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BOARD OF EDUCATION—WHERE NEGOTIATED PURCHASE IS MADE—AUTHORITY FOR EXPENSE OF EXPERT APPRAISAL OF REAL ESTATE AND REAL ESTATE BROKER'S SERVICES—COMPENSATION—COMMISSION RELATED TO PROPERTY VALUE (OAG NO. 3527, 1938, OVERRULED)

BOARD OF EDUCATION—AUTHORITY FOR TEMPORARY RENTAL OF UNUSED PROPERTY FOR OTHER THAN SCHOOL PURPOSE—SECTION 3313.45 R. C.—AUTHORITY FOR RENTAL OF MINERAL LANDS OR ANY REAL PROPERTY, GIFT, DEVISE, ETC., CONDITIONED TO AUTHORIZE OR REQUIRE SUCH RENTAL.

BOARD OF EDUCATION—AUTHORITY TO EMPLOY RENTAL AGENT—COMPENSATION FROM FUNDS TO WHICH PROCEEDS OF RENTAL OPERATIONS ARE CREDITED.

SYLLABUS:

1. The authority of a board of education to acquire real property for school building sites, expressly given in Section 3313.17, Revised Code, necessarily implies the authority to pay, as a part of the cost of acquisition, where a negotiated purchase is made, the expense of expert appraisal of the value of such property and the expense of a real estate broker's services if the board deems the services of such appraisal expert and of such broker to be advantageous to the board in effecting such purchase. Compensation for such services may be made on a commission basis, related to the value of the property involved. (Opinion No. 3527, Opinions of the Attorney General for 1938, page 2495, overruled in part).

2. A board of education has no general power to rent property which it owns, but where a board of education finds itself in possession of property which is not needed for school purposes and which it cannot advantageously dispose of by sale, it may lawfully permit the temporary use of said property for some purpose other than a school purpose, and it may lawfully accept money for such use. Such board may, under authority of Section 3313.45, Revised Code, also contract for the rental of mineral lands owned by it; and may operate on a rental basis any real property acquired by gift, devise, etc., which gift, devise, etc., is so conditioned as to authorize or require such rental operation.

3. Where a board of education is authorized by law to rent real property owned by it the board may in its discretion employ the services of a rental agent as an incident of such rental operation and may pay his compensation from the same fund to which the proceeds of the rental operations are credited.

Columbus, Ohio, October 8, 1956

Hon. James A. Rhodes,
Auditor of State
State House,
Columbus, Ohio

Dear Sir:

I am in receipt of your request for my opinion which reads as follows:

"In accordance with Opinion 1938 O. A. G. No. 3527 (page 2495), I have instructed the several State Examiners to make findings in all those school districts wherein a Board of Education in securing a site for school buildings has employed a person or real estate firm at a rate percent commission on the purchase price for the securing of options.

"I have also asked the Examiners to make findings whenever a Board owning real estate which it has rented out, pays a real estate broker a percentage commission on the rental charge made for collecting rents and managing property.

"In two recent instances, I find that the City Solicitor of the City of 'M' and the City Attorney of the City of 'C', the legal advisors to the Boards of these two cities, have ruled that the Board has authority to hire such services and to pay the same out of the general tax revenue received by the Board. In both instances the attorneys have concluded the power to do so was an implied power vested in the Board of Education.

"An opinion is accordingly requested:

"(1) Whether or not a Board of Education may pay from its funds, a person or a real estate firm or broker, a rate percent commission on the purchase price of a building site for a school district.

"(2) Whether or not a School Board could legally pay a rate percent commission to a real estate broker or a designated person of the amount collected as rents for property for renting the same and managing the same.

"(3) Whether a Board of Education may pay a real estate broker or other designated person a fixed sum to appraise proposed sites for school purposes and whether or not such Board may pay for conducting preliminary negotiations in behalf of the Board tending to establish a purchase price which the Board would agree to pay and the seller or owner agrees to accept, without resorting to condemnation proceedings, or whether the Board is presumed to have that knowledge and requisite skill to arrive at a fair value of such

real estate without the advice and guidance of such counsel by such real estate broker or other informed person.

