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Honorable Wardlow Lane
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Dear Sir:

Opinion No. 0-2103

Re: Whether or not consolidated common school district trustees may pay attorney fees out of school funds for representing four previous trustees in quo warranto suit.

This is in reply to your letter of March 19, 1940, requesting the opinion of this department upon the following matter:

"Last fall four of the seven trustees of the Paxton Consolidated Common School District had suits filed against them to oust them from office. These four employed attorneys to represent them in this suit which alleged among other things the improper handling of the school funds.

"Finally the case was settled by all seven of the trustees tendering their resignation and the county board appointed seven more. Now then, can this new board pay out of the school funds of this district the fees of the attorneys who represented the four trustees Quo Warranto suit that was brought against them to oust them from office?"

It is too well established to require a citation of authorities that the present trustees of the consolidated common school district in question have no power or authority to ratify or approve illegal contracts of previous trustees. Your inquiry then is narrowed to a determination of whether or not school trustees may legally employ attorneys to defend them in a suit in the nature of a quo warranto brought to oust them from office for official misconduct, so as to constitute a charge upon school funds of the district.

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There are two well established principles of law by which we must be guided. They are first that:

"A quasi public corporation, such as a school district, which owes special duties to the public, may not enter into any contract that is not expressly authorized by law or necessarily implied from powers expressly granted." *McCorkel v. District Trustees, eto.* (C.C.A.1938), 121 S. W. (2d) 248.

And second that:

"A school district is a quasi corporation of a public nature, and the trustees of said district cannot lawfully expend money belonging thereto except for the purposes authorized by statute." *Adams v. Miles* (Com. App.), 35 S. W. (2d) 123.

In deciding whether or not authority to so employ attorneys exists the following articles of the Revised Civil Statutes of 1925 (Vernon's Edition) must be considered:

"Article 2748. Said trustees shall be a body politic and corporate in law, and shall be known by and under the title and name of district trustees of district number ____, and county of ____, State of Texas; and as such may contract and be contracted with, sue and be sued, plead or be impleaded, in any court of this State of proper jurisdiction, and may receive any gift, grant, donation or devise made for the use of the public schools of the district. All reports and other official papers shall be headed with the number of district and name of county."

"Article 2749. Said trustees shall have the management and control of the public schools and public school grounds; and they shall determine how many schools shall be maintained in their school district, and at what points they shall be located; provided, that not more than one school for white children and one school for colored children shall be established for each sixteen square miles of territory of major fraction thereof, within such district; and they shall determine when the schools shall be opened

and when closed. They shall have the power to employ and dismiss teachers; but in case of dismissal, teachers shall have the right of appeal to the county and State Superintendents. They shall contract with teachers and manage and supervise the schools, subject to the rules and regulations of the county and State Superintendents; they shall approve all claims against school funds of their district; provided, that the trustees, in making contracts with teachers, shall not create a deficiency debt against the district."

"Article 2827. 1. The State and county available funds shall be used exclusively for the payment of teachers' and superintendents' salaries, fees for taking the scholastic census, and interest on money borrowed on short time to pay salaries of teachers and superintendents, when these salaries become due before the school funds for the current year become available; provided that no loans for the purpose of payment of teachers shall be paid out of funds other than those for the then current year.

"2. Local school funds from district taxes, tuition fees of pupils not entitled to free tuition and other local sources may be used for the purposes enumerated for State and county funds and for purchasing appliances and supplies, for the payment of insurance premiums, janitors and other employes, for buying school sites, buying, building and repairing and renting school houses, and for other purposes necessary in the conduct of the public schools to be determined by the Board of Trustees, the accounts and vouchers for county districts to be approved by the county superintendent; provided, that when the State available school fund in any city or district is sufficient to maintain the schools thereof in any year for at least eight months, and leave a surplus, such surplus may be expended for the purposes mentioned herein.

". . ."

