

of public safety. Hence it is concluded in answer to your question, that if the "park policemen" contemplated by your inquiry are to be such as may be empowered to act in the capacity of city police officers, such policemen by reason of statutory requirement must be under the control and supervision of the department of public safety.

Respectfully,

JOHN G. PRICE,  
*Attorney-General.*

3140.

BOARD OF EDUCATION—MAY NOT FIX SALARY OF SUPERINTENDENT OF SCHOOLS AT SPECIFIED AMOUNT AND PROVIDE THAT IN ADDITION SUPERINTENDENT SHALL RECEIVE CERTAIN PERCENTAGE OF FOREIGN TUITION COLLECTED—DUTY OF RECEIVING SCHOOL FUNDS IMPOSED UPON TREASURER OF SCHOOL DISTRICT—MONEYS RECEIVED FROM FOREIGN DISTRICT FOR TUITION PLACED IN TUITION FUND.

1. *A board of education in fixing the salary of its superintendent of schools may not fix such salary at a specified amount and provide that in addition thereto the superintendent shall receive a certain percentage of the foreign tuition collected, for the reason that such payment would not be a "fixed" salary as intended by section 7690 of the General Code, and such superintendent is not a bonded employe of the district.*

2. *The duty of receiving school funds is imposed upon the treasurer of the school district and under the provisions of section 7682 G. C. (109 O. L. 373) all money received for tuition from foreign district shall in all cases, upon its receipt, be placed in the tuition fund.*

COLUMBUS, OHIO, May 25, 1922.

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

GENTLEMEN:—Acknowledgement is made of the receipt of your communication in which you submit the following question for the opinion of this department:

"In fixing the salary of its superintendent of schools, may a board of education of a city district *fix such salary at a specified amount* and provide that in addition thereto the superintendent shall receive a certain percentage of the foreign tuition collected, at the same time making it the duty of the superintendent to collect such tuition?"

In considering this question your attention is invited to the recent decision of the supreme court in the case of *State of Ohio ex rel. Clark vs. Cook*, decided on November 22, 1921, the second branch of the syllabus reading as follows:

"2. Boards of education, and other similar governmental bodies, are limited in the exercise of their powers to such as are clearly and distinctly granted. (*State ex rel. Locher, Pros. Atty., vs. Menning, 95 Ohio St., 97, approved and followed.*)"

An investigation of the records of this department shows that a question largely similar to the one you submit was passed upon about ten years ago by the then Attorney-General. The question under consideration at that time was whether a board of education could legally employ a superintendent of schools at a stated salary per month and in addition give him the tuition from the non-resident pupils as a part of his salary, if the board of education so desired. This inquiry was answered in Opinion 371, issued on April 30, 1912, and appearing at page 491, Vol. I, Opinions of the Attorney-General for 1912, the syllabus reading as follows:

"A board of education may not provide that the superintendent of schools shall receive, in addition to a stated salary, all funds received for tuition of non-resident pupils, for the reason that such payment would not be a 'fixed' salary as intended by section 7690, General Code.

Furthermore, such would be in contravention to section 7603, General Code, which provides special distribution for the respective funds under the control of the board."

It will be noted that this opinion was issued prior to the enactment of what was known as the Ohio School Code of 1914, and it is therefore necessary to examine the statutes in force at this time to ascertain whether a different view would follow at this time, since it is found that the sections of law discussed in Opinion 371 have been amended since 1912.

The general authority to elect a superintendent of schools in any district appears in section 7690 G. C., which reads in part as follows:

"It (the board of education) may elect, to serve under proper rules and regulations, a superintendent or principal of schools and other employes, including, if deemed best, the superintendent of buildings, and may *fix their salaries.*"

The specific section bearing upon the election of a superintendent of schools in a city school district is section 7702 G. C., which says:

"The board of education of each city school district at a regular meeting between May 1st and August 31st, shall appoint a suitable person to act as superintendent of the public schools of the district. \* \* \* "

The manner of electing the superintendent of schools is set forth in section 4752 G. C., which provides that he shall be elected, as other business of the board is transacted, by public roll call of the members composing the board. However, in none of the sections mentioning the superintendent of schools is there any reference made to his specific duties, your question being as to whether the board of education could make it the duty of the superintendent in a city district to collect tuition due from foreign pupils and then provide that in addition to the fixed salary of the superintendent he shall receive a certain percentage of the foreign tuition collected.