“(4) If your answers to 1, 2 and 3 are in the affirmative, whether or not such services should be paid for out of the Building Fund of the Board or out of its General Fund.”

The authority of a board of education to acquire real property for a school building site is found in Section 3313.17, Revised Code, which reads as follows :

“The board of education of each school district shall be a body politic and corporate, and, as such, capable of suing and being sued, contracting and being contracted with, acquiring, holding, possessing, and disposing of real and personal property, and taking and holding in trust for the use and benefit of such district, any grant or devise of land and any donation or bequest of money or other personal property.”

A question somewhat similar to the third question raised in your inquiry, with respect to the appraisal of property, was considered, as you suggest, in Opinion No. 3527, Opinions of the Attorney General for 1938, page 2495. Therein the writer said at page 2513 :

“Section 7638, supra, vests the board of trustees of a city school district public library with the power to purchase grounds and buildings, ‘appropriate land for library purposes if the owner and the board cannot agree upon terms, and dispose of land when, in its opinion it is no longer needed for library purposes.’

“It is assumed that the trustees of a public library are cognizant of the duties imposed upon them by law as such trustees ; and that when they are elected to serve, and accept the responsibilities of service, as such trustees, they are qualified and fitted in both knowledge and experience, to perform their duties.

“It therefore must be said that when the board of trustees contemplates to sell or purchase real estate, the value of the particular property in question is within knowledge of the members of the board, or, they are so fitted in intelligence and experience that they can ascertain the value of the real estate from the market value of similar surrounding property.

“The employment of appraisers to determine the value of the real estate to be purchased or sold, would in effect be a delegation of the powers of the trustees to the appraisers. The vesting of the board of trustees with the extraordinary power of appropriation of lands for library purposes, if the owner and board fail to agree as to price, negatives any authority of the board to delegate any part of the transaction of the sale or purchase of land to any other person.”

I am wholly unable to accept this narrow view of the authority of a public agency to employ the services of specially skilled persons in the exercise of a power plainly bestowed by statute. Such a view, logically extended, would require a board of education, or the individual members thereof, (1) to examine the title of land proposed to be acquired, (2) to draft the conveyance involved, and (3) to survey the boundaries of the site to locate precisely on the ground the land described in such conveyance.

In the highly complex society in which we live today there are innumerable tasks which no prudent person would undertake to perform for himself, and which no one could be expected, as a public officer, to personally accomplish. It is true that the courts have in the past rather strictly construed the statutory powers of public agencies, including boards of education. In *State, ex rel. Clarke, v. Cook*, 103 Ohio St., 465, for example, we find this holding in paragraph 2 of the syllabus:

"2. 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. Manning*, 95 Ohio St., 97, approved and followed.)"

This strict rule was relaxed, however, in *Schwing v. McClure*, 120 Ohio St., page 335, in recognition of the *necessarily implied* powers of a board of education, the first paragraph of the syllabus therein reading as follows:

"1. Members of a board of education of a school district are public officers, whose duties are prescribed by law. Their contractual powers are defined by the statutory limitations existing thereon, and they have no power except such as is expressly given, or such as is necessarily implied from the powers that are expressly given." (Emphasis added.)

In the case at hand the power to acquire a site is "expressly given." No prudent individual, unless he were skilled in real property valuation, would be inclined to rely on his own judgment alone as to the value of a parcel of land which he was proposing to buy. A similar prudence on the part of public officers is not only authorized but is commendable as well, and in special circumstances, might well be deemed a positive duty. I conclude, therefore, that a board of education may properly pay for the services of an appraisal of the value of a parcel of real property the purchase of which is under consideration by the board.

