

It being the law of this state that only chancery cases are had on appeal in the court of appeals and that a criminal case in that court is heard on error, becoming a new cause therein, the conclusion follows that a clerk of the court of appeals may charge for his services when rendered the fees allowed by law in such cases.

Respectfully,

JOHN G. PRICE,
Attorney-General.

1358.

SCHOOLS—WHEN SUPERINTENDENT OF SCHOOLS IN CITY SCHOOL DISTRICT MAY BE PAID NECESSARY EXPENSES TO SEARCH FOR TEACHERS—WHEN MEMBER OF BOARD OF EDUCATION MAY PERFORM SUCH DUTY.

When it is necessary to search for teachers to teach in the schools of the district, the superintendent of schools in a city school district may be paid expenses actually incurred. When the superintendent for any reason cannot so act, after the board by resolution has declared such necessity to exist and has so authorized a member to perform such duty any reasonable expense actually incurred by members of the board in search of teachers may be paid for it. The service fund, once created, may be used only to pay expenses of the members of the board actually incurred in the performance of their duties.

COLUMBUS, OHIO, June 22, 1920.

Bureau of Inspection and Supervision of Public Offices Columbus, Ohio.

GENTLEMEN:—Acknowledgment is made of the receipt of your request for the opinion of this department upon the following questions:

1. Is it legal for the board of education of a city to pay expense of superintendent of schools in traveling in search of teachers to be employed in the schools by said board of education?
2. Is it legal for such board of education to pay expense of a member of the board of like nature?
3. Can the service fund under section 7704 G. C., be used for expenses of any one other than a member of the board?"

There is no section of the school law that I am able to find bearing directly upon the mode or manner of the procurement of teachers that is directly in point in answering your questions. Reliance therefore must be placed upon what is implied by a reasonable construction of the law generally touching the powers of boards of education covering the expenditures in question.

The language of the constitution is in part as follows:

"The general assembly shall make such provisions, * * * as * * * will secure a thorough and efficient system of common schools throughout the state. * * *". Art. VI, Sec. 2.

Pursuant to the authority thus given, the legislature has passed many school laws that impose various and sundry duties in broad general terms on boards of education looking to the thoroughness and efficiency of our public schools.

Your questions refer to no city board of education in particular, nor do they say that the expenses have been paid or made by any. However, I assume that some

city board has actually had such expenses which it has paid to either the superintendent of schools or to a member or members of the board, or both.

To determine the legality or illegality of particular acts of a city board of education is comparatively an easier matter than to give a broad general application of the law to acts permissive under the law not specifically set out by it but within its intention or imported into the legislative intent by a reasonable operation of it. That is to say, that while I think the law is broad enough to permit the expenses to be paid, yet there must be such necessity in the case that the expenses incurred could not have been avoided by diligent effort on the part of the members of the board or the superintendent otherwise to the same end. The facts in each particular instance should determine the necessity of the expenses. Schools must have teachers and if teachers do not offer themselves they must be sought by those charged by law with the duty of employing them.

Then again it is believed that where a member of a board actually incurs this expense it must have been done after a resolution has been had delegating to such member the duty of employing a teacher for a place in the schools of the district.

Section 7690 G. C. applies to all boards of education and is in part as follows:

"Each board of education shall have the management and control of all of the public schools of whatever name or character in the district. It may appoint a superintendent of the public schools, truant officers, and janitors and fix their salaries * * *"

Section 4750 G. C., which applies to all boards of education, is as follows:

"The board of education shall make such rules and regulations as it deems necessary for *its government and the government of its employes* and the pupils of the schools."

Section 4750, it will be noticed, gives to all boards of education the power to prescribe such rules and regulations for its government and the government of its employes as it deems necessary. Now where the board has given to the superintendent, one of its employes, the power to employ teachers, subject to its confirmation and approval, any such expenses actually incurred in the employment of a teacher might not come within the provisions of the law for a member of the board unless through the inability of the superintendent to act the board or one of its members was obliged to do so. And it is clearly so where the board by resolution has not legally determined that such disability existed and authorized one of its members so to act.

Section 7702 G. C. provides that the board of education of a city school district at a regular meeting held between certain dates shall appoint a suitable person to act as superintendent of the schools of the district.

Section 7703 G. C. is as follows:

"Upon his acceptance of the appointment, such superintendent, subject to the approval and confirmation of the board, may appoint all the teachers, and for cause suspend any person thus appointed until the board or a committee thereof considers such suspension, but no one shall be dismissed by the board except as provided in section seventy seven hundred and one. But any city board of education, upon a three fourths vote of its full membership, may *re employ* any teacher whom the superintendent refuses to appoint. Such superintendent shall visit the schools under his charge, direct and assist teachers in the performance of their duties, classify and control the promotion of pupils, and *perform such other duties as the board determines.*

* * *

The superintendent, while he is also a teacher or must have the qualifications required by law to be a teacher, is the administrative officer of the board, so to speak. The statute says that he may appoint teachers subject to the confirmation and approval of the board, but does not specifically say how or in what manner the procurement or appointment of such teachers may be made.

