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1. BUS—STATE UNIVERSITY—BOARD OF TRUSTEES—NOT LIABLE AS A BOARD OR INDIVIDUALLY FOR DAMAGES TO PERSON OR PROPERTY GROWING OUT OF NEGLIGENCE—EMPLOYEE IN OPERATION OF BUS PURCHASED WITH PUBLIC FUNDS BY TRUSTEES—USE, ACTIVITIES, CONDUCT AND MANAGEMENT OF UNIVERSITY—PROVISO, REASONABLE CARE IN SELECTION OF EMPLOYEE AND NO ACTIVE PARTICIPATION IN NEGLIGENCE WHICH PRODUCES INJURY.
2. BOWLING GREEN STATE UNIVERSITY—BOARD OF TRUSTEES—WITHOUT AUTHORITY TO EXPEND PUBLIC FUNDS FOR PROTECTIVE INSURANCE AGAINST LIABILITY GROWING OUT OF OPERATION OF BUS.

## SYLLABUS:

1. The board of trustees of a state university is not liable as a board or individually for damages to person or property growing out of negligence on the part of their employe in the operation of a bus purchased by such trustees with public funds, and used in connection with the various activities properly incident to the conduct and management of such university, provided they have used reasonable care in the selection of such employe and do not actively participate in the negligence which produces such injury.

2. The Board of Trustees of Bowling Green State University is without authority to expend public funds in procuring insurance to protect the members of such board from liability growing out of the operation of a bus purchased by such board for use in the proper activities of such university.

Columbus, Ohio, August 12, 1947

Mr. E. J. Kreischer, Business Manager, Bowling Green State University  
Bowling Green, Ohio

Dear Sir:

I have before me your request for my opinion, reading as follows:

“We are hereby requesting an opinion relative to liability of a member of the University Board of Trustees resulting from death, injury, or property damage as a result of an accident caused by a motor vehicle purchased by a department of Bowling Green State University. Furthermore, that if the Board of Trustees is liable for such damages, whether or not the University may carry Property Damage and Public Liability Insurance on such vehicles, premium to be paid from local funds.

The Board of Trustees recently purchased a 45-passenger bus which was paid from Athletic funds. This bus was procured primarily for the purpose of transporting members of the various athletic teams. It also will be used for the transportation of other extra-curricula activities, such as: Women's Glee Club, Men's Glee Club, Orchestra, Band, Drama, and Speech. Each of these local activities will compensate the Athletic Department for the use of this bus. Furthermore, it will be used for academic activities, such as for transportation of students on field trips to laboratories in Toledo, Cleveland, and other cities, and field trips for Biological Science. The compensation for such trips will be made from laboratory fees paid by the students for such services.

It was deemed advisable by the Board of Trustees that insurance should be carried on this bus, including Property Damage and Public Liability, particularly in view of the fact that

the bus was not procured nor will it be operated from state appropriated funds, and that in the event of an accident resulting in loss of life, personal injury, or property damage, whether or not the claimants might have recourse against the members of the Board of Trustees jointly or severally. In accordance with their action the writer has entered into contract with the Buckeye Union Casualty Company for such insurance. The question has arisen as to whether or not the University can legally pay for such insurance.

If the Trustees are in any way liable for claims arising from personal injury, death, or property damage, they feel that they should be protected under an insurance policy. If, however, there is no real or contingent liability for the Trustees, it would not be necessary to carry this insurance."

The first question that appears to arise from your statement of facts is whether the trustees of your University in the purchase and use of the bus in question, were acting within the scope of their duties and authority. Section 4860-3 of the General Code sets forth the general powers of the board of trustees, as follows:

"The board of trustees of Bowling Green State University shall elect, fix the compensation of and remove the president and such number of professors, teachers and other employees as may be deemed necessary by said board. *The board of trustees shall do any and all things necessary for the proper maintenance and successful and continuous operation of said university.* The board of trustees may accept donations of lands and moneys for the purposes of said university." (Emphasis added.)

I find no other section of the General Code expressly conferring authority on, or limiting the powers of such board in so far as concerns the general conduct and management of the University. It is a matter of common knowledge that in all colleges and universities, including state institutions, a great number of extra-curricular activities are not only sanctioned but are directly established and conducted by the trustees and officers. Among these, athletic activities, the organization of athletic teams, and the conduct of inter-collegiate contests hold, perhaps, the leading place. That these extra-curricular functions form a legitimate part of the work of a state university, appears to have been decided quite positively in the case of *Long v. Trustees of the Ohio State University*, 24 O. App., 261 (dis. 116 O. S., 738) where the court held:

"The Ohio State University may, under the powers con-

ferred upon it by statute, establish and maintain upon its campus a store for the purpose of selling and furnishing books and other student supplies to students and professors of said University upon a cost basis.

