

1979.

APPROVAL—BONDS AKRON CITY SCHOOL DISTRICT, SUMMIT COUNTY, OHIO, \$20,000.00, PART OF ISSUE DATED JUNE 1, 1922.

COLUMBUS, OHIO, February 25, 1938.

*The Industrial Commission of Ohio, Columbus, Ohio.*

GENTLEMEN:

RE: Bonds of Akron City School District, Summit County, Ohio, \$20,000.00.

I have examined the transcript of proceedings relative to the above bonds purchased by you. These bonds comprise part of an issue of school building bonds in the aggregate amount of \$500,000 of a \$3,000,000 authorization, dated June 1, 1922, bearing interest at the rate of 5% per annum.

From this examination, in the light of the law under authority of which these bonds have been authorized, I am of the opinion that bonds issued under these proceedings constitute valid and legal obligations of said school district.

Respectfully,

HERBERT S. DUFFY,

*Attorney General.*

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1980.

STATE EMPLOYES RETIREMENT BOARD—SPECIFIC AUTHORITY UNDER SECTION 486-40 G. C. TO APPOINT SECRETARY—POWER TO MAKE NECESSARY RULES AND REGULATIONS—SECRETARY IS EMPLOYEE—BOARD HAS POWER TO FIX TERM OF EMPLOYMENT.

*SYLLABUS:*

1. *The State Employes Retirement Board has specific authority under virtue of Section 486-40, General Code, to appoint its secretary, to perform such other functions as are required for the proper execution of the provisions of the Act creating the board, with the further authority to make all rules and regulations necessary to carry out the provisions of the act.*

2. *The secretary of the board is an employe. Such board having, prior to April 15, 1937, appointed a certain person secretary without fixing his term, had ample power and authority at such time (April 15, 1937) to fix the expiration of such secretary's term as of December 31, 1938, and such secretary is entitled, as a matter of law, to hold such office until such time.*

COLUMBUS, OHIO, February 25, 1938.

HON. CHARLES J. MANNEY, *Chairman, State Employees' Retirement Board, Columbus, Ohio.*

DEAR SIR: I am in receipt of your recent communication, as follows:

"I have been requested to ask you for an official opinion as to the validity of the contract entered into by this Board with its present Secretary, Mr. Wilson E. Hoge.

In order that you may have this matter clearly before you, I am enclosing herewith a letter dated November 23, 1937, from Mr. Hoge, as secretary of this Board, giving you an extract from the minutes of the meeting of this Board held April 15, 1937."

I likewise acknowledge receipt of a transcript of your record, as follows:

"At a meeting of the Board on July 10, 1933, held at the offices of the Board, 410 Wyandotte Building, Columbus, Ohio, the following motion was passed:

'That Wilson E. Hoge, present auditor, be employed at his present salary as acting secretary and auditor, effective July 16, 1935, and that the services of all other present employees be terminated as of July 15, 1935, except those re-employed by Mr. Hoge.'

At a meeting of the Board on December 16, 1935, held at the offices of the Board, 410 Wyandotte Building, Columbus, Ohio, the Board passed the following motion:

'That the said Wilson E. Hoge be made Secretary to the Retirement Board.'

At a meeting of the Board on April 15, 1937, held at the offices of the Board, 811 Wyandotte Building, Columbus, Ohio, the following motion was passed:

'That the present term of the Secretary, Wilson E. Hoge, expire December 31, 1938, and that thereafter the Secretary

of the State Employes' Retirement Board be employed for terms of two years, and that in all cases he shall serve until his successor is elected and qualified."

At a meeting of the Board on April 22, 1937, held at the offices of the Board, 811 Wyandotte Building, Columbus, Ohio, the following motion was passed:

"That the Secretary's salary be set at the rate of \$3600.00 per year effective May 1, 1937."

Boiling the facts down and taking them chronologically, I find:

1. Wilson E. Hoge was employed by your Board as acting secretary and auditor, effective July 16, 1935.
2. On December 16, 1935, Mr. Hoge was appointed Secretary to the Retirement Board.
3. On April 15, 1937, a motion was passed providing that Mr. Hoge's term as secretary expire December 31, 1938, and that thereafter the Secretary of the Board should be employed for a two year term and in all cases serve until his successor should be elected and qualified.

