

OPINION NO. 73-088

Syllabus:

The furnishing of a reference text on Ohio school law to the city solicitor's office by the board of education of a city school district which encompasses an area greater than the city itself, for use in dealing with legal questions related to the board of education, is not "compensation" for purposes of R.C. 3313.35, and is impliedly authorized by that section.

To: Joseph T. Ferguson, Auditor of State, Columbus, Ohio
By: William J. Brown, Attorney General, August 31, 1973

I have before me your request for my opinion which may be stated as follows:

Is a city school district board of education, whose district encompasses an area greater than the city itself, authorized to purchase a legal reference text for the use of the city solicitor when dealing with legal questions related to the board of education?

I understand that the text in question is one on Ohio school law.

Under R.C. 3313.35 the city solicitor is designated the legal counsel for city school districts within the state. That section states in part that:

* * *In city school districts, the city solicitor shall be the legal adviser and attorney for the board thereof, and shall perform the same services for such board as required of the prosecuting attorney for other boards of the county. Such duties shall devolve upon any official serving in a capacity similar to that of prosecuting attorney or city solicitor for the territory wherein a school district is situated regardless of his official designation. In a district which becomes a city school district pursuant to section 3311.10 of the Revised Code, the legal adviser shall be the solicitor of the largest of the municipal corporations all or a part of which is included within the school district boundaries. No compensation in addition to such officer's regular salary shall be allowed for such services.

In Opinion No. 3644, Opinions of the Attorney General for 1954, my predecessor construed R.C. 3313.35, which has not been amended in any way which would affect his conclusions. The syllabus of that Opinion reads as follows:

1. The provisions of Section 3313.35, Revised Code, requiring the city solicitor of a city which is partly or wholly within the bound-

aries of a city school district, to act as legal adviser and attorney for the board of education of such district, is applicable to all cities which have not framed or adopted a charter pursuant to the provisions of Section 7, of Article XVIII, of the Constitution.

2. In case a city has adopted a charter pursuant to Section 7 of Article XVIII of the Constitution, which does not either directly or indirectly impose on its legal officer the duty to act as the legal adviser and attorney of the board of education, Section 3313.35, Revised Code, will not operate to impose such duty. Opinion No. 2478, Opinions of the Attorney General for 1934, page 425, approved and followed.

3. A board of education of a city school district may lawfully employ, and pay from the funds of the school board, legal counsel to assist or supplement the services provided to the school district by the city solicitor. Opinion No. 1392, Opinions of the Attorney General for 1933, page 1250, approved and followed.

Relying on the case of Nepper v. French, 125 Ohio St. 613 (1932), my predecessor noted at 141 that a board of education, other than that of a city school district, is authorized to employ counsel other than the prosecuting attorney, if it so desires. He then approved the ruling of Opinion No. 1392, Opinions of the Attorney General for 1933, which extended the Supreme Court's holding to the case of a city board of education and city solicitor. The reason for this extension is that R.C. 3313.35 provides "that the city solicitor should perform the same services for a board in a city school district as required of the prosecuting attorney for other boards of the county." Opinion No. 3644, supra, at 141.

My predecessor also questioned the constitutionality of R.C. 3313.35, insofar as it requires a city solicitor to provide legal service without compensation to a city school district, whose territory may be far larger than the city itself. He noted at 137 that, in the case before him, 50% of the population and 80% of the tax duplicate of the city school district lay outside the boundaries of the city whose solicitor was required by R.C. 3313.35 to provide legal service. He cited the case of Board of Education v. Columbus, 118 Ohio St. 295 (1928), which held unconstitutional R.C. 3963, which provided that, "no charge shall be made by a city or village or by the waterworks department thereof for supplying water for * * * the use of the public school buildings in such city or village. The statute was held to violate Article XVIII, Section 4, Ohio Constitution (municipal home rule provision), inter alia. My predecessor stated at 138 as follows:

While the above holding might cast some doubt on the constitutionality of the statute here under consideration, it, of course, would be beyond my power as an executive officer, to make such a declaration. This could be done only by the judiciary.

Your question presents an issue which the fact situation of Opinion No. 3644, supra, did not: the possibility that the proposed action may be prohibited by the last sentence of R.C. 3313.35, which states that, "no compensation in addition to such officer's regular salary shall be allowed for such services. Thus, if the proposed action is compensation, it cannot be authorized by the statute.

I understand from your question that ownership of the books will not be transferred to the current city solicitor, but rather that the books will be placed in the office of the city solicitor, for the use of whoever occupies that office, in researching the board of education's legal problems. Therefore, the issue may be resolved on the basis of Opinion No. 1987, Opinions of the Attorney General for 1933, whose syllabus advises as follows:

1. The compensation of members of the General Assembly can not lawfully be changed during their term of office.

2. Members of the General Assembly may not lawfully be granted allowances or perquisites in addition to their fixed compensation.

3. The payment of personal expenses of members of the General Assembly incurred for board or lodging, while attending the regular or special sessions of that body may not lawfully be paid from an appropriation made for the purpose of meeting the necessary cost of conducting the business of the two houses of the General Assembly, such as clerk hire, stationery, office supplies, printing and the like.

My predecessor stated at 1905 as follows

* * *I cannot subscribe to the view that the personal expenses of members of the legislature, incurred for board and lodging while attending sessions of the legislature, may be classed as proper expenses of the General Assembly itself, on a parity with the furnishing of heat, light, desks, stationery and other conveniences and necessities intended for the more prompt and efficient discharge of its duties. In my opinion, such expenditures are purely personal expenses of the individual members.

This language, read in conjunction with the third branch of the syllabus, reveals a distinction between personal expenses of public officers and expenses of conducting their official business. Expenditures of public funds for the former, stated the Attorney General at 1904-1905, would be either additional compensation or an allowance or perquisite, both of which are prohibited by Article II, Section 31, Ohio Constitution. However, expenditures for the purpose of conducting official business are, by implication, neither.

In drawing this distinction, my predecessor was following a general rule, which is stated in 63 Am. Jur. 2d 866, Public Officers and Employees, Section 302, as follows

The courts have made a distinction between official expenses and personal expenses and concur that the legislature has the power to appropriate public funds for the official expenses of all departments of the state government. The conflict is on the question whether the legislature has the power to allow personal expenses where the constitution contains a provision fixing or limiting the salary or compensation of a public officer.

There can be little doubt that the furnishing of a legal reference text is an official expense rather than a personal expense such as room and board. Consequently, it is not compensation, prohibited by R.C. 3313.35.

With that point resolved, I can apply the ruling of Opinion No. 3644, *supra*, to the instant fact situation. That Opinion ruled that a board of education of a city school district may lawfully employ, and pay from the funds of the school board, legal counsel to assist or supplement the services provided to the school district by the city solicitor" (branch 3 of the syllabus). "No doubt the compensation of such additional counsel could cover the necessary expenses of providing such legal services. Therefore, the board would be authorized to furnish such counsel with the use of a legal reference text to be used in answering legal questions concerning the board, or to include in his compensation an amount to cover his expenses in obtaining the use of such text, provided that the text was necessary for such purpose.

Can it be, then, that a board of education has authority to furnish the use of such a text to the additional counsel, but not to the city solicitor, who has the primary duty to provide legal services to the board, and whom the board may not compensate for such service? Such a construction would be as absurd as any it would be possible to impose upon a statute, in terms of its practical consequences. Such a construction should, of course, be avoided. See P.C. 1.49 (E) and 1.47 (C).

Therefore, under the ruling of Opinion No. 3644, *supra*, I must advise that the board of education has authority for the proposed action. It may be argued that the board has no express statutory authority, under the second branch of the syllabus of State, ex rel. Clarke v. Cook, 193 Ohio St. 465 (1921), which reads as follows:

Boards of education and other similar governmental bodies are limited in the exercise of their powers to such as are clearly and distinctly granted. * * *

However, such powers may be granted either expressly or by necessary implication of the express powers. State, ex rel. v. Pierce, 96 Ohio St. 44, 47 (1916). I have concluded that the board of education's express authority to rely upon the legal services of the city solicitor, together with its authority to hire and compensate additional counsel, implies the authority to furnish him with whatever materials he needs to perform such services properly and efficiently.

A general rule of statutory construction states that grants of authority to expend public funds must be construed strictly. State, ex rel. Pierce, supra, at 47. However, I am constrained to avoid an extremely strict construction in this case because of my predecessor's doubts about the constitutionality of R.C. 3313.35. Opinion No. 3644, supra. While he also noted that only the judiciary can declare a statute unconstitutional, it is my right and duty to construe a statute, when possible, to comply with the constitutions of the state and the United States. See R.C. 1.47 (A), and Opinion No. 70-011, Opinions of the Attorney General for 1970. Therefore, a construction which relieves a municipal treasury of some of its arguably unconstitutional burden of providing free legal service to a city school district board of education should be favored.

In specific answer to your question, it is my opinion and you are so advised, that the furnishing of a reference text on Ohio school law to the city solicitor's office by the board of education of a city school district which encompasses an area greater than the city itself, for use in dealing with legal questions related to the board of education, is not "compensation" for purposes of R.C. 3313.35, and is impliedly authorized by that Section.