SCHOOLS: Directors of common school districts can employ attorneys to defend mandamus action if they are acting in good faith.

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Mr. Marshall Craig
Prosecuting Attorney
Charleston, Missouri

Dear Sir:

We have your letter of recent date which reads as follows:

"We would like an opinion on the following matter. The voters in a common school district petitioned the board of the district to call an election for the purpose of voting on whether they would combine with an adjoining consolidated school district. The board refused to call the election and the petitioners brought a suit in mandamus to compel the election. The question which has arisen is whether the common school district can use the school funds for the pursoe of hiring counsel and paying costs in the defense and appeal of that mandamus suit."

Section 3349, R. S. Mo. 1939, reads as follows:

"No county, city, town, village, school township, school district or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration, shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing."

In view of the foregoing statute, it is necessary to determine whether the employment of an attorney by a common school district is within the scope of the powers of such district or is expressly authorized by law. We find no statute which expressly authorizes a school board of such a district to employ an attorney. However, it is a well established principle of law that where express powers are granted public officers, such implied powers as are necessary to make the express powers effective are also granted. In

State ex rel v. Wymore 132 S.W. 2d, 979, 987, 345 Mo. 169, the rule was stated as follows:

> "The rule respecting such powers is, that in addition to the powers expressly given by statute to an officer or a board of officers, he or it has, by implication, such additional powers, as are necessary for the due and efficient exercise of the powers expressly granted, or as may be fairly implied from the statute granting the express powers.' Throop's Public Officers, Sec. 542, P. 515."

While the Courts have not expressly ruled that school boards have the power to employ attorneys, they have impliedly so ruled. The case of Page v. Township Board of Education 59 Mo. 264, was a case where an attorney had sued a school district for compensation for legal services rendered the district. In discussing the case the Court said:

> "This was a suit to recover an attorney's fee of fifty dollars. There was no dispute that the services were rendered, and that the fee was a reasonable one; but the court gave judgment for the defendant on the grounds that there was no written contract made with said school board, and no order entered on the minutes of the board at a regular or stated meeting of said board. The proof was that the attorney was employed verbally."

> "The judgment will be reversed and the case remanded, with directions that a judgment for the $50 be entered for the plaintiff;"

In the above case it was apparently assumed that the school board had power to employ the attorney, but the only question ruled on was whether his employment should have been in writing and made a matter of record.

Also in the case of Thompson v. School District 71, Mo. 495, 499, the Court said:

> "Managing officers of other corporations may engage the services of attorneys without express delegation of power or formal resolutions to that effect. Western Bank v. Gilstrap, 45 Mo. 419; Turner v. C. & D. M. C. R. R., 51 Mo. 501; Southgate v. A. & P. R. R. R., 61 Mo. 89, and no good reason is perceived why the same rule should not obtain in instances like the present one.

> Exigencies may arise, even in the concerns of a school board, which would compel the immediate employment of an attorney, when delay might prove greatly detrimental to the interests of the board. We, therefore, hold the reason of the rule above noted, applies as well here as in other instances. Of course, if we concede the power, without formal resolution, to employ an attorney, the usual results of such employment will follow as a necessary consequence."

Likewise, the case of Terry v. Board of Education, 84 Mo. App. 21, was a case where an attorney had sued a school district for compensation for legal services rendered the district. In that case the Court apparently assumed that the school board had authority to employ the attorney, but it ruled that the statute (now Section 3349, supra) prevented the attorney recovering because his contract was not in writing. In ruling the case the Court said, l.c. 25,:

> "The legislature had full power to prescribe this mode of authenticating the contracts of school districts, and also to condition the enforcibility of such contracts upon compliance with these requirements. It has done so. Hence the contract of plaintiff not being in accordance with the statute, imposed no obligation upon the former school board, nor upon the defendant as its successor, in duty, as well as in right."

From the above cases we believe it is clear that the Courts have impliedly recognized the power of school boards to employ attorneys when situations arise which necessitate the board having the services of an attorney.

It might be suggested that the suit you mention is really not a suit against the district but one against the directors personally. Its purpose is to compel the directors to do what the instigators of the suit assert is the duty of the directors. At first blush it might appear that it would be against public policy for the directors to be allowed to use public money to defend themselves from doing their duty. Of course, we are assuming that the directors are acting in good faith. If they are not, they would be liable to the district for any loss occasioned by their bad faith.

In the Page case, supra, nothing was said as to the nature of the services rendered by the attorney. In the Thompson case, supra, the Attorney was defending the district against a suit for money. However, in the Terry case, supra, the attorney had been employed, among other things, to defend the directors against an injunction suit. Nothing is said as to what the directors were to be enjoined from doing, but evidently the suit sought to restrain the directors from doing certain things which the instigators of that suit thought were illegal. The attorney was, therefore, employed to try to uphold actions of directors which were claimed to be illegal. In the case you present it is claimed the directors are violating the law, so there would seem to be no difference in your case and in the Terry case in that regard. If the directors call an election and a consolidation of districts is subsequently voted when in fact the election should not have been called according to law, it is apparent the district would suffer from the confusion which would result. It seems to us, therefore, that the directors are acting for the district when they honestly determine whether the election should be called. Of course, we have nothing before us to show whether the board should call an election or not. We are assuming that the board has determined that legally they should not call the election under the circumstances. As long as they are acting in good faith, they should not be compelled to employ attorneys personally to defend their actions.

C O N C L U S I O N

It is, therefore, the opinion of this office that directors of common school districts may employ attorneys to defend themselves against a mandamus action and pay such attorneys out of the school money so long as they act in good faith in refusing to do the things sought to be compelled by such mandamus action.

Yours very truly,

HARRY H. KAY,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

HHK/vlv