You desire to be informed as to the present official status of Mr. Hoge, under this statement of fact.

Your Board was created under authority of Amended Senate Bill No. 281, effective October 19, 1933, and by such enactment your Board was authorized to employ a secretary, but no term was fixed for such secretary. This Act is now comprehended under Sections 486-32 to 486-75, General Code, inclusive.

Section 486-40, General Code, provides as follows:

"The retirement board shall elect from its membership a chairman and shall appoint a secretary, an actuary, and such medical, clerical and other technical and administrative employees as may be necessary for the transaction of the business of the retirement system. The compensation of all persons so appointed shall be fixed by the retirement board. *The retirement board shall perform such other functions as are required for the proper execution of the provisions of this act, and shall have authority to make all rules and regulations necessary therefor.*" (Intalics the writer's.)

Section 486-34, General Code, provides as follows:

"The general administration and management of the state employes' retirement system and the making effective of the provisions of this act are hereby vested in a board to be known

as the 'state employes' retirement board, which shall consist of five members as follows: The attorney general. The auditor of state. The chairman of the civil service commission, and two other members known as state employe members, who shall be members of the state employes' retirement system and who shall be elected by ballot by the members of the retirement system from among their number in a manner to be approved by the retirement board."

Section 486-35, General Code, provides as follows:

"The first election of members of the retirement board shall be conducted by and under the supervision of the attorney general, the auditor of state and the chairman of the civil service commission, acting as a canvassing board, within thirty days after this act becomes effective. At the first election each state employe shall have the right to vote for two candidates for membership on the retirement board. One for a term of two years and one for a term of one year, the candidate receiving the greatest number of votes shall be deemed elected for the two year term. Their successor shall be elected for a term of two years each."

The 92nd General Assembly enacted Amended Senate Bill No. 253 into law, the same becoming effective June 24, 1937. While this act did repeal a number of the sections of Amended Senate Bill No. 281, it did not repeal Sections 486-34, 486-35 and 486-40, General Code, above quoted. However, Sections 486-36 and 486-37 of the former act were repealed and we quote them from Amended Senate Bill 253, viz:

Section 486-36, General Code:

"Any vacancy occurring in the term of any employe member of the retirement board shall be filled by the remaining members of the board for the unexpired term of such member and the appointee shall serve until his successor is elected and qualified. Any employe member of the retirement board who fails to attend the meetings of the board for three months or longer without valid excuse shall be considered as having resigned and the board shall declare his office vacated as of the date of the adoption of a proper resolution."

Section 486-37, General Code:

"All elections for members of the retirement board, after the first election, shall be held annually on the first Monday in October for two year terms beginning on the first day of the

January following the election. Each employe member shall hold office until his successor is elected and qualified. Any member of the retirement system shall be eligible for election as a member of the retirement board and the name of any member who shall be nominated by a petition signed by at least one hundred members of the retirement system shall be placed upon the ballots by the retirement board as a regular candidate. Names of other eligible candidates may at any election be substituted for the regular candidates by writing such names upon the ballots. The candidate receiving the highest number of votes for any term as a member of the retirement board shall be elected a member of the retirement board for such term."

While the last two sections above quoted were repealed by the last act, they were re-enacted in haec verba and we are not confronted with a change in the law. A cursory examination of the law will develop the fact that the provisions as to elections and terms of employe members can be complied with. The employe members are serving two-year terms and were so serving when the secretary's term was fixed. Hence, as one employe member must be elected this year (1938), at least one of the employe members of the board on April 15, 1937, when Mr. Hoge's term was extended to December 31, 1938, is serving a term which will not expire until January 1, 1939.

The Attorney General was a member of the board at such time and, as a matter of law, his term would not expire until the second Monday of January, 1939. The auditor of state was then a member of the board and his term would not expire until the second Monday of January, 1941.