For a comprehensive analysis of the word "fixed" your attention is invited to the language appearing in Opinion 2458, issued by this department on October 10, 1921, wherein it is said:

"To 'fix' a compensation is to prescribe a rule or rate by which it is to be determined. *Flag vs. County*, 51 Ore., 172, 177, 178. In *Zimmerman*

vs. Canfield, 42 O. S., 463, 467, 468, compensation was held to be *fixed*, within the meaning of a statute requiring the commissioners to fix compensation for lands appropriated, when the amount to be allowed was 'determined upon'. 'To fix the value of the property' was held in *People vs. Nassau Co.*, 104 N. Y. Supp., 350, 356, to mean 'final determination.' Also, 'to decide definitely; make sure; settle; determine'. In *Gas Co. vs. Peru*, 89 Fed., 185, 189, it was said that 'fix' in an ordinance authorizing council to 'fix the rate' to be charged for gas, means 'to make fast, firm, or immovable'. In *Crickett vs. State*, 18 O. S., 9, 21, the duty imposed upon the General Assembly to 'fix \* \* \* the compensation' of officers, was held discharged when that body 'shall prescribe or "fix" the rule by which compensation is to be determined'. In *Huck vs. Gaylord*, 50 Tex. 578, 582, the court employed Worcester's definition, viz: 'Worcester defines the word fix "To settle or remain permanently"'. The word 'fix' is also defined in *Funk & Wagnall's New Standard Dictionary*, viz: 'To decide definitely; make sure; settle; determine.' And in *Hedrick and Walden's Cases*, 16 Ct. of Claims, 88, it was held that 'a salary is "fixed" when it is at a stipulated rate for a defined period of time.'

In the case of *State of Ohio ex rel Clark vs. Cook*, decided in November, 1921, and reference to which has heretofore been made, the court spoke as follows upon the question of the fixing of a salary, to-wit:

"The express power to fix a salary does not grant by implication the power to unfix said salary. The exercise of the power agreeable to the statute exhausts that power agreeable to the statute. The power to change after once fixed, from the language of the *Locher* case, supra, shows that such power is not 'clear and distinctly granted'. The power not being so granted to the board of education, cannot be exercised by the board of education, and its attempted exercise thereof is *ultra vires*. The action of the board of education in attempting to change the salary of the county superintendent, after once fixed, is illegal and void under the statute."

It would appear, then, that in the light of these previous opinions and court decisions a board of education in fixing the salary of its superintendent of schools at a designated amount, and then providing in addition that such superintendent should be allowed a certain percentage of foreign tuition collected, would not be such a fixing of the salary of such superintendent as is contemplated by the statutes. It is clear that no one has knowledge at the beginning of a school year as to what the amount of foreign tuition collected might be and thus it would be impossible to arrive at any fixed amount which would equal a certain percentage or fraction of the foreign tuition collected. A superintendent might be employed for a series of years and since this tuition collected would be one thing in one year and another thing in another year, it is apparent that the salary of the superintendent, instead of being fixed as contemplated by law at the time of employment, would be different in one year than in another. However, there is another point worthy of consideration in this case and that is whether it is proper for the board of education to employ some one to perform work or duties which already devolve upon another employe of the board who is properly bonded and whose salary is presumed to be fixed, with the knowledge on the part of the board and the officer himself receiving such salary that such salary is in satisfaction of all services to be rendered in that office by the person occupying it.

Under recent school legislation, requiring districts not supporting high schools

to pay the tuition of their pupils at an adjoining high school, the amount of tuition which is paid from one district to another is frequently a very considerable amount in a number of cases. This tuition per capita is set forth under section 7747 G. C. to be computed in a certain way by dividing the cost of the high school, plus a certain per cent, to be added as appearing in that section, by the number of pupils who are instructed in the school. In filling out various forms required in taxation and the apportionment of school funds, and in the making of its budget for the next year, the board of education will always take into consideration what its receivable foreign tuition is likely to be. This *foreign tuition received from another district belongs in the treasury of the district which performs service* and the person in charge of the treasury of the receiving district is the clerk-treasurer of the board of education.

Prior to the time of the adoption of section 4782, the offices and duties of the treasurer of a board of education and the clerk were entirely distinct, but under section 4782 the clerk shall now perform all the duties placed upon the treasurer of the board of education by various sections of the law.

A case distinguishing between the duties of a clerk of a board of education and the duties of a treasurer of a board of education *prior to the combining of the two activities, under one person*, is that of *State vs. Griffith*, 74 O. S., 80, decided April 3, 1906, in which the court said on page 93:

“ \* \* \* The duty of receiving, keeping and disbursing funds seems to be exclusively imposed upon the treasurer of the district.”

