OPINION NO. 70-084

Syllabus:

A school board may contract with a caterer to provide food service to a school within the district. Opinion No. 455, Opinions of the Attorney General for 1963, is overruled.

To: Lee C. Falke, Montgomery County Pros. Atty., Dayton, Ohio
By: Paul W. Brown, Attorney General, July 15, 1970

Your request for my opinion states in part:

> "We have received a request from the Superintendent of the Montgomery County School Board as to the legality of the County School Board to enter into a contract with a catering service for providing food service to our Joint Vocational School.
>
> "* * *Our Board of Education would propose to contract with a caterer who would operate the food program for the Joint Vocational School.* * *"

Section 3313.81, Revised Code, authorizes boards of education to establish and operate school lunchrooms. A portion of Section 3313.81, supra, states, in referring to lunchroom facilities:

> "Such facilities shall be under the management and control of the board and the operation of such facilities for school lunch purposes shall not be for profit."

Section 3313.81, supra, was interpreted by Opinion No. 455, Opinions of the Attorney General for 1963, as precluding a board of education from hiring caterers to operate the school lunch program. The thrust of Opinion No. 455, supra, probably resulted from federal regulations governing the administration of the national school lunch program which forbade the participation of any school which contracted its food or milk service outside of the school. A portion of these regulations, Section 210.8 of the administrative rules for the Food and Nutrition Service, Department of Agriculture, has recently been changed. A food service management company may now be employed by a school in the conduct of its feeding operations, without causing the school to lose its federal assistance.

Section 210.8, supra, requires that any contract made pursuant to the section provides for the maintenance of thorough records by the contractor, and further, that any federal donated commodities shall inure only to the benefit of the school's feeding operation. The section goes on to say:

> "A School Food Authority that employs a food service management company shall remain

> responsible for seeing that the feeding operation is in conformance with its agreement with the State Agency or the FNS Regional Office."

The change in federal law reflects an attempt to implement the federal policy of safeguarding the health and well-being of school children by ensuring that school lunches are available to all. To view Section 3313.81, supra, as precluding the school lunch program from being contracted outside of the school creates an unnecessary obstacle to the implementation of the program. A board that contracts with a food service management company to operate the school feeding program still must meet all applicable standards, and none of the board's responsibility is contracted away by such an action. To hire an outside contractor to run the school lunch program does not, per se, remove the program from the control and management of the board as prohibited by Section 3313.81, supra.

Section 3313.81, supra, also states that lunchrooms shall not be operated for profit. The better construction of the meaning of this requirement appears in California School Employees Association v. Sequoia School District, 272 C.A. 2d 98 (1969). In this case a suit was brought in an attempt to prevent the school district from replacing a school-operated manual food service with a vending service operated by an outside food service contractor. The court, in rejecting the argument that the statutory prohibition against a school food facility making a profit prevented the planned action to contract the food service to an outsider, said at page 132 of the decision:

> "Any benefit to the supplier which may be attributed to the election of the district to furnish food services in the manner proposed is purely incidental, and is no different from the benefit formerly furnished the purveyor of unprepared foodstuffs which ultimately ended up on a steam table."

This reasoning applies with equal validity and force to the Ohio statutory prohibition against a school food facility being operated for a profit. The meaning of "profit" seems to be that the charges for the meals shall not be such as to create a profit from the operations, rather than that no supplier or contractor involved in the food operation receive a profit for the work performed for the school.

It is therefore my opinion and you are advised that a school board may contract with a caterer to provide food service to a school within the district. Opinion No. 455, Opinions of the Attorney General for 1963, is overruled.