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SCHOOLS—COUNTY BOARD OF EDUCATION HAS AUTHORITY TO BRING ABOUT A SUBMISSION OF AN ADDITIONAL LEVY OF TAXES WHEN LOCAL BOARD HAS BEEN DERELICT IN THE PERFORMANCE OF ITS DUTIES—SPECIFIC CASE PASSED UPON.

SYLLABUS:

Where the facts showing a dereliction of duty on the part of the local board are as conclusive as set forth in the instant case, a county board of education, under the provisions of section 7610-1, General Code, would be justified and empowered to take the necessary and proper action to bring about a submission of an additional levy of taxes to the electors of the local district in question.

COLUMBUS, OHIO, September 25, 1924.

HON. VERNON M. RIEGEL, *Director of Education, Columbus, Ohio.*

Dear Sir :—

This will acknowledge receipt of your communication of recent date in which you submit the following:

“Section 7610-1 specifies that ‘if the board of education in a district under the supervision of the county board of education fails * * * to provide for the continuance of any school in the district for at least thirty-two weeks in the year, * * * the county board of education of the county to which such district belongs, upon being advised and satisfied thereof, shall perform any and all such duties or acts, in the same manner as the board of education by this title is authorized to perform them.’ The board of education of Elk township in Vinton county refuses to take action looking toward the submission to the electors of the district the question of authorizing an additional three-mill levy, although the accounts of this board of education show that the schools of the district can not continue for thirty-two weeks without such levy. If the county board of education is advised and satisfied that the Elk township board of education’s failure to submit such levy will make it impossible to maintain schools in the district for at least thirty-two weeks, will said county board take action looking to the submission of the extra levy to the voters of the Elk township district?”

Section 7610-1, General Code of Ohio, to which you refer, reads as follows:

“If the board of education in a district fails to provide sufficient school privileges for all the youth of school age in the district or to provide for the continuance of any school in the district for at least thirty-two weeks in the year, or to provide for each school an equitable share of school advantages as required by this title, or to provide suitable school houses for all the schools under its control, or to elect a superintendent or teachers, or to pay their salaries, or to pay out any other school money, needed in school administration, or to fill any vacancies in the board within the period of thirty days after such vacancies occur the county board of education of the county to which such district belongs, upon being advised and satisfied thereof,

shall perform any and all such duties or acts, in the same manner as the board of education by this title is authorized to perform them. All salaries and other money so paid by the county board of education shall be paid out of the county treasury on vouchers signed by the president of the county board of education, but they shall be a charge against the school district for which the money was paid. The amount so paid shall be retained by the county auditor from the proper funds due to such school district, at the time of making the semi-annual distribution of taxes."

The power and authority of county boards of education under the above quoted section has been considered in a former opinion of this department, Opinions of the Attorney General for 1921, Vol. I, p. 23, to which your attention is directed.

In the opinion referred to reference is made to the case of *Board of Education vs. Commissioners*, 10 O. N. P. (n. s.) 505. In the above case the residents of a township school district petitioned the board of education to establish a subdistrict and to build a building therein which was refused by the local board of education and thereupon the residents of said district requested that the county commissioners act for the local board as was requested in their petition. The authority reposed in the county board of education by section 7610-1, General Code, was formerly reposed under the provision of the Revised Statutes, Section 3969, in the county commissioners of the county. In the opinion in the above case the court has discussed at some length the powers and duties committed by the above section of the Revised Statutes to the county commissioners and classes those powers and duties as ministerial and judicial powers and from that opinion the following is quoted:

"The school electors of each district elect a board of education for their district schools; into the hands of this board of education the law of our state commits, in general, all the powers granted respecting the maintenance of schools in such districts; * * *

As a rule courts will not interfere with boards of education in the exercise of these functions. The control and management of the schools of this state is given to the boards of education by the statute, and these boards cannot be interfered with in any manner by the court unless there is a gross abuse of the discretionary powers given.

Nevertheless, the authority of the board of education is not final in all matters; a certain supervisory power invested in the county commissioners by Revised Statutes, section 3969, * * *

It will be noted that some of these powers committed to the county commissioners after default on the part of the board of education, such as certifying the levy, hiring and paying teachers, etc., are ministerial merely in their nature, and that some of them are judicial. As to the ministerial acts, the law is simple; * * * *

As to the exercise of judicial powers, the case is different. The county commissioners in such cases can not interfere merely by reason of a difference of opinion; they certainly have no higher powers than the courts have; that is, they can only interfere and assume the functions of the local board, when that board has acted, or declined to act, in such a way as to show a gross abuse of discretion. * * * *

A ministerial act, according to the accepted definition, 'is one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, with regard to, or the exercise of, his own judgment upon the authority of the act being done.' *State vs. Nash*, 66 O. S., 558.

Judicial acts, on the other hand, involve the investigation and determination of a state of facts, an act of choice or discretion or judgment as to the propriety of actions to be taken in reference to the facts thus ascertained. * * *

At the time this case was decided the county school districts and the county board of education had not been created. The present law (sections 7610 and 7610-1, General Code) divides the powers enumerated in the original section (Revised Statutes 3969) between the county commissioners and the county board of education; otherwise it stands practically the same as before amendment. The discussion in the opinion of the court above quoted points out that the functions of a local board of education belong in two classes, that is, ministerial duties and judicial acts, both of which are defined therein. As to ministerial acts, when the local board fails to perform them, the county board of education may then step in and do such acts for the local board; but as to judicial acts, it is observed that a county board of education may not do what the courts have consistently refused to do unless there is shown to be gross abuse of discretion, or, in the absence of fraud and collusion, a grave assumption of authority not granted.

The county board of education acts "upon being advised and satisfied" of the dereliction and neglect of duty or the abuse of power on the part of the local board. See also the case of *Board of Education vs. Shaul*, 17 Dec., 269, which is also referred to in the former opinion of this department, in which case the court says:

"The court's construction of section 3969 R. S. is, that when a board of education fails in any year to do any of the things enumerated therein, all of which in the opinion of the court, come within the class of ministerial duties, as herein defined, the board of county commissioners, upon being advised and satisfied thereof, may do and perform any and all of said duties in as full a manner as the local board is authorized to do."

In the statement of facts presented in your inquiry, the thing complained of against the local board is that it has refused and still refuses to take action looking toward the submission to the electors of the district the question of authorizing an additional three mill levy, although the accounts of the board in question show that the schools of the district cannot continue for thirty-two weeks without such additional levy. Your statement of facts further assumes that the county board of education, of which the local district is a part, has been advised and is satisfied that the failure of the local board of education to submit such levy will make it impossible to maintain schools in the district for the period of thirty-two weeks. This state of facts leaves little for the county board of education to determine. Under the facts as presented in your question, there seems to be no other conclusion than that the local board of education has failed in a matter that is vital to the carrying forward of the schools of the district. The provisions of section 7610-1 is to the effect that when the county board of education is "advised and satisfied thereof, it shall perform all such duties and acts in the same manner as the board of education by this title is authorized to perform them." However, notwithstanding the conclusive statement of facts submitted, it is believed that the county board of education still would have some discretion as to whether or not they should take the necessary action to cause a submission of the additional tax levy to a vote of the electors of the district. When the county board of education is advised and satisfied that the local board is in default, it is empowered to act for and in place of such local board. In ministerial functions the county board acts for and instead of the local board; in acts judicial in character it is cautioned that before acting, it must

be advised and satisfied that the facts are sufficient to show such abuse of discretion or gross neglect of duty as will be convincing to a court if it hopes to have its action upheld.

Therefore, you are advised that there can be little doubt of the intent of the law to invest county boards of education with power to perform all the acts and duties enumerated in section 7610-1, General Code, in which the local board of education is in default or has failed in its duty, and where the facts showing a dereliction of duty on the part of the local board are as conclusive as set forth in your inquiry and statement, it is believed the county board of education would be fully justified in taking the necessary and proper action to bring about a submission of an additional levy to the electors of the district in question.

Respectfully,
C. C. CRABBE,
Attorney General.

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APPROVAL, FINAL RESOLUTION, SUPPLEMENTAL CONTRACT FOR
SECTION "L", I. C. H. NO. 158, ATHENS COUNTY.

COLUMBUS, OHIO, September 25, 1924.

Department of Highways and Public Works, Division of Highways, Columbus, Ohio.

1795.

APPROVAL, FINAL RESOLUTION, ONE ROAD IMPROVEMENT IN
WASHINGTON COUNTY.

COLUMBUS, OHIO, September 25, 1924.

Department of Highways and Public Works, Division of Highways, Columbus, Ohio.