As amended in 104 O. L., 158, section 4782, read in part as follows:

“ \* \* \* the clerk of the board of education of the district shall perform all the services, discharge all the duties, and be subject to all the obligations required by law of the treasurer of the school district.”

Section 4782 was amended in 108 O. L., Part I, p. 704, but the above language as appearing in 104 O. L. was not changed and such is the law today, that the clerk of the board of education shall perform the services and discharge all the duties, and be subject to all the obligations required of the treasurer in a school district.

“ \* \* \* The clerk of the board of education can receive extra compensation for performing the duties of treasurer of such board, and the board of education has the legal right to fix the compensation of such clerk, when he is required to perform the added duties of treasurer of the board of education \* \* \* under section 4782, General Code.” (Opinion No. 1141, Annual Report of the Attorney-General for 1914.)

The officers of each board of education are elected on the first Monday of January; a clerk is chosen for a term not to exceed two years, but no treasurer is elected because of the language of section 4782, *supra*. The position of clerk in a board of education is a very important one, the law contemplating that at no time shall it be vacant. To illustrate, section 4753 G. C. provides that if the clerk is not present at a meeting, then the members shall choose one of their number to serve in his place until the appearance of the clerk at the meeting. Under section 4754 G. C. the clerk shall record the proceedings of each meeting and these minutes shall be read at the next meeting, approved by the board, signed by the president and attested by the clerk. Among the things which should appear in the minutes of the board of education in these meetings would be the status of tuition ac-

counts, either where the district in question owed an adjoining district, or where, on the other hand, the adjoining district owed the local district. If the collection of tuition were left in the hands of some one other than the clerk-treasurer of the board, then the board would not have before it at the time of its meeting, when action might be desired, the exact status of tuition accounts, where the district was either the creditor or the debtor. Other sections indicating the importance of the office of clerk-treasurer are section 4756, where the clerk shall execute all deeds required for the transfer of property, and section 4757, where the clerk shall assist in the execution of all conveyances of any kind. Similarly under section 4760 process in all suits against boards of education shall be by summons served upon either the clerk or the president of the board. If there were litigation pending in a tuition case, under no circumstances could the process be made upon the superintendent of schools in the district but would have to be upon the clerk or president of the board, even though the tuition account due had been paid to a superintendent but not turned in to the clerk-treasurer of the district. Of special importance is the requirement in 4764, which says:

“Before entering upon the duties of his office, each school district treasurer shall execute a bond, with sufficient sureties in a sum not less than the amount of school funds that may come into his hands, payable to the state, approved by the board of education and conditioned for the faithful disbursement according to law of all funds which come into his hands \* \* \*, the bond \* \* \* in such amount as the board of education may require.” (101 O. L., 264.)

Here it is directly provided that the treasurer (who is at present also the clerk of a board of education) shall at all times be under sufficient bond in a sum greater than the amount of school funds “that may come into his hands”; among these funds that come into his hands are the tuition funds which are paid by foreign school districts. If it should happen that these tuition funds received could not be found in the hands of the treasurer at the time of any examination, his bond executed under section 4764 G. C. amply protects the board of education and the school district itself. However, if the collecting and temporary keeping of these tuition funds is turned over to another employe, such as a superintendent of schools, who is not under bond, then the protection contemplated in 4764 on all the school funds of any kind, at any time, would not be present. Further safeguards as to the funds in the hands of the treasurer of a school district appear in sections 4767, 4768, 4769 and 4770 of the General Code. Under section 4767, if there was a change in the office of the clerk-treasurer during a period when another school employe had in his charge the collection of these tuition funds, then the counting of funds provided for in 4767 could not be fully carried out, because this counting of funds must take place at the time of the approval of any new bond, and there shall be entered upon the record of the board a certificate setting forth the exact amount of money so found in the hands of such treasurer. If a foreign district had paid tuition to an employe of a local district, other than the clerk-treasurer of the local district, then such tuition funds might not be in the treasury at the time of the counting, though they would be if the clerk-treasurer had received such tuition collections from the foreign board.

Section 4767 says further:

“Such record shall be signed by the president and clerk of the board and be prima facie evidence that the amount therein stated was actually in the treasury at that date.”

Section 4768 reads in part:

“ \* \* \* no money shall be paid to the treasurer of the district other than that received from the county treasurer, except upon the order of the clerk of the board, who shall report the *amount of such miscellaneous receipts* to the county auditor each year immediately preceding such treasurer's settlement with the auditor.”