We can leave the chairman of the Civil Service Commission and one of the employe members of the board out of the picture and we find that the terms of three members of the board out of five will not expire until after Mr. Hoge's term as secretary had expired. The law fixed no term for the secretary and prior to April 15, 1937, he held his position at the pleasure of the board and would have continued to so hold it had it not been for the resolution of April 15, 1937. Then we have the query, did the board exceed its authority when it extended his term to Decembe 31, 1937? The board was not required to fix a term for Hoge, but having fixed it, can the board terminate it? This board had broad powers as will be seen by reference to the italicized portion of Section 486-40, General Code. It could appoint a secretary and other officers and perform such other functions as are required for the proper execution of the provisions of the act and make all rules and regulations necessary therefor. The position in question is beyond the

pale of civil service, consequently there is no question of qualification or charges involved.

There is just one question here, viz., did the board have the power to fix the term of Hoge as secretary as it did fix it, and if not why not?

Evidently, it was the legislative intent that the appointees of the board should serve during the pleasure of the board. I gather this intent from the failure of the General Assembly to fix a term for the appointees. If it was the pleasure of the board on April 15, 1937, that Mr. Hoge should serve as its secretary until December 31, 1938, and it so provided, was such board exceeding its blanket power to make all necessary rules and regulations for its own government? When the board provided on April 15, 1937, that Hoge's term should end December 31, 1938, it did, by actual calculation, provide him with a twenty and one-half month term.

There is a dearth of Ohio authority dealing with a situation such as is here presented. I do find one case that might be resorted to as a faint side-light to this case, but there is little similarity in the facts involved, and the statutory set-up is radically different. I refer to the case of *Board of County Commissioners of Franklin County vs. Ranck*, 9 Ohio Circuit Court Reports, p. 301. I will touch this case very briefly, as I do not feel that it can be relied on as a precedent in this matter.

On January 5, 1895, the board of county commissioners of Franklin county made a contract with one Ranck, whereby he was employed as janitor of the court house for one year at a salary of \$80.00 per month, payable monthly, and Ranck proceeded to perform his duties. On the next day, Sunday, January 6, 1895, the term of office of one member of the board expired and on the following day (Monday) his successor qualified and entered upon the duties of his office. The new board organized, as it was required under the statute to do, and it passed a resolution wherein Ranck's employment was "reconsidered and rescinded and held as null and void" and, on the 30th day of January, the new board by resolution employed another person as janitor. On February 12th Ranck presented a claim for \$80.00 for his services from January 6, 1895, to February 5, 1895. The board rejected the claim but did tender him the sum of \$80.00 for services as janitor from the first day of January, 1895, to the first day of February, 1895, with the understanding that such "tender was not to be considered a recognition of an alleged contract" attempted to be entered into by the board of county commissioners of the date of January 5, 1895. Ranck appealed his case to the Common Pleas Court, setting out the facts herein recited, together with the further facts that the money was in the treasury applicable to the payment of the claim and that the new board had notified him that his services would not be required after February 1, 1895.

The county commissioners answering alleged that the appointment

of Ranck was in excess of the powers of the old board and Ranck's employment at that time was unnecessary. The last averment was made so as to bring the matter under the purview of the then Section 853 R. S., now Section 2402, General Code, which provided:

"Special sessions of the board may be held as often as the commissioners deem it necessary. At a regular or special session, the board may make *any necessary order or contract* in relation to the building, furnishing, repairing or insuring the public buildings or bridges, the employment of janitors, the improvement or enclosure of public grounds, the maintenance or support of idiots or lunatics, the expenditure of any fund, or provide for the reconstruction or repair of any bridge destroyed by fire, flood or otherwise and do any other official act not, by law, restricted to a particular regular session."