It is quite apparent that the Legislature has given no express authority to consolidated common school district trustees to employ counsel to represent them and

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provide for their payment with school funds in litigation of any nature, and Article 2827 has circumscribed their authority to spend school funds. Is the power necessarily implied from powers which are expressly granted?

As stated in 37 Tex. Juris at page 945:

"Even in the absence of power expressly conferred, trustees may employ attorneys to institute and prosecute actions in their behalf as a necessary incident of their powers to contract, to sue and manage and control the school affairs and interests. Likewise they may pay such attorney a reasonable compensation out of the special maintenance fund in the management and control of the trustees."

An example of this rule is the case of Arrington v. Jones (C. C. A.) 191 S. W. 361, one of many of its kind holding that school trustees may employ an attorney "to represent them in legal proceedings respecting school affairs." See also Harding et al v. Raymondville Independent School District (C.C.A. 1932), 51 S. W. (2d) 826; Stewart v. Newton Independent School District (Civ. App. 1939), 134 S. W. (2d) 429. The representation in such instances, however is of the school trustees as a body corporate, and in no instance have we found authority for the proposition that school funds may be used to pay attorney's fees incurred in a personal suit against the trustees to oust them from office.

Indeed, the rule allowing the school trustees to employ attorneys and compensate them out of the public school funds is limited to matters involving school affairs wherein the interests of the school are involved. Denman v. Webster, 139 Cal. 452, 73 Pac. 139; Eyrne v. Covington Board of Education, 140 Ky. 531, 131 S. W. 260; Templin v. Fremont District, 36 Iowa 411; Oklahoma City Board of Education v. Thurman, 121 Okla. 108, 247 Pac. 996; McKinnon v. State, 70 Fla. 561, 70 So. 567, Walker et al v. Walter et al (C.C.A. 1922), 241 S. W. 524; Graves & Houtchens v. Diamond Hill Indl School District (C.C.A. 1922), 243 S. W. 638.

As stated in Vol. 24 of Ruling Case Law at page 597:

"The question has frequently arisen as to the propriety of the expenditure of school funds in counsel fees. Broadly speaking a school district having the power to sue and be sued may

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employ an attorney if the employment is necessary for the protection of the public interests committed to it. The power to employ includes the power to compensate. But the power to employ counsel exists only where a public interest is concerned which the board is charged by law with the duty to protect, and of course school funds cannot be used to pay costs or counsel fees in actions brought ostensibly in relation thereto, but in reality for the benefit of private persons. The question usually arises and is most difficult to determine where statutes exist providing that some legal official shall act as counsel for the board. If the statute requires such officer to appear for the district, it cannot employ another in his place, if he is able and willing to act, though it may, in a proper case, employ an assistant counsel; and a statute permitting the employment of special counsel when necessary is constitutional. These decisions depend largely on the local statutes, and are frequently of little value as authority beyond the particular jurisdiction. Where a school district is expressly authorized to employ counsel for certain purposes its authority will be limited strictly to the powers granted."

In *Denman v. Webster*, supra, it was held that the power of the school board to employ counsel exists only where a public interest is concerned which the board is charged by law with the duty to protect, and that the school board had no authority to employ counsel in an election contest to determine who were the de jure members of the school board.

In *Byrne and Read v. Board of Education of the City of Covington*, supra, the question was as to the right of six members of the board of education of Covington to employ an attorney to sue to compel the other six members to meet with the former, so as to proceed with the business before the board. The court held that an attorney could not be employed for such purposes and said:

"The board of education is a body corporate. It is an agency of government. Its capacity to contract is circumscribed. It can contract only in behalf of the common school interests of the city in any event. It was not competent for it to have contracted to pay the counsel fees incurred by its individual members in a matter wholly among themselves. If the case had been

