



STATE OF ARKANSAS
THE ATTORNEY GENERAL
DUSTIN MCDANIEL

Opinion 2014-098

December 18, 2014

The Honorable Steve Oliver
Prosecuting Attorney
18th Judicial District East
501 Ouachita Avenue, Suite 404
Hot Springs, Arkansas 71901

Dear Mr. Oliver:

This is my opinion on your questions about the legality and consequences of a school district's conveying money and other property to its former superintendent as part of a "severance package" or "settlement agreement."

You state that the superintendent offered his resignation, and that the school board accepted it, on August 2; that the board voted on August 11 to authorize the board president to negotiate a severance package for the superintendent; and that the parties reached agreement on August 13 that the superintendent would receive from the district both money and tangible property.

You cite a law that prohibits school districts from giving, donating, or transferring without "adequate market value consideration" to an administrator any school property, and from "giving" to a leaving administrator school property valued at more than \$100.¹

Your questions are:

1. In the event that a School Administrator severs employment with a school district, may the district transfer school owned property having a value in

¹ A.C.A. § 6-21-110(b), (c) (Repl. 2013). I assume for purposes of this opinion that the money and tangible property transferred to the superintendent were worth more than \$100.

excess of one hundred dollars (\$100.00) as part of a settlement agreement or severance package?

2. In the event the answer to question number one is in the negative, have the School Board members subjected themselves to criminal and/or civil liability for violating A.C.A. of 1987, § 6-21-110 (b), (c)?

RESPONSE

In my opinion, the answer to your first question depends on whether the district receives adequate consideration – which may take one of several forms – in exchange for the property transferred. In my opinion, school directors cannot be held criminally liable for any violation of the statute at issue and will not be civilly liable absent extraordinary facts.

DISCUSSION

Question 1 – In the event that a School Administrator severs employment with a school district, may the district transfer school owned property having a value in excess of one hundred dollars (\$100.00) as part of a settlement agreement or severance package?

The statute you cite prohibits any gift, donation, or transfer without adequate consideration to a current administrator, and any gift worth more than \$100 to a “leaving or retiring” administrator. As gifts and donations are transfers made without consideration, the statute does not purport to prohibit any transfer supported by consideration.

Whether a particular transfer is supported by adequate consideration is a question of fact.² My office, in its opinions function, is neither equipped nor charged to act as a finder of fact.³ The opinions process is not an adversarial proceeding that tends, due to the parties’ opposing interests, to elicit all relevant facts. While you provided some background in your opinion request, it is not clear that I have all relevant facts, and I accordingly cannot render an opinion on whether the transfer

² See, e.g., Op. Att’y Gen. 2013-036.

³ See, e.g., Op. Att’y Gen. 2014-045.

at issue here was supported by adequate consideration. I will, however, discuss how applicable law might apply to some possible fact situations.

The transfer at issue likely was supported by adequate consideration if the “severance package” was contracted for between the superintendent and the district. You included with your request copies of written employment contracts – including one entered into in January 2014 – between the superintendent and the district. I have reviewed only the later contract, which does not appear to contain a provision for severance pay. I do not know, however, whether the writing contains all terms of the parties’ agreement or whether the contract may have been amended. I accordingly cannot conclusively determine that the parties did not agree, before the superintendent irrevocably resigned, that he would receive a “severance package” upon his departure.

Your question also refers to a “settlement agreement” and thereby to another way in which the transfer might have been supported by adequate consideration. The phrase implies that a *bona fide* dispute existed between the superintendent and the district and that the district, in exchange for the transfer, received consideration in the form of a release from the prospective burden of litigation against the superintendent and potential liability to him.⁴ The facts you supplied are not inconsistent with the possibility that the superintendent’s resignation was conditioned on the later negotiation of consideration in exchange for the abandonment of a claim.

Your use of “severance package” and “settlement agreement” suggests consideration, so it seems likely that there was no violation of the statute in this instance. It is possible, however, that the transfer was not supported by adequate consideration. If there was no agreement for a “severance package,” and no *bona fide* dispute to settle, then the transfer to the former superintendent – after his resignation – may have amounted to a transfer without consideration, which is prohibited by the statute.

Again, because I may not be in possession of all the relevant facts, I can offer no opinion on whether this transfer contravened the statute.⁵

⁴ See generally Op. Att’y Gen. 2008-186 and authorities cited therein.

⁵ Because your request focused on the statute, I have not discussed other provisions of law that might be deemed applicable here. Another reason I do not address those provisions at length is the fact that they – like the statute – do not prohibit transfers supported by consideration. See, e.g., Ark. Const. art. 2, § 8 and *Chandler v. Board of Tr.*, 236 Ark. 256, 258, 365 S.W.2d 447 (1963) (“No principle of constitutional law is

Question 2 – In the event the answer to question number one is in the negative, have the School Board members subjected themselves to criminal and/or civil liability for violating A.C.A. of 1987, § 6-21-110 (b), (c)?

