinion it is unnecessary to overrule said opinion to reach the conclusions that have been reached with reference to the clerk.”

It appears to me that the distinction made by the Attorney General, in the 1929 opinion, between a president's participation and a clerk's participation by signing a contract and performing other ministerial duties with respect thereto is a distinction without a difference. The language of the Attorney General seems to indicate that he felt the same way. He states that it is very doubtful as to the former opinion being basically sound, but that it was not necessary for the purposes of his opinion, to overrule the former opinion. He did, however, in his 1929 opinion hold contrary to the statement of the Attorney General in the 1925 opinion with respect to a clerk's participation in the making of a contract, and by following through the principles upon which the 1929 opinion is based, it in effect disapproves the 1925 opinion. As I view the matter I believe the 1929 opinion is the more basically sound of the two opinions, and

that a clerk's participation cannot be distinguished from a president's participation with respect to the mere signing of the contract. In both cases the duty performed is a mere ministerial duty.

As a matter of fact, the execution of a written contract with a teacher by a board of education does not constitute the making of the contract. The contract is made by the appointment of the teacher, which, of course, must be done by a resolution of the board duly adopted by a vote of the members of the board after the resolution has been introduced in a legal board meeting, the notification of the appointee and his due acceptance thereof. When a teacher is appointed by a board of education and notified thereof either orally or in writing, and he accepts the appointment according to its terms, a contract arises as a matter of law. This may be followed by a formal written contract between the parties, but this written contract is merely the evidence of the contract which arose by the appointment, notification and acceptance. 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.”

I come now to the consideration of your inquiry relative to the sale of forfeited lands.

I presume your inquiry arises by reason of the provisions of Section 5766 of the General Code, which are as follows:

“The purchaser of such lands, his heirs, or assigns, from the day of such purchase, shall be held in all courts as the assignee of the state of Ohio. The amount of taxes and penalties charged on the land at the time it was sold, with all legal taxes afterward paid thereon by such purchaser, his heirs or assigns, shall be a lien on it, and may be enforced as any other lien.”

While the above section, standing alone, might indicate that a purchaser of forfeited lands receives in all cases only a lien for the amount of unpaid taxes, yet it must be borne in mind that the purchaser referred to therein is the person who receives from the county auditor a

certificate of sale, as provided for in Section 5762, General Code. On this point it was held, in the case of *State ex rel., v. Godfrey*, 62 O. S., 18, 56 N. E., 482, that certificates of purchase convey only the lien of the state for taxes.

In connection with the above section, the provisions of Section 5762, *supra*, must be considered. Said section reads as follows:

“The county auditor on making a sale of a tract of land to any person, under this chapter, shall give to such purchaser a certificate thereof. On producing or returning to the county auditor the certificate of sale the county auditor, on payment to him by the purchaser, his heirs, or assigns, of the sum of one dollar and twenty-five cents shall execute and deliver to such purchaser, his heirs, or assigns, a deed therefor, in due form, which deed shall be prima facie evidence of title in the purchaser, his heirs, or assigns.”

From the above, it will be noted that after the purchaser receives a certificate of sale, he may return the same to the county auditor and by paying the sum of \$1.25, the county auditor is required to execute and deliver to such purchaser a deed, which deed shall be prima facie evidence of title in the purchaser, his heirs and assigns.

Considering the two above quoted statutes then, one in the light of the other, it would appear that immediately upon the purchase of forfeited lands the purchaser receives a certificate of sale, which certificate conveys only the lien of the state for taxes; however, upon receiving a deed from the county auditor as provided for in Section 5762, *supra*, the purchaser becomes invested with a perfect title to said lands. To this effect is the holding in the case of *Kahle, et al. v. Nisely*, 74 O. S., 328, wherein it was stated:

“Where, under Section 2899, Revised Statutes, lands have been duly forfeited to the state for the non-payment of taxes and penalty, a valid sale and conveyance of such lands by the county auditor, extinguishes all previous titles thereto, either legal or equitable, and invests the purchaser with a new and perfect title to said lands, discharged from all previous liens and incumbrances.”

It is not a violation of Section 12932, of the General Code of Ohio, for the president of a board of education or for the clerk of a board of education who is also a member of such board, to sign a contract to employ a teacher to whom he or she is related as father or brother, mother

or sister, provided such president or clerk does not vote for such employment or participate in the making of such a contract otherwise than by signing a written contract which may be made between the parties, or performing whatever ministerial duties may devolve upon him as such president or clerk in connection with the making of the said contract.

Under the terms of Section 5762, General Code, the certificate of sale which is given to the purchaser of lands which have been forfeited to the state of Ohio conveys the lien only of the state for taxes and penalties charged on said lands at the time they were sold. The deed given to such purchaser by the county auditor pursuant to the provisions of said section conveys to the purchaser a fee simple title to said lands.

You also request my opinion as to the constitutionality of the laws relating to the sale of forfeited lands. In respect to this matter, this office has consistently taken the position that the power to set aside an act of the legislature upon constitutional grounds is a power solely vested in the judiciary, and one which may not be assumed by the Attorney General. For this reason this office had declined to render opinions upon the constitutionality of laws after they have been passed.

Respectfully,

JOHN W. BRICKER,  
*Attorney General.*

5808.

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APPROVAL—BONDS OF COLUMBIANA COUNTY, OHIO,  
\$73,900.00.

COLUMBUS, OHIO, July 6, 1936.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*

5809.

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CIVIL SERVICE COMMISSION—MAY NOT REQUIRE APPOINTING AUTHORITY IN MAKING LAY-OFFS OF CLASSIFIED CIVIL SERVICE EMPLOYEES TO DO SO IN THE INVERSE ORDER OF ORIGINAL APPOINTMENT.

**SYLLABUS:**

1. *The Civil Service Commission of the State of Ohio does not have the authority to make a regulation which would require the appointing authority in making a lay-off in the classified service of the state to lay off employes in the inverse order of their original appointment.*