SCHOOL BOARDS: May not employ counsel by the year.

January 24, 1935.

FILED
38

Hon. James J. Harutun
Member of Legislature
Jefferson City, Missouri

Dear Mr. Harutun:

This is to acknowledge your request for an opinion as to whether or not a school board has the power to employ an attorney by the year.

Corpus Juris, Vol. 56, Paragraph 504, pages 479-480, has the following to say relative to the capacity and power of school boards to contract:

> "School districts or other local school organizations have the power of entering into such contracts, and such only, as are expressly or impliedly authorized by statute. The authority of school boards or officers to bind the district by contracts relative to school matters is also controlled by statute, and is such only as is conferred, either expressly or by necessary implication, by statute; and generally a school district or other local school organization cannot be held liable on contracts of its board or officers which such board or officers had no legal authority to make, subject to an exception as to bona fide holders of negotiable instruments. A de facto school officer may bind the school organization by a contract otherwise within his power."

We find no Missouri statute that authorizes the school boards to employ an attorney by the year. School

boards, however, have a great many powers and duties conferred upon them by law, namely, they have a right to hire teachers, employ janitors, purchase supplies, rent buildings for school purposes, make rules and regulations for the use of the buildings and for the governing of the school, suspend pupils and do all things necessary to carry out the purposes of the school laws. Thus, if an attorney was employed by the year under certain circumstances it might be that such employment would be within their implied powers. However, we refrain from ruling that it is a matter of right for the school board to employ counsel by the year, absent facts.

Section 2962, R. S. Mo. 1929, 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."

If a school board is confronted with the necessity of defending or bringing an action at law, then, in order to do such we believe it would be within the scope of its powers to employ counsel, and while we do not find any case in Missouri squarely on that point, yet there are a number of cases which in effect so hold. However, we desire you to bear in mind that the majority of these cases were decided prior to the enacting of the above statute.

In Henry C. Page v. The Township Board of Education, 59 Mo. 264, 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 Thompson v. School District, 71 Mo. 495, l. c. 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."

However, in the case of Terry v. Board of Education of City of St. Louis, 84 Mo. App. 21, the St. Louis Court of Appeals, l. c. 25, said the following:

> "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. * * * * * There is no way of evading the application of this statute to the school board under either charter without denying it the distinctive character as a school district which is possessed under both incorporations."

And further,

> "The case of Page v. Township Board of Education, 59 Mo. 264 (cited by appellant) evidently arose prior to the enactment of the above statute, or was inadvertently decided, for the Act of 1874, in express terms, applies to 'school townships,' and requires their contracts to be evidenced according to its provisions. The decision in that case was rendered in 1875. It

> is reasonably certain, therefore, that the services sued for accrued under a contract made before the Act of 1874, elsewise the case would not have reached the supreme court when it did. The learned counsel for appellant cites Thompson v. School Dist., 71 Mo. 495. That case has no bearing whatever upon the application of the statute of 1874, for it distinctly appears from the statement in the opinion that the causes of action therein sued for arose in the years 1867, 1868 and 1869. At that time there was no statutory restriction upon the power of such corporations to contract orally, and the remarks of the learned judge in that case have therefore no bearing whatever on the point under review."

It may be reasonably inferred, then, from the above cases that a school board would have the right to employ counsel in emergency cases just so long as the mode, manner and method of employment comply with Section 2962, supra.

A late case on the subject of contracts made by a school board, which lays down a rule of law to be considered and borne in mind, is the case of Miller v. Alsbaugh et al., 2 S. W. (2d) 208, wherein the Springfield Court of Appeals, l. c. 212, said the following:

> "No recovery can be had against a school district upon quantum meruit nor upon an implied contract. The fact that the school district got the benefit of the work and continues to use the well does not give any right of action against the district (Cases cited)."

From the foregoing it is our opinion that as a general rule a school board does not have the power to employ

an attorney by the year to represent it. However, this rule might have exceptions upon proper showing as to the facts surrounding the employment. In other words, the board at each meeting could have emergencies arise that would necessitate the use of an attorney and the employment then would be a series of single transactions and not a yearly contract. Therefore, in order to give the board power to employ counsel by the year, we are of the opinion that the law should provide for it.

Respectfully yours,

James L. HornBostel
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

JLH:EG