Such enterprise, being incidental to the main objects and purposes of the University, is not forbidden to the University as an agency of the state by any provision of the state Constitution."

The powers given by statute to the Ohio State University which were there considered, do not differ greatly from those conferred upon the Trustees of Bowling Green State University. In the case of the Ohio State University the statute gives its trustees authority to "adopt by-laws, rules and regulations for the government of the university"; whereas, as already noted as to Bowling Green State University, there is conferred what seems to me to be more comprehensive authority, to wit, "to do any and all things necessary for the proper maintenance and successful and continuous operation of said university."

In the case just referred to, it was claimed that the asserted power—with or without legislative sanction—is contrary to the state Constitution. Commenting on this, the court said:

"The constitutional question is a challenge to the right of the state, or an agency of the state, to engage in a commercial enterprise, where such enterprise is incidental to or closely connected with a legitimate function of the state. This is a far-reaching proposition. Originally the government functions of the state were simple, and confined strictly to state functions; but as the state has advanced the government becomes more complex. In comparatively recent years the state has enlarged the scope of its enterprises so as to include many that have heretofore been considered as purely private enterprises. These are mostly, if not entirely, cases or instances where a commercial or private enterprise is carried on as accessory to some legitimate function of the state. This is especially true with respect to the universities of the state."

Commenting further upon the powers of the state university, the court said:

"It would follow, necessarily, that all the enterprises undertaken by the University should be reasonably incidental to the main purpose, to wit, the maintenance of a University."

Referring to the broad powers given the state university and to the enterprise directly involved, the court said:

“The power of the University trustees to engage in an incidental enterprise would be legitimate, unless limited by statute. No direct or specific statute would be necessary to confer the power.”

The powers given by law to the board of trustees of a state university are to a considerable extent governed by the same rules as those conferred by law on boards of education, and it is a well established principle that they have only such powers as the General Assembly has seen fit to give them by express grant, and such as are necessarily implied therefrom or incidental thereto. Likewise, it is well established that a board of education is not responsible as such, for injuries to persons or property, growing out of the negligence of its employes, resulting in injury to person or property. The principle is thus stated in 36 O. Jur., page 401:

“The doctrine of respondeat superior does not apply to a school board, and it is not liable for the negligent acts of any of its subordinate officers or servants.”

Among the many cases applying this principle, are *Finch v. Board of Education*, 30 O. S., 37; *Board of Education v. Volk*, 72 O. S., 469.

The application of this principle to public officers, generally, is thus stated in 32 O. Jur., page 967:

“Public officers are not liable for acts or default, negligence or omissions of subordinate officials in public service, unless they direct the act complained of to be done, or personally cooperate in the negligence from which the injury results.” Citing *Conwell v. Voorhees*, 13 Ohio, 523.

A like statement is found in 43 Am. Jur., page 94:

“It is settled, subject, however, to a number of exceptions, that in the absence of a statute imposing liability, or of negligence on his part in appointing or supervising his assistants, an officer is not liable for the default or misfeasance of subordinates and assistants, whether appointed by him or not, providing the subordinates or assistants, by virtue of the law and of the appointment, become in a sense officers themselves, or servants of the public, as distinguished from servants of the officer, and providing the officer does not direct the act complained of, or personally co-operate in the negligence from which the injury results.”

It is accordingly my opinion that neither the Board of Trustees of Bowling Green State University, as a body, nor the individual members of such board, are liable in damages for accidents occurring in the use of the bus purchased by them out of state funds under their control, and used for various activities in connection with the operation and management of such university.

It has been held by this office in a number of opinions that where there is no liability to be protected against, public officers are not authorized to use public funds under their control for procuring liability insurance. See 1943 Opinions of the Attorney General, page 181; 1945 id, page 607.

In view of my conclusion above stated, the Trustees of Bowling Green State University would not, in my opinion, have authority to use funds of such university in payment for liability insurance to protect the board of trustees or its members from damage claims.

Respectfully,

HUGH S. JENKINS,  
Attorney General.