A similar conclusion must be reached as to the cost of locating property which is (1) suitable for school use, (2) held for sale, and (3) held at a reasonable price. One can well suppose that in many cases, where a board is only very seldom confronted with the necessity of real property acquisition, the services of a realty broker, as a practical matter, would be but little warranted. Even in such cases, however, it must be remembered that such services are designed to enable the board to make a purchase at a price as advantageous as possible without the necessity of appropriation proceedings. In the rendition of such services the broker is presumably skilled, and if the board should deem it a matter of business advantage to utilize that skill I conclude that it may lawfully do so.

As to your second question relative to the rental of school property, in Opinion No. 2534, Opinions of the Attorney General for 1953, page 158, I held in the first paragraph of the syllabus :

“1. Except as the power may be implied as being necessary to carry into effect some expressly granted power a board of education is not authorized to rent or lease property held by it for the public school purposes of its district ; but where a board of education finds itself in possession of property which is not needed for school purposes and which it cannot advantageously dispose of by sale, it may lawfully permit the temporary use of said property for some purpose other than a school purpose, and it may lawfully accept money for such use. * * *”

Without a description of the circumstances here involved I must assume that the rental activity here in question falls either within the scope of this rule, or concerns a rental contract with respect to mineral lands as authorized in Section 3313.45, Revised Code, or involves rental property held as the result of a conditional gift as provided in Sections 3313.17 and 3313.36, Revised Code, the conditions of the gift being such as to contemplate a rental operation by the board.

Where such rental activity is authorized under the law in any of the circumstances suggested above it would appear to be a matter of discretion on the board's part whether the services of a rental agent is required. Certainly the board members themselves will scarcely be thought to be under the duty personally to make rental collections, to enforce evictions, or to find new tenants ; for I am unable to distinguish the expense of such normal incidents of the rental business from that in providing for such common expense items as those incurred in providing janitor or maintenance serv-

ice, for example. I conclude, in short, that the authority to incur such expense is implied in the power to rent the property concerned.

As to your final question, where a purchase of real property is concerned, it seems quite clear that the cost of appraisal and the cost of brokerage services are both expenses of acquisition and should be paid as an item of such from the same fund as the purchase price is paid. As to items of rental expense, these should clearly be paid from the same fund to which the rental income is credited.

Coming now to the question of the propriety of compensating these services on a commission basis, it is obvious that such a method of compensation involves a service contract rather than the hiring of individuals in the status of public employees. The authority of the board in the matter of contracts is mentioned in Section 3313.17, Revised Code, as follows:

“The board of education of each school district shall be a body politic and corporate, and, as such, capable of suing and being sued, contracting and being contracted with, acquiring, holding, possessing, and disposing of real and personal property, and taking and holding in trust for the use and benefit of such district, any grant or devise of land and any donation or bequest of money or other personal property.”

This authority of “contracting and being contracted with” quite clearly refers to the power to act as a distinct legal entity, and adds nothing to the authority of the board by way of subject matter with respect to which contracts may be made, it being necessary to seek that authority elsewhere in the statutes.

In numerous sections in the “school code” we find express provisions for hiring teachers, superintendents, assistant superintendents and other administrative officers, business managers, and janitors and other employees. See Sections 3319.07, et seq., 3319.01, 3319.02, 3319.03, and 3319.47, Revised Code.

All of these provisions are descriptive of public “employees” in the usual and ordinary meaning of that term, and such an authorization cannot be deemed to include employment on a contract basis. See *State, ex rel. Stilson Associates, v. Ferguson*, 154 Ohio St., 139.

In Section 3313.37, Revised Code, however, we find this provision:

“The board of education of any school district, except a county school district, may build, enlarge, repair, and furnish the

necessary schoolhouses, 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 language emphasized above, under the rule of *ejusdem generis*, may be regarded as authorizing “all other necessary provisions” with respect to the specific powers enumerated in the preceding language in the sentence in which it is found, and specifically may be deemed to authorize “necessary provisions” in connection with the purchase or lease of real estate and building sites. This suggests the view that if such action is “necessary” in the view of the board, the personal services of appraisers, brokers, and rental agents may be obtained by contract and compensated on fees related to the value of the premises purchased or sold or to the sums collected as rent.

The provision noted above in Section 3313.37, Revised Code, as to “other necessary provisions for the schools” was formerly found in Section 7620, General Code, and was the subject of consideration in *Fehl v. Board of Education*, 23 N. P. (NS) 409. Involved in that case was a question of the validity of a personal service contract to supply janitor service to some eighty school buildings. On the point here pertinent Judge Matthews said (pp. 410, 411) :

“By force of Section 4749, General Code, it is enacted that boards of education shall be bodies politic and corporate and ‘as such capable of suing and being sued, contracting and being contracted with.’

“By Section 7620 it is made the duty of boards of education, among other things, to ‘make all other provisions necessary for the convenience and prosperity of the schools within the sub-district.’

“By Section 7690, boards of education are given the ‘management and control of all the public schools of whatever name or character in the district,’ and power to ‘appoint a superintendent of public schools, truant officer and janitors, and fix their salaries * * * and such other employes as it deems necessary.’

By force of these sections of the statutes it is the opinion of the court that boards of education have full power to make all contracts which may be reasonably regarded as ‘necessary for the convenience and prosperity of the schools,’ unless restrained by the terms of Section 7623.”

Section 7623, General Code, thus referred to required competitive bidding where a board of education "determines to build, repair or enlarge or furnish a school house * * *," and is analogous to currently effective Section 3313.46, Revised Code. Of the effect of Section 7623, General Code, Judge Matthews said (pp. 412, 414) :

"It seems to the court that this section is clear and does not require construction. It clearly does not apply to all contracts that a board of education might enter into; by its terms it only applies to such contracts as a board of education may enter into when it determines 'to build, repair, enlarge or furnish a school house or school houses, or make any improvement or repair provided for in this chapter.'

"The court is therefore of the opinion that under the express provisions of the General Code giving to boards of education the power to contract and be contracted with, and to make all necessary provisions for the convenience and prosperity of the schools, the defendant had power to enter into the contract for the cleaning of the school houses without submitting the contract to public competition in accordance with Section 7623 referable to other specific classes of contracts."

It seems clear that a similar limiting construction must be given to the analogous provisions in Section 3313.46, Revised Code, for there too reference is made to cases where the board "determines to build, repair, enlarge, or furnish a schoolhouse." In this connection it may be conceded that the acquisition of a school site is a part of the whole project of *providing* a school, but such site acquisition, and the activities incident thereto, are clearly distinct from *building* a schoolhouse. For this reason I conclude that the competitive bidding requirements in Section 3313.46, Revised Code, would not be applicable to personal service contracts of the sort here in question.

It is a matter of common knowledge that compensation on a commission basis is the almost universal practice in the case of appraisal experts, real estate brokers, and rental agents. Whether the practice of obtaining such services on this basis is so much more advantageous than the employment of the individuals concerned on a salary basis as to constitute the contract a "necessary provision" for the schools seems to me to be a matter committed to the discretion of the board of education. If we grant the authority to obtain the services by contract rather than by hiring employees it would appear to be immaterial upon what basis the compensation is fixed

so long as it is reasonably related to the value of such services. I conclude, therefore, that such services may properly be compensated on a commission basis if the board should decide that such course is the more advantageous.

Accordingly, in answer to your inquiry, it is my opinion that :

1. The authority of a board of education to acquire real property for school building sites, expressly given in Section 3313.17, Revised Code, necessarily implies the authority to pay, as a part of the cost of acquisition, where a negotiated purchase is made, the expense of expert appraisal of the value of such property and the expense of a real estate broker's services if the board deems the services of such appraisal expert and of such broker to be advantageous to the board in effecting such purchase. Compensation for such services may be made on a commission basis, related to the value of the property involved. (Opinion No. 3527, Opinions of the Attorney General for 1938, page 2495, overruled in part.)

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3. Where a board of education is authorized by law to rent real property owned by it the board may in its discretion employ the services of a rental agent as an incident of such rental operation and may pay his compensation from the same fund to which the proceeds of the rental operations are credited.

Respectfully,

C. WILLIAM O'NEILL

Attorney General