

2030.

APPROVAL, BONDS OF JACKSON TOWNSHIP-FARMERSVILLE RURAL SCHOOL DISTRICT, MONTGOMERY COUNTY, OHIO—\$4,650.00.

COLUMBUS, OHIO, December 19, 1933.

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

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2031.

APPROVAL, BONDS OF SWAN RURAL SCHOOL DISTRICT, VINTON COUNTY, OHIO—\$2,496.00.

COLUMBUS, OHIO, December 19, 1933.

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

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2032.

COUNTY ATTENDANCE OFFICER—NOT VIOLATION OF SECTION 12910, G. C. TO BE INTERESTED IN FIRE INSURANCE CONTRACT FOR USE OF VILLAGE AND RURAL BOARDS OF EDUCATION—VIOLATION OF SECTION 12911, G. C., IN SUCH CASE IF PREMIUM ON ANY ONE POLICY EXCEEDS \$50.00.

*SYLLABUS:*

1. *It is not a violation of section 12910, General Code, for a county attendance officer, appointed under section 7769-1, General Code, to be interested in a contract for the purchase of fire insurance for the use of village and rural boards of education covering the school properties under the jurisdiction of such boards.*

2. *It is a violation of section 12911, General Code, for a county attendance officer to be interested in a contract for the purchase of fire insurance for the use of a rural or village board of education, covering school properties under the jurisdiction of such boards, if the premium on any one policy of insurance exceeds \$50.00.*

COLUMBUS, OHIO, December 19, 1933.

HON. CHARLES S. LEASURE, *Prosecuting Attorney, Zanesville, Ohio.*

DEAR SIR:—This acknowledges receipt of your recent inquiry which reads as follows:

“Will you kindly advise me whether or not it is a violation of the provisions of penal section 12910 of the General Code of Ohio for a County Attendance Officer who is appointed by virtue of the provisions of section 7769-1 of the General Code of Ohio to solicit and write fire

insurance contracts with rural and village boards of education for the protection of the school properties in the respective rural and village districts.”

Section 12910, General Code, reads as follows:

“Whoever, holding an office of trust or profit, by election or appointment, or as agent, servant or employe of such officer or of a board of such officers, is interested in a contract for the purchase of property, supplies or fire insurance for the use of the county, township, city, village, board of education or a public institution with which he is connected, shall be imprisoned in the penitentiary not less than one year nor more than ten years.”

Section 7769-1, General Code, provides as follows:

“Every county board shall employ a county attendance officer, and may employ or appoint such assistants as the board may deem advisable. The compensation and necessary traveling expenses of such attendance officer and assistants shall be paid out of the county board of education fund. With the consent and approval of the judge of the juvenile court, a probation officer of the court may be designated as the county attendance officer or as an assistant. The compensation of the probation officers of the juvenile court so designated shall be fixed and paid in the same manner as salaries of other probation officers of the juvenile court; their traveling expenses as attendance officers which would not be incurred as probation officers shall be paid out of the county board of education fund. In addition to the compensation herein provided the county board of education may pay such additional compensation as it may deem advisable, to any probation officer designated as attendance officer and such additional amount shall be paid from the county board of education fund. The county attendance officer and assistants shall work under the direction of the county superintendent of schools. The authority of such attendance officer and assistants shall extend to all the village and rural school districts which form the county school district. But this section shall not be interpreted to confine their authority to investigate employment to that within the county school district.”

From an examination of the last quoted section, it would appear that a county attendance officer is not a public officer, but merely an employe of a county board of education. While the courts of Ohio have never absolutely agreed on the criteria necessary to constitute a position a public office, it has been quite often stated that for a person to be a public officer, he must be required to take an oath, execute a bond, receive emoluments, have a definite term of service, and exercise independent sovereign functions. See *State ex rel. Landis vs. Commissioners of Butler County, et al.*, 95 O. S. 157, 159; *State vs. Hunt*, 84 O. S. 143, 149; *State ex rel. Attorney General vs. Jennings*, 57 O. S. 415; *State, ex rel. Armstrong vs. Holliday*, 61 O. S. 171; *Palmer vs. Zeigler*, 76 O. S. 210; *State ex rel. vs. Brennan*, 49 O. S. 33; *State ex rel. vs. Callan*, 110 O. S. 367; and *Wright vs. Clark*, 119 O. S. 462.

Applying this general test, it may be seen that a county attendance officer has no definite tenure of office, is not required to take an oath or give a bond,

and does not exercise exclusively independent sovereign functions. While sections 7769-2 and 7770, General Code, do give county attendance officers certain independent duties, yet section 7769-1, General Code, supra, specifically states that the county attendance officer shall "work under the direction of" the county superintendent of schools. Therefore, I am inclined to feel that a county attendance officer is not a holder of "an office of trust or profit by \* \* \* appointment" within the provisions of section 12910, General Code.