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a contest between two of the litigants as to which was entitled to the office of member of the board, it would in a sense have involved a matter affecting the schools of the city. So does the action in question. But it affects the school interests only as an incident. The action was personal as to its parties. Any citizen and patron of the school might as well have maintained it. But the test of the liability of the board of education on the contract is not whether the public body was benefited by it. It is never allowed that the state, or any of its constituent arms of government, though expressly permitted to make contracts and be sued upon them, may become liable on implied assumpsit. Public corporate bodies must not only act in a matter within their jurisdiction, but in the manner expressly authorized by law, or they cannot bind the public as for debt. So the board of education alone could contract a debt against itself as a public corporation. Neither a minority of the board acting together, or whatsoever number acting independently and personally, could do so. Nor, in such instances, does the question of benefit or advantage derived by the public affect the question of the public's liability. It must be remembered that the public in its quality of sovereign is never liable at all as for debt, unless it expressly permits. And when it permits such liability it must contract, not only for the matter, but only in the manner expressly authorized."
(Underscoring ours)

The case of *Smith v. Pittsburgh School District*, 70 Pa. Super. 184, is directly in point. In that case the school board employed attorneys to represent them in an action instituted to restrain them from representing the school in certain matters since an act of the Legislature (which the defendants alleged to be unconstitutional) terminated their offices during the year. Plaintiffs in the present case were their attorneys in the previous action which they lost; and the present action was instituted to recover attorneys' fees. The court said:

"The holder of an office has an undisputed right to contest the validity of legislation which ousts him. That is personal to himself. The will of the public is voiced by the legislature, and he who raises the contest assumes the

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burden of establishing his right, and the burden of costs, expenses, etc., are incident to that contest. He has no vested right to an office created by the legislature, and independently of the legislative will, the public has no interest in continuing these particular persons as directors of this sub-school district.

". . .

"The old board of directors of the sub-school district had no power to make these defendants liable for professional services in such a contest. The directors were exercising powers delegated to them by law, and only in the exercise of such powers, acting exclusively in their official capacities as the immediate representatives of the public and purely and in behalf, could they bind the public. . . ." (Underscoring ours)

We believe that this is the law in Texas and opinions of previous administrations of this department are in accord with this view. See opinion dated October 11, 1937, to Honorable A. A. Miller, County Attorney, Newton County.

In Walker et al v. Walter et al, (C.C.A. 1922) 241 S. W. 524, a suit was filed to remove certain trustees of an independent school district from office, plaintiff alleging various acts of official misconduct and incompetency. The petition also prayed for a temporary injunction enjoining defendants from spending any money or funds belonging to the school district to defend the cause. The Court of Civil Appeals although reforming in part the judgment below continued the temporary injunction to prohibit the paying out of school funds for any of the expenses of litigation.

For a case similar in principle restraining common school district trustees from spending public funds which expenditures would benefit the trustees personally, see Barton v. Vickery, (C. C. A. 1916) 189 S. W. 1103.

The case of Graves & Houtchens v. Diamond Hill Ind. School District, (C. C. A. 1922) 243 S. W. 638, involved the application of principles of law similar to those involved in the instant case. In that case the trustees of the independent school district had entered into a contract with a firm of attorneys for the purpose of having them defeat certain bills pending in the Legislature. The court

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held that the contract was ultra vires, opposed to public policy and void. In the course of the opinion Chief Justice Conner stated the rule as follows:

"While it is doubtless true that there is power in a board of trustees of an independent school district to employ counsel and pay out of the public funds of the district a reasonable fee in cases where the interests of the district require assertion or defense in the courts of the county, we find no authority, after careful search, either expressed or implied in the statutes of this state, to employ counsel and expend the public funds of the district in the attempt to secure or defeat legislation."
(Underscoring ours)

Consequently, it is the opinion of this department and you are respectfully advised that school funds of the consolidated common school district in question may not be used to pay attorney's fees incurred by certain members of a previous board of trustees in the defense of a quo warranto suit brought against them.

Yours very truly

ATTORNEY GENERAL OF TEXAS

APPROVED APR 20, 1940

Walter F. Koch BY
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BY

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