In former years city boards of education and city superintendents had many applications from teachers desiring employment in the schools from which a selection could be made in sufficient number to fill all positions in the schools, but such is not now the case in many places throughout the state. Therefore a greater effort over a wider field is required to fill places in the teaching force, and the superintendent or the board is not relieved of that duty because the law does not specifically state the mode or manner of appointment or procurement of such teachers.

In *State vs Morris*, 63 O S, 496, the court said:

"If it should be found that certain things are authorized to be done by the board of revision, and no statute can be found prescribing the exact mode of performing that duty or thing, the presumption would be that the general assembly intended that it might be performed in a reasonable manner, not in conflict with any law of the state. This principle was recognized by this court in *Jewett vs. Railway Co*, 34 Ohio St., 601, 608, where the following is found in the opinion: 'Where authority is given to do a specific thing, but the precise mode of performing it is not prescribed, the presumption is that the legislature intended the party might perform it in a reasonable manner.'"

Section 7620 G. C. as amended 108 O. L., 187, says:

"The board of education of a district may build, enlarge, repair and furnish the necessary school houses, purchase or lease sites therefor, * * * and make all other necessary provisions for the schools under its control. It also shall provide fuel for schools * * * and make all other provisions necessary for the convenience and prosperity of the schools within the subdistricts."

The convenience and prosperity of the schools of necessity requires teachers and the board or superintendent is charged with the duty of procuring them. Now traveling expenses may be a necessary incident to such duty. I therefore conclude that any reasonable expense necessarily incurred by the superintendent in securing teachers for the schools of his district such as you have mentioned is lawful for the board to pay as being within the general provisions of law prescribing such duty. Such expense may be a detail connected with the appointment of teachers.

Coming to your second question: If it be within the law for the board to pay such expenses for its agent, and in the appointment of teachers the superintendent so acts, it cannot be said that the board, when the necessity arises and after proper delegation so to do, may not legally pay the expenses mentioned in your question that are actually incurred by one of its members to secure teachers to teach in the schools of the district.

If a board has adopted a set of rules and regulations by authority of section 4750 G. C. requiring the superintendent of schools to appoint teachers subject to its approval and a condition arises because of which the superintendent is unable to appoint enough teachers for the board's approval to complete the number needed in the schools then the board should act. In such a case it may by resolution authorize one of its members to procure such teachers as it needs to teach in its schools and may provide

for the payment of any reasonable expense actually incurred in procuring them. The necessity of such action and the expense actually incurred are thus formally recognized by its express will formally given.

As is hereinafter shown the general assembly has recognized that city board members may have expenses which they may pay out of a service fund specifically created, but is silent as to just what those expenses may be.

If the law had set out the scope and character of the expenditures thus provided for so great care and caution might be avoided in the payment of expenses incurred in procuring teachers, yet great care must be taken to prevent any needless expenditure of the funds of the board, and the necessity for such expenss, as you indicate in your questions, should always be acknowledged by a formal action of the board put upon its minutes.

Section 7704 G. C. provides for the creation of a fund known as the "service fund" and says that such fund is to be used only in paying the expense of such members actual'y incurred in the performance of their duties. The statute does not say what the expenses of the board may be and no where in the statute is to be found specific statements of such expenses.

Your attention is called to the fact that the service fund above mentioned is obtained from the contingent fund of the board, limited in amount to a sum not in excess of five cents for each child enrolled in the schools, and created for the express purpose named in the statute. In the absence of a service fund, the expenses incurred, spoken of in your first and second questions, would be paid from the contingent fund.

Section 7704 G. C. is directory as to the creation of such service fund, but mandatory as to the use of the same when it is once created; that is, restricted to the payment of actual expenses of members of the board incurred in the performance of their duty. In my opinion such fund may be used only for payment of expenses of members of the board actually incurred in the performance of duty as such board members.

Respectfully,

JOHN G. PRICE,

Attorney-General.

1359.

TAXES AND TAXATION—FAILURE OF AUDITOR OF STATE FORMALLY TO CERTIFY ONE MILL LEVY FOR SCHOOL PURPOSES TO BE RETAINED IN COUNTY UNDER SECTION 7575 G. C. AMONG "STATE TAXES"—SAID REFUSAL DOES NOT JUSTIFY COUNTY AUDITOR IN REFUSING TO EXTEND LEVY ON TAX DUPLICATE OF COUNTY.

The failure of the auditor of state formally to certify the one mill levy for school purposes to be retained in the county under section 7575 G. C. among the "state taxes," for the reason that it is not to be settled for with other state taxes, does not justify the county auditor in refusing to extend the levy on the tax duplicate of the county nor in omitting to include the amount of such levy with other state taxes for the purpose of the adjustment of tax levies to be made by the budget commission. Such levy is a state levy in the same sense that it is made directly by the general assembly and is mandatory.

COLUMBUS, OHIO, June 22, 1920.

HON. LOUIS H. CAPELLE, *Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—Receipt is acknowledged of your letter of recent date requesting the opinion of this department interpreting section 7575 of the General Code, as amended in house bill No. 615, with respect to the following facts: