

Note from the Attorney General's Office:

1933 Op. Att'y Gen. No. 33-2130 was overruled
in part by 1995 Op. Att'y Gen. No. 95-040.

2130.

SCHOOL BUS—VILLAGE COUNCILMAN MAY NOT BE LEGALLY EMPLOYED BY BOARD OF EDUCATION TO DRIVE SCHOOL BUS BUT MAY INDEPENDENTLY CONTRACT TO PROVIDE TRANSPORTATION FOR PUPILS.

SYLLABUS:

1. *A village councilman may not be legally employed by a board of education to drive a school bus for such board of education.*
2. *A village councilman may, while serving as such councilman, enter into an independent contract with a board of education to provide transportation for the school pupils of the district.*
3. *It is a question of fact to be determined by the terms of the specific contract whether or not the relationship existing between the board of education and the bus driver, is that of employer and employe, or independent contractor.*

COLUMBUS, OHIO, January 3, 1934.

HON. HAROLD U. DANIELS, *Prosecuting Attorney, Painesville, Ohio.*

DEAR SIR:—This acknowledges receipt of your recent communication which reads:

“The undersigned would like your official opinion upon whether or not a member of the Council of the Village of Willoughby may be legally employed by the Board of Education of Willoughby Township as a driver of a school bus when the councilman owns the bus and secures his contract after competitive bidding.”

Your question undoubtedly arises because of doubt as to the applicability of the following provision of section 4218, General Code:

“* * * No member of the council (village) shall hold *any other public office or employment*, except that of notary public or member of the state militia * * *.” (Word in parenthesis and italics the writer’s.)

In Opinions of the Attorney General for 1930, volume II, page 1237, it was held, as disclosed by the syllabus:

“A member of council of the village of Beachwood may not be legally employed as the driver of a school bus by the board of education.”

An examination of such opinion discloses the following question was therein presented—May a member of the council of the village of Beachwood be *employed* as a driver of the school bus, by the local board of education during the term for which he was elected, and is, a member of the village council?

It seems to have been assumed in such opinion that the particular bus driver was as “employe” of the local board of education within the meaning of section 4218, General Code, as the question therein asked contained the words “employed as a bus driver.” There is no discussion in such opinion as to whether

the bus driver involved might have been what is known in law as an "independent contractor", and if so, whether the language of such section would be equally applicable to an "independent public contractor", as to an "employee."

From the facts presented in such opinion, it would appear that the local board of education owned the bus and merely hired the councilman to drive it, and that the said councilman was at all times subject to the orders of the board of education.

In the present instance, however, the facts are somewhat different. From your communication, it appears that the councilman owns the school bus and has entered into a contract with the board of education of Willoughby Rural School District to provide transportation to the schools of the district based on his competitive bid.

The element of contracting for school transportation after competitive bidding has no bearing on the question presented, as it has been held by this office that boards of education are not required to have competitive bidding for contracting for school transportation. See Opinions of the Attorney General for 1931, volume I, page 125. However, the fact that the councilman owns the bus may be an important element in determining whether or not under the terms of the contract the councilman is in fact an "independent contractor" or "employee of the board of education."

It is a general principle of law that the legislature is presumed to have used words in a statute in their ordinary legal meaning. When the legislature enacted section 4218, General Code, it must have been cognizant of the well recognized fact that the word "employment" does not legally include an "independent contractor." Moreover, section 4218, General Code, is penal in nature, as a violation of the terms of such section causes a "forfeiture" of the office of councilman. It is a well known rule of law that penal statutes must be strictly construed.

In my opinion, No. 487, rendered April 6, 1933, the question arose as to whether a certain bus driver who owned a school bus and was hired by a board of education in a school district at the rate of \$90.00 per month, which sum included his personal services and also the use of the bus, was an "employee" of the school district, within the meaning of that term as used in section 1465-61, General Code, a section of the Workmen's Compensation Act. After reviewing numerous authorities which pointed out the distinction between an "employee" and an "independent contractor", in that the latter retains control of the work to be performed, I stated that "the relationship, whether contractor or employe, depends upon the specific terms of the contract." It is unnecessary here to restate in detail the authorities pointing out the test of determining whether or not a person is an employe or independent contractor. I am enclosing a copy of the opinion for your examination. At page 8 of the opinion it was stated:

"It is possible under the terms of the blank form of the contract submitted for the person contracting for the transportation of school pupils to be either an independent contractor or employe. The relationship existing between the board of education and the person contracting with the board for the transportation of the school children must be determined in each case by the specific terms of the contract. If the owner of the bus is required by the terms of the contract to drive his own bus, it is a contract for the personal services of the driver and therefore a contract of hire within the Workmen's Compensation Act. If by the terms of the specific contract the person contracting with the

board is not required to personally drive the truck, he is not an employe within the Workmen's Compensation Act."

The first sentence of the first paragraph of the syllabus of such opinion stated:

"The relation existing between the board of education and the bus driver under contract for the transportation of pupils must be determined by the terms of the specific contract, whether employe or independent contractor."

Inasmuch as I do not have before me the terms of the contract, it is obviously impossible to definitely state whether or not the councilman involved in your question is or is not holding public employment within the meaning of section 4218, General Code, and therefore a more specific answer to your question may not be given. However, I believe that after an examination of the contract, in connection with the test laid down in my opinion No. 487, your question can be readily answered.

I might further add that section 12911, General Code, has no application, as it cannot reasonably be maintained that a contract for the transportation of school children is a contract for the purchase of "property, supplies, or fire insurance" within the meaning of such section.

Respectfully,
JOHN W. BRICKER,
Attorney General.

2131.

APPROVAL, BONDS OF MARION CITY SCHOOL DISTRICT, MARION COUNTY, OHIO—\$11,000.00.

COLUMBUS, OHIO, January 4, 1934.

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

2132.

APPROVAL, BONDS OF CLINTON COUNTY, OHIO—\$16,000.00.

COLUMBUS, OHIO, January 4, 1934.

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

2133.

APPROVAL, BONDS OF BROOKFIELD TOWNSHIP RURAL SCHOOL DISTRICT, TRUMBULL COUNTY, OHIO—\$1,000.00.

COLUMBUS, OHIO, January 4, 1934.

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