

The referee was responsible for examining the facts and submitting his conclusions to the court. The Supreme Court held that the referee was not a public officer because there was no continuity or tenure to the position. The following displays the thinking of the Court:

“ . . . The oath required is the oath of allegiance to the United States and to the state, and an oath to perform faithfully the duties of the office. The term ‘officer’ as there used, can only be taken to refer to such offices as have some degree of permanence, and are not created by a temporary nomination for a single and transient purpose. A designation of a person to do some one act of duty, with no official tenure except as incident to that transitory function cannot make him a public officer, without involving a great absurdity. Every public office includes duties which are to be performed constantly, or as occasion arises, during some continuous tenure” (pp. 365-366)

(See also *Shurbun v. Hooper*, 40 Mich. 503)

It has been said that such commissioners are officers of the court which appointed them. (*Brackett v. Commonwealth*, 223 Mass. 199, 111 N.E. 1036 (1916)). An officer of the court is not necessarily a public officer however. Attorneys, for instance, are officers of the court but the Michigan Supreme Court has made it clear that this does not constitute them public officers (*Sloman v. Bender*, 189 Mich. 258).

It is thus my opinion that court commissioners appointed for condemnation appraisal purposes under Act 352, P.A. 1925, are not public officers and are therefore not eligible for social security coverage as a public employee under the State-Federal agreement.

FRANK J. KELLEY,
Attorney General.

641016.1

**CONSTITUTIONAL LAW: Free public elementary and secondary schools.
SCHOOLS: Districts—Authority to charge registration or course fees.**

Article VIII, Sec. 2 of the Michigan Constitution of 1963, in providing for free public elementary and secondary schools, bars boards of education from imposing registration fees as a condition to registration of pupils in elementary and secondary schools of the school district.

A board of education may not lawfully charge fees for participation in courses such as band or for participation in athletic programs.

No. 4376

October 16, 1964.

Dr. Lynn M. Bartlett
Superintendent of Public Instruction
Lansing, Michigan

In your recent letter you state:

“My office is in receipt of a number of communications which indicate that some public school districts are charging fees to be paid

by students at registration as a condition of registration. In addition, I am informed that some school districts are charging fees for taking certain courses for credit, such as band, and participation in athletic programs."

You request my opinion on the following questions:

"1. Is the board of education of a school district lawfully authorized to impose a fee as a condition of registration?

"2. Is a board of education of a school district lawfully empowered to charge a fee before students can participate in courses such as band, for credit, or participation in athletic programs?"

1. In Article VIII, Sec. 2 of the Michigan Constitution of 1963 the people have commanded the legislature to

"maintain and support a system of *free public elementary and secondary schools* as defined by law. Every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color or national origin." (Emphasis supplied)

The legislature fulfilled this mandate by delegating the function of education to local state agencies organized under state laws to carry out the responsibilities given them. Education is not inherently a part of the local self-government of a municipality except insofar as the legislature may choose to make it so. *School District of the City of Lansing v. State Board of Education*, 367 Mich. 591 (1962).

School districts are legal divisions of territory created by the state for educational purposes. *Board of Education of the City of Detroit v. Superintendent of Public Instruction*, 319 Mich. 436 (1947).

The government of school districts has been entrusted by the legislature to boards of education of the school district. *Rehberg v. Board of Education of Melvindale, Ecorse Township School District No. 11, Wayne County*, 330 Mich. 541 (1951).

It is the public policy of this state that resident children receive a free education in the public schools. *School District No. 1, Fractional, of the Township of Mancelona v. School District No. 1 of Township of Custer*, 236 Mich. 677 (1926).

In *Dowell, et al v. School District No. v, Boone County*, 250 S.W. 2d 127 (Ark. 1952), the Arkansas Constitution required the state to maintain free schools. A school district sought to impose a registration fee as a requirement for admission of a pupil to the public schools. The court ruled that under the Constitution affording free schools, no registration fee could be demanded as a condition for admission of children to the public schools. The school district was prohibited from violating the clear spirit and the plain wording of the Constitution by indirection through the imposition of a registration fee. *Special School District No. 65, Logan County v. Banks*, 221 S.W. 1060 (Ark. 1920).

Act 269, P.A. 1955, as amended, being C.L.S. 1961 § 340.1 et seq.; M.S.A. 1959 Rev. Vol. § 15.3001 et seq., is known as the School Code of 1955.

The legislature has authorized boards of education to admit non-resident pupils to schools operated by the district and to impose and collect tuition.

In accordance with the formula as set forth in Sec. 582 of the School Code of 1955, supra, as to non-resident pupils, boards of education are authorized to impose tuition based on operation cost but not on registration fees.

Therefore, it is the opinion of the Attorney General that the action of a board of education of a school district imposing a fee as a condition of registration in its elementary or secondary schools is unlawful in that it violates Article VIII, Sec. 2 of the Michigan Constitution of 1963.

2. The right of the board of education to offer a course in music or band appears to be well settled. *Knabe, et al, v. The Board of Education of the City of West Bay City*, 67 Mich. 262 (1887).

When a course in band is offered in a public elementary or secondary school, a board of education is without lawful power to charge a fee for such course in that such action offends Article VIII, Sec. 2 of the Michigan Constitution of 1963. The same ruling would apply to other courses of instruction offered by boards of education in elementary or secondary schools under their control.

Under Sec. 781 of the School Code of 1955, supra, the legislature has prescribed that courses in health and physical education be offered to children attending the public schools of the state, and in school districts having a population of more than 3,000 the board of education is commanded to engage competent instructors of physical education and to provide facilities and equipment for instruction and training in health and physical education, pursuant to Sec. 782 of the School Code of 1955.

Article VIII, Sec. 2 of the Michigan Constitution of 1963 bars boards of education from imposing a fee before students can enroll in health and physical education courses.

Interscholastic athletic activities are a part of the educational program of a school district. *Richards v. Birmingham School District*, 348 Mich. 490 (1957).

Boards of education have only such powers as the statutes expressly or impliedly confer upon them. *Jacox v. Board of Education of Van Buren Consolidated School District*, 293 Mich. 126 (1940).

Section 784 of the School Code of 1955 empowers the superintendent of public instruction to supervise and control interscholastic athletic activities of all of the schools of the state.

It must be concluded that a board of education is without lawful authority to charge a fee before students can participate in athletic programs.

Therefore, it is the opinion of the Attorney General that a board of education may not lawfully impose a fee for courses for credit, such as band, or participation in athletic programs.

FRANK J. KELLEY,
Attorney General.