The above quoted section is in the exact words of Section 853 R. S., as it existed in 1895, when the case was presented. The court of Common Pleas found in favor of Ranck and the county commissioners prosecuted error to the Circuit Court. In its consideration, the Circuit Court proceeded to read the word "necessary" out of Section 853, R. S. It then considered the question as to whether or not the maxim "Omnia praesumuntur rite esse acta" was applicable. In American English this maxim means that there is a presumption of law that every public officer does his duty and that he performs faithfully those matters with which he is charged and, until the contrary is shown, that the persons acting in a public office have been duly appointed and are acting with authority. If Ranck could have made this maxim stick he could have won, but the court held it not only did not apply to county commissioners but it did not apply to a contract that was violative of public policy, which it held Ranck's contract to be. The court then proceeds to cite numerous authorities of other states to show that Ranck's contract was against public policy and void and it so held, reversing the Court of Common Pleas. I quote the syllabus, viz.:

"A contract made for the employment of janitor made by a board of county commissioners, for a period of time extending beyond the time when a change is certain to occur in the persons composing the board, unless made in good faith, in the interest of the public and for a time reasonable under the circumstances, is against public policy and void."

This case has been cited but few times. I do not regard it as of

much help in the solution of the question submitted because of the dissimilarity of law and fact. The opinion of one of my predecessors, found at page 1472, Vol. 2 (1927), No. 835, is more helpful. In the Ranck case the court found the contract bad as being violative of public policy. It could not have violated public policy if the board of county commissioners had the right under the law to make it, and did in fact make it in good faith, consequently the court must have found either that the contract with Ranck was made in bad faith or the board of county commissioners had no authority to make it, or both.

I quote from the syllabus of the opinion referred to, *supra*:

"Boards of education may in their discretion contract for the transportation of pupils for an entire school year or for a longer period if they deem it advisable, provided the general provisions of law with reference to the making of contracts by boards of education are complied with."

The question of funds with which to pay does not enter into this case any more than it entered into the bus-drivers contract referred to in the above opinion, as the State, by general appropriation act, takes care of Hoge's contract as completely as Section 5660, General Code, took care of the bus-driver's contract in 1927.

As I take it, public policy is a hard subject to master. No court or other official having to do with the administration of justice has the right to declare a contract, made in good faith, bad simply because it does not look righteous from every angle. The only true public policy, as I view it, is the policy dictated by the constitution and laws of the State of Ohio.

I refer again to Opinion No. 835 (1927). After referring to Sections 7731-1, 7731-2 and 7731-3, General Code, which provide, respectively, for the designation of depots for children, kind of a vehicle to be provided and the qualifications of the drivers of the vehicles, it is stated:

"Aside from these specific regulations, the statutes are silent as to the manner by which boards of education shall provide transportation for the pupils. The question of making contracts for such transportation and the terms thereof, or employing persons to effect the same is left entirely to the wisdom and judgment of the board. The Supreme Court of Ohio has repeatedly said that in the absence of fraud or abuse of discretion, the courts cannot control the discretionary powers vested in a board of education. *Brannon vs. Board of Education*,

99 O. S. 369; *Board of Education vs. Boehm, et al.*, 102 O. S., 292.

It cannot be said as a matter of law that for a board of education to enter into a contract for the transportation of pupils for an entire school year or for a term of years would be an abuse of discretion."

Upon investigation, I am impressed that the same law that applies to an appointee that comes within the category of public officers does not apply where the appointee is a mere employe. I am content to stand upon the text as announced in 19 Ruling Case Law, Section 198, p. 894:

"The appointment and removal of public officers is a governmental function and a municipal council cannot engage a public officer by contract for a term extending beyond that of its own members so as to impair the right of their successors to remove such officer and appoint another in his place. But this principle has no application to persons holding a mere employment such as school teachers and with them a contract may be made extending beyond the term of the members of council who make it."

In Ohio, municipal corporations may employ street commissioners, deputy marshals, etc. These appointees are public officers as contemplated by the text just quoted, while the laborer in the street cleaning department, although appointed to his position by council, would be an employe. Is Hoge a public officer or an employe? His duties are purely clerical. He has none of the attributes of a public officer although he serves a quasi public agency, which agency is clothed with broad powers and invested with sound discretion under the statute.

Answering your specific question, I am of the opinion that your board, under its broad grant of power to appoint a secretary and perform generally such other functions as are required for the proper execution of the act creating the board, together with the authority to make all rules and regulations necessary, had full power to appoint Mr. Hoge as secretary to your board and that on April 15, 1937, it had full power and authority to extend his term to December 31, 1938.

Respectfully,

HERBERT S. DUFFY,

*Attorney General.*