However, it is not necessary to definitely decide whether or not a county attendance officer is an "officer", as he undoubtedly would, as hereinafter shown, come within the meaning of the words "employee of \* \* \* a board of such officers" within the meaning of such phrase as used in section 12910, General Code, supra.

In Opinions of the Attorney General for 1929, volume II, page 1480, a question arose concerning the proper interpretation of the words "agent, servant or employe" appearing in the first portion of section 12910, General Code, supra. The then Attorney General stated at pages 1484, 1485:

"The terms of said Section 12910, General Code, will be more intelligible if reference is had to its history. Prior to the codification of 1910, Section 6969, Revised Statutes, read as follows:

'It shall be unlawful for any person holding any office of trust or profit in this state, either by election or appointment, or any agent, servant or employe of such officer, or of a board of such officers to become directly or indirectly interested in any contract for the purchase of any property, supplies or fire insurance for the use of the county, township, city, village, hamlet, board of education or public institution with which he is connected. And it shall be unlawful for any such person, agent, clerk, servant or employe to become interested in any contract for the purchase of property, supplies or fire insurance for the use of any county, township, city, village, hamlet, board of education or public institution with which he is (not) connected when the amount of such contract exceeds the sum of fifty dollars, unless the contract is let on competitive bids, duly advertised as provided by law. Any person violating the provisions of this act shall be imprisoned in the penitentiary not more than ten years nor less than one year.'

The above quoted Section 6969, Revised Statutes was enacted in 1900 (94 O. L. 291). It retained its original form without amendment until February 14, 1910, the time of the passage of the act adopting the codification of the committee appointed by the General Assembly for that purpose. In the General Code, then adopted, Section 6969, Revised Statutes, was somewhat changed in its phraseology and was divided into what is now Sections 12910 and 12911, General Code, which sections have not since been changed.

It will be noted that Section 6969, Revised Statutes, provided that it shall be unlawful for any person holding any office of trust or profit in this State, either by election or appointment, or any agent, servant or employe of such officer or a board of such officers to become directly or indirectly interested in any contract for the purchase of property, supplies or fire insurance for the use of the county, township, city, village, hamlet, board of education or public institution with which he is connected, whereas, upon codification, the language was changed to read:

‘Whoever holding an office of trust or profit by election or appointment, or as agent, servant or employe \* \* \*

Upon comparison of the language of the former statute and the statute as codified, it will be observed that the word ‘any’ as used in the former statute was changed to ‘as’. I know of no reason why this was done. In so far as this change in language might affect the meaning of the statute, I am of the opinion that it should be construed as though the word ‘any’ had not been changed to ‘as’. Substituting the word ‘any’ for the word ‘as’ in Section 12910, General Code, it clearly appears that any employe of the village council may not lawfully, during the time of his employment, sell fire insurance to the village.”

In other words, the first few lines of section 12910, in effect read:

“Whoever, holding an office of trust or profit by election or appointment, or *any* agent, servant, or employe of such officer or of a board of such officers,” etc.

Now, there is no doubt but that members of a county board of education are public officers within the meaning of section 12910, General Code. In the recent Supreme Court case of *Schwing vs. McClure*, 120 O. S. 335, it was stated at page 340:

“A member of a school board, while he is not a township, county, or city officer, is a *public officer*. 35 Cyc., 899; *Ogden vs. Raymond*, 22 Conn., 379, 58 Am. Dec. 429; *Morse vs. Ashley*, 193 Mass, 294, 79 N. E. 481; *Cline vs. Martin*, 94 Ohio St., 420, 115 N. E. 37; *Wogoman vs. Board of Education of Rural School Dist. of Perry Twp.*, 95 Ohio St., 409, 116 N. E. 1087; *Leatherman vs. Board of Education of Allen County*, 96 Ohio St., 596, 118 N. E. 1083.”

In the case of *Cline vs. Martin, et al.*, 94 O. S. 420, it was stated at page 428, in holding that a member of a board of education was neither a county, township or municipal officer, that a school district is “a political organization unknown to the constitution—a mere creature of legislative enactment.”

The legislature has, by the provisions of section 4679, General Code, classified school districts into (1) city school districts, (2) exempted village school districts, (3) village school districts, (4) rural school districts and (5) county school districts. Separate boards of education are provided for by sections 4698, 4708, 4712 and 4728, General Code, to govern each of the five classes of school districts.

In view of the fact that section 7769-1, General Code, provides that the county board of education shall employ a county attendance officer, and members of a county board of education are public officers, it seems clear that a county attendance officer is an employe of “a board of such officers”, within the meaning of that phrase as used in section 2910, General Code.

It had previously been specifically stated by this office that the words “with which he is connected” following the words “public institution” in the latter portion of section 12910, modify all of the nouns preceding, as well as the words “public institution.”

In Annual Report of the Attorney General for 1911-1912, volume I, page 227, it was stated, after quoting sections 12910 and 12911, General Code:

"These sections together constitute section 6969, Revised Statutes. In their present form they afford some doubt as to whether the phrases 'with which he is connected' in section 12910 and 'with which he is not connected' in section 12911, modify any of the preceding nouns excepting the word 'institution.' If, however, they do not modify any of the preceding nouns the two sections are mutually inconsistent. I am satisfied that this point is doubtful enough at least to permit of comparison of the two sections being in *pari materia*, and also of the original section 6969, Revised Statutes. In the said original section, the language is such as to make it perfectly apparent that these two phrases modify all the nouns immediately preceding them respectively."

The language of the foregoing opinion was followed in Opinions of the Attorney General for 1930, volume II, page 1436.

At this time, attention should be directed to the fact that the word "the" precedes all the nouns in the latter portion of section 12910, General Code, as was the case in Revised Statute 6969, now repealed. Thus the word "the" modifying the phrase "board of education", shows that the legislature intended that the inhibition of section 12910, General Code, against selling fire insurance should be restricted to the sale of fire insurance to the *single* political organization with which the officer or employe was attached. It is true that section 7769-1, General Code, provides that the authority of a county attendance officer "shall extend to all the village and rural school districts which form the county school district." However, if it were to be held that such phraseology of section 7769-1, General Code, is sufficient to make the county attendance officer "connected" with all village and rural boards of education in the county, then the words "a" or "any" would have to be read into section 12910 in place of the word "the", in order to bring such county attendance officer within the inhibition of the section. Now, section 12910 is a penal section, and, under the familiar rule of law, must be strictly construed. I do not believe, in view of the strict construction that must be given to this statute, that the words "a" or "any" can be substituted in such section for the word "the."

There is another angle to your question which is deserving of some consideration. Under section 7610-1, General Code, a county board of education is empowered to act in place of local boards of education in certain cases where such local boards are neglectful of their duties. It might be argued that a county board of education could make a contract for the purchase of fire insurance for a village or rural school district under this statute. However, a careful examination of section 7610-1 will show that the enumerated instances in which a county board of education may act in place of a local board of education does not include the power to contract for fire insurance.

I am therefore of the opinion, in specific answer to your question, that it is not a violation of section 12910, General Code, for a county attendance officer who is appointed by a county board of education under section 7769-1, General Code, to be interested in a contract for the purchase of fire insurance by a village or rural board of education, covering school properties belonging to rural and village school districts.

While you do not specifically so ask, it might be well to point out that section 12911, General Code, would be violated under the facts set forth in your communication, if the annual premium on any one policy of fire insurance on the school properties exceeded \$50.00. In Opinions of the Attorney General for 1930, volume II, page 1434, it was held, among other things, that it was a viola-

tion of section 12911, General Code, for a county probate judge to be interested in a contract for the purchase of fire insurance on school buildings, when any premium on a policy exceeded \$50.00. Other opinions of former attorneys general were quoted with approval which held that, there being no provision in the statutes for advertising and receiving bids for fire insurance, it was a violation of section 12911, General Code, for an officer or employe of a board of such officers to sell fire insurance to a political subdivision with which he was not connected, when the premium exceeded \$50.00. Obviously, the reasoning of such opinion is applicable to the situation you present.

Respectfully,

JOHN W. BRICKER,

*Attorney General.*

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2033

ANNUITY—AUTHORITY OF INSURANCE COMPANIES TO MAKE SUCH  
CONTRACTS—DISCUSSION OF ANNUITY CONTRACTS.

*SYLLABUS:*

1. *When a person or corporation in consideration of the receipt of monthly payments agrees at a definite future time thereafter to repay an amount equal to the sum so paid plus interest thereon, the contract evidencing such transaction is not a contract for an annuity when the money is to be repaid in a lump sum.*

2. *When a person or corporation in consideration of the receipt of monthly payments agrees at a definite future time thereafter to repay an amount equal to the sum so paid plus interest thereon, the contract evidencing such transaction is a contract for an annuity when the money is to be repaid in a lump sum or at the option of the contractee, in periodic installments.*

3. *Sections 9339 and 9462-1, General Code, authorizing insurance companies to grant, purchase and dispose of annuities are a grant of additional power to insurance companies and do not constitute a limitation on the powers of other corporations authorized by their charter or statutes to issue annuity contracts the payment of which does not depend upon the happening of some contingency which may or may not happen at a particular time.*

COLUMBUS, OHIO, December 18, 1933.

HON. CHAS. T. WARNER, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your request for my opinion concerning the following questions:

"1. I have before me, four separate forms of contracts, which I am enclosing herewith, for your consideration in arriving at a conclusion on my first question. These contracts are as follows: Specimen Contract, Series G. No. G4733 of The Capital Endowment Company, Cleveland, Ohio, Specimen Income Builders Contract, in the sum of \$1,000.00, payable at maturity in one sum in currency of the United States of America, issued by the Central Acceptance Corporation, Cincinnati, Ohio, Specimen Income Reserve Contract, participating and convertible, No. 32R 0000 of the Fidelity In-