Among the miscellaneous receipts referred to in 4768 are the amounts of tuition received from foreign school districts. This section further indicates that since all of these miscellaneous receipts are school moneys and belong in the treasury of the school district and since it is the duty of the treasurer of the board of education to receive the moneys due a board of education, it would not be proper to grant a certain percentage of tuition amounts due to another person as compensation for the collection of such tuition amounts.

Section 4769 reads: .

“ \* \* \* Before giving such treasurer a warrant or order for school funds, the auditor may require the treasurer to file with him a statement *showing the amount of such funds in his possession* signed by the clerk of the board of education.”

Section 4770 reads in part:

“Within the first ten days of September, each year, the treasurer shall settle with the county auditor for the preceding school year, and for that purpose he shall make a certified statement showing the *amount of money received, from whom, and on what account*, the amount paid out and for *what purpose*. \* \* \* ”

If the clerk-treasurer was the person to receive foreign tuition, then he would always have on his books an exact statement of all the moneys received and for what purpose, where if another person were collecting these foreign tuition accounts, the clerk-treasurer might have these entries on his books and again he might not. The contemplation of the law is not that he should go out and seek some one and get this information in order to have his books correct at the time of any settlement or official examination.

Reference to the bond of the clerk of the board of education also appears in 4774 G. C.

Section 4775 G. C. provides that the clerk shall prepare an annual report “of the receipts” and expenditures of school money and the statistical statement in reference to the school, and transmit the same to the county auditor by September 1st. The section further says:

“But in each school district having a superintendent of schools, such report, *except the receipts and expenditures of money*, shall be made by the superintendent.”

From the language of the above section it appears that the superintendent of schools must have nothing to do with receipts and expenditures of money, that being left to the clerk-treasurer of the school district.

Under the provisions of section 4776 G. C. the clerk of the board shall prepare annually, ten days prior to the election, "an itemized statement of all money received and disbursed by the treasurer of the board within the school year next preceding", and post at the place of holding such election, or print in some newspaper of general circulation in the district. The reference here to "all money received \* \* \* by the treasurer of the board" includes tuition payments made by foreign districts. Section 4776, as regards this report, is applicable to all school districts in the state, except city districts where the clerk is not required to publish this statement prior to an election. See also sections 4778, 4779, and 4780 G. C. Thus section 4780 G. C. reads in part:

"The treasurer's accounts shall show the amounts *received from* \* \* \* *other sources* on the order of the clerk \* \* \* and for what purposes paid. A separate account of each fund must be kept, and each account balanced at the close of the school year, and the balance in the treasurer's hands belonging to each fund shown."

Section 4781 G. C. reads in part:

"The board of education of each school district shall fix the compensation of its clerk and treasurer, which shall be paid from the contingent fund of the district. If they are paid annually, the order for the payment of their salaries shall not be drawn until they present to the board of education a certificate from the county auditor, stating that all reports required by law have been filed in his office. \* \* \* "

One of those reports required by law to the county auditor is the amount of foreign tuition received and if the board of education had given the duty of collecting foreign tuition to another school employe, the clerk-treasurer could not make out this report intelligently, since he had not made these collections himself and would not have exact knowledge as to the tuition accounts, unless the tuition accounts collected had been promptly turned in and he would thus make his report upon the statement of another return than what he officially knew to be the facts himself.

Section 4783 G. C. provides:

"When the treasurer is \* \* \* dispensed with, all the duties and obligations required by law of the county auditor, county treasurer or other officer or person relating to the school moneys of the district shall be complied with by dealing with the clerk of the board of education thereof. Before entering upon such duties, the clerk shall give an additional bond equal in amount and in the same manner prescribed by law for the treasurer of the school district."

Under the provisions of section 7586 G. C. each board of education annually, prior to the first Monday in June, "shall fix the rate of taxation necessary to be levied for all school purposes" after the state funds are exhausted, and this tax levy for tuition purposes in a school district may rise or fall according to the amount of foreign tuition collected and put in the treasury of the school district prior to the time of preparing the annual budget for the preceding year. It is not the contemplation of the law that the board of education should ask an employe how much of the foreign tuition had been received, but on the contrary the

exact status should appear in the books of the clerk-treasurer at that time, and from these figures the tax rate for tuition purposes might be increased or lessened for the succeeding year. The manner of the apportionment of school funds is set forth in section 7603. This apportionment refers to all the moneys that are received by a school district and the closing sentence reads as follows:

*"Moneys coming from sources not enumerated herein except for tuition of children of non-residents shall be placed in the contingent fund."*

This language is further strengthened by newly amended section 7682, which now reads:

*"Each board of education may admit other persons upon such terms or upon the payment of such tuition within the limitations of other sections of law as it prescribes. Notwithstanding the provisions of section 7603, General Code, money received for tuition shall in all cases upon its receipt be placed in the tuition fund."*

Here we have a direct mandate that the tuition as soon as received by the receiving officer or agent of the board of education shall be placed in the tuition fund. The section does not say that a portion of such money shall be placed in the tuition fund or any fraction of it, or that it can be depleted in any way by paying a percentage to any person for the collecting of it, the provision being that the tuition received, that is, all the tuition, shall be placed in the tuition fund of the district. Under the provisions of section 284 G. C. the bureau of inspection and supervision of public offices shall make an examination of school district offices at least once in every two years and inquiry shall be made "into the methods, accuracy and legality of the accounts, records, files and reports of the office", and it is not the contemplation of the law that when the examiner desires to examine the books of the clerk-treasurer in a school district it will be necessary to send out for another school employe not under bond, and possibly not then in the district, to get the exact status of the tuition funds collected since the last official examination. If these collections are made by the clerk-treasurer, as the agent of the board of education, and placed immediately in the tuition fund of the district as an entity by the clerk-treasurer, then the examiners of the bureau of inspection and supervision of public offices, or any other person, can find at once the exact status of each and every account, as to the amount paid, amount due and the disposition of the funds received.

For the law bearing upon the question of a servant or employe being interested in any contract of a board of education, see section 12910 G. C. It might follow that if a percentage of the amount of the tuition collected was paid to any one, there would be undue activity in attempting to bring to the district in question foreign pupils, thus militating possibly against the pupils resident in the district who are entitled in the first instance to the school facilities of the district, and a further result of operating against the success of schools in adjoining districts, which might become more or less depleted in membership if their own resident pupils were being urged to attend a certain other school. These, of course, are rare contingencies, but from a legal standpoint such conditions could obtain.

In reply to your inquiry, following the discussion above given, and considering prior opinions of this department and the sections of law cited as they now read, you are advised that it is the opinion of this department that:

(1) A board of education in fixing the salary of its superintendent of schools may not fix such salary at a specified amount and provide that in addition thereto



the superintendent shall receive a certain percentage of the foreign tuition collected, for the reason that such payment would not be a "fixed" salary as intended by section 7690 of the General Code, and such superintendent is not a bonded employe of the district.

(2) The duty of receiving school funds is imposed upon the treasurer of the school district and under the provisions of section 7682 G. C. (109 O. L., 373) all money received for tuition from foreign districts shall in all cases, upon its receipt, be placed in the tuition fund.

Respectfully,  
 JOHN G. PRICE,  
*Attorney-General.*

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3141.

APPROVAL, TRANSCRIPT OF PROCEEDINGS, PROPOSED SALE OF BERME EMBANKMENT OF OHIO CANAL IN CITY OF MASSILLON, CONTAINING 1183 SQUARE FEET MORE OR LESS—AUTHORITY OF SPECIAL ACT, 108 O. L., 280.

COLUMBUS, OHIO, May 26, 1922.

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

GENTLEMEN:—Your letter of May 8, 1922, was duly received, submitting for the attention of this office a transcript of your proceedings in respect to the proposed sale to William K. Atwater and Charles M. Atwater of a portion of the Berme embankment of the Ohio canal in the City of Massillon, containing one thousand, one hundred eighty-three (1,183) square feet, more or less.

The sale in question is proposed to be made under authority of a special act passed April 17, 1919, and appearing in 108 O. L., Part I, p. 280.

I note that you have appraised the property at \$1,183.00.

Finding as I do that your proceedings as shown by the transcript are in conformity with the terms of the special act above mentioned, I am joining with you in the resolutions for the sale and I am returning the duplicate transcript with my signature appended thereto.

Respectfully,  
 JOHN G. PRICE,  
*Attorney-General.*

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3142.

APPROVAL, CONTRACT OF STATE OF OHIO WITH E. L. BRUEGGMAN, AKRON, OHIO, FOR ADDITIONAL WORK IN CONSTRUCTION OF WASTEWAY AT EAST RESERVOIR.

COLUMBUS, OHIO, May 26, 1922.

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

GENTLEMEN:—Your letter of May 18, 1922, was duly received, submitting for the attention of this office a contract in triplicate proposed to be entered into by