I assume for purposes of answering this question that a statutory violation occurred, but my assumption for this limited purpose should not be taken to imply that a violation actually occurred.

In my opinion, school directors cannot be held criminally liable for any violation of the statute at issue and will not be civilly liable absent extraordinary facts.

The Arkansas Criminal Code⁶ governs criminal prosecutions and contemplates prosecutions only for “offenses.”⁷ An offense is conduct for which imprisonment or a fine is authorized by statute.⁸ The Code authorizes imprisonment and fines with respect to offenses that are designated as felonies, misdemeanors, or violations.⁹ Conduct that is not so designated is an offense only if the statute describing the conduct provides for imprisonment or a fine.¹⁰

The conduct proscribed by the statute at issue is not designated a felony, misdemeanor, or violation, and does not provide for imprisonment or a fine. Additionally, the statute expressly binds school boards and other public educational entities, not individual human beings like school directors. I conclude

more fundamental or more firmly established than the rule that the State cannot, within the limits of due process, appropriate public funds to a private purpose”); Ark. Const. art. 14, §§ 2, 3 and *Gray v. Mitchell*, 373 Ark. 560, 569, 285 S.W.3d 222 (2008) (quoting *Little River Cnty. Bd. of Educ. v. Ashdown Special Sch. Dist.*, 156 Ark. 549, 556, 247 S.W. 70 (1923)) (contracted-for severance pay – that was also alleged to be in settlement of *bona fide* dispute -- to former superintendent was “immediately and directly connected with the establishment and maintenance of a common school system” and did not contravene constitutional restrictions on use of school funds); and Ark. Const. art. 5, § 27 and Op. Att’y Gen. 2008-186 (prohibition on “extra compensation” to public officers).

⁶ A.C.A. §§ 5-1-101 *et seq.*

⁷ See A.C.A. § 5-1-103 (Repl. 2013).

⁸ See A.C.A. § 5-1-105(a) (Repl. 2013).

⁹ See A.C.A. §§ 5-4-104, -201, -401 (Repl. 2013). Violations are not punishable by imprisonment.

¹⁰ See A.C.A. §§ 5-1-107(a)(3), -108(b).

that the statute does not define an “offense” and that a school director cannot be prosecuted for violating it.

With respect to civil liability, school directors and other specified public officials are immune by statute – except to the extent of liability insurance coverage – from civil liability for acts of negligence¹¹ but not for intentional torts.¹² While the directors surely intended to authorize the transfer, I doubt that such intent is of a kind that would prompt a court to hold the statute’s immunity to be unavailable,¹³ and I do not necessarily perceive here a tort, much less an intentional tort. A predecessor in this office discussed the statute in a similar context:

It has been stated that the intent of [the statute] was to grant immunity to municipal agents and employees for acts of negligence committed in their official capacities. *See Autry v. Lawrence*, 286 Ark. 501, 696 S.W.2d 315 (1986). It is unclear the extent to which this statutory immunity would apply to a potential “illegal exaction” suit, which is the most likely form of action an opponent would choose to challenge an unlawful or unconstitutional tax. Such actions are usually brought against the municipal entity itself, and not against the individual council members. In any event, it has been held that council members in their individual capacities are entitled to absolute immunity from damages when functioning in their legislative capacities, as is the case here. *See Taylor v. Cockran*, 644 F.Supp. 753 (E.D. Ark. 1986). In short, I can foresee no potential personal liability of directors, even in the unlikely event that the tax levy was held unconstitutional.¹⁴

My predecessor’s reasoning and conclusion seem broadly applicable to the situation you describe. I conclude that no director would be personally civilly liable in connection with the situation you describe, at least absent truly extraordinary facts of which I am unaware.

¹¹ *See* A.C.A. § 21-9-301 (Supp. 2013).

¹² *See, e.g., Battle v. Harris*, 298 Ark. 241, 766 S.W.2d 431 (1989)

¹³ *Compare Dietsch v. Tillery*, 309 Ark. 401, 833 S.W.2d 760 (1992) (school directors’ alleged misrepresentation and concealment of dangerous condition relating to asbestos, and their alleged knowledge of and failure to comply with required safety procedures, would, if proved, constitute an intentional tort for which immunity would not be available under the statute).

¹⁴ Op. Att’y Gen. 94-058.

Steve Oliver, Pros. Att'y
18th Judicial District East
Opinion No. 2014-098
Page 6

Assistant Attorney General J. M. Barker prepared this opinion, which I approve.

Sincerely,

A handwritten signature in blue ink, appearing to read "Dustin McDaniel", with a long horizontal flourish extending to the right.

DUSTIN MCDANIEL
Attorney General

DM/JMB:cyh