

OPINION 25

247 of the acts of 1949 as it may be amended from time to time.”

Therefore, although the pupils which are to be counted include all pupils in the school, the “average daily attendance” of those pupils must be determined in accordance with the rules and regulations of the state commission on general education pursuant to the 1949 Act cited above, which may be found in Burns §§ 28-1021—1028.

OFFICIAL OPINION NO. 25

November 16, 1966

INDIANA STATE FAIR BOARD—Governor’s Power to Appoint Members—Other Statutes Applicable to Board.

Opinion Requested by Hon. Roger D. Branigin, Governor.

You have requested my opinion concerning your authority to appoint the Secretary and the Superintendent of Grounds and Buildings for the Indiana State Fair. In 1943 O.A.G. 55, the then Attorney General stated that the Superintendent of Grounds and Buildings must be appointed by the Governor. An examination of that opinion, the statutes creating and governing the State Fair Board, and cases relevant thereto, shows that the result reached in the opinion was occasioned by a peculiar situation prevailing in the manner of selection of the Fair Board itself.

The present Indiana State Fair Board was established by Acts 1947, ch. 214, as amended, which may be found in Burns IND. STAT. ANN., §§ 15-216—229. The first section of the act describes the property of the Fair Grounds as “trust prop-

erty held by the state of Indiana as trustee for and on behalf of the people of the state of Indiana.” The Indiana State Fair Board is “the sole agency of the state of Indiana to administer said trust property for and on behalf of the state of Indiana.” Section two creates the Indiana State Fair Board, consisting of sixteen appointed members and three “ex-officio” members, and abolishes the “Indiana state fair board” which was the new name given by Acts 1941, ch. 230, § 1, to the successor to the “Indiana board of agriculture” established by Acts 1921, ch. 77. The board created by the 1947 act is to be known by the same name as that designated in the 1941 act, but is to have the powers and duties set forth in the 1947 act, and to manage and control the property controlled by the “Indiana board of agriculture,” as renamed in 1941. Of the appointed board members, five are to be selected by the Governor, and eleven are to be “nominated” from eleven “state fair agricultural districts” created by § 3 of the act, at last amended by Acts 1957, ch. 326, § 1, by representatives of various county “agricultural interests,” denominated “general interests” by the act. These “interests” are specifically set out in § 4, as last amended by Acts 1957, ch. 326, § 2, and include various breeders’ and growers’ associations (at the present time, ten in number), farm and home economics clubs and associations, and county and other agricultural fairs. County delegates, limited to one vote per county for each enumerated “general interest,” and further limited to fifteen (15) votes per county, select in district conference “a nominee for appointment to the state fair board.” The statute further provides that “the governor shall, prior to the next annual reorganization meeting of the board, appoint the person so nominated by said conference. . . .”

Section 5, as amended by Acts 1953, ch. 86, § 3 in relevant particulars, empowers the state fair board to “employ a *secretary* who shall be the fair manager, a *superintendent of grounds and buildings*, and such custodians, clerks and servants as may be necessary to prosecute its work.” (Emphasis added.) However, the board is to manage the property:

“. . . Said board shall also have complete control of said state fair grounds, the buildings and other equipment thereon and all property and property rights held

OPINION 25

for the furtherance of its purposes, and it is authorized to purchase such other property, equipment, and material and erect such other buildings or make improvements thereof, as may by it be deemed necessary to the proper control of the exhibitions held under its direction and to rent buildings or space therein, or space on said grounds for exhibitions during fairs and for such other purposes at other times as the board may determine; to fix and collect rentals for the same, to fix and collect entrance fees, admission fees, and privilege fees, as may be deemed just and proper; Provided, however, that the board shall not permit any use of the grounds or buildings in a manner prohibited by the laws of the state of Indiana. . . . The board shall have power to enlarge the scope and field of its activities from time to time as it may deem to the advantage of agriculture, including district fairs, and its kindred pursuits." Burns' § 15-221, § 6.

The board may, "as the active agent of the state as trustee, in the control and management of said property and the conduct of the business for which it has been set apart," borrow money and issue bonds. However, the approval of the Governor must be obtained and the credit of the state may not be pledged. The statute does purport to authorize the pledging of the property held as "trustee," § 12, as amended by Acts 1957, ch. 224, § 1.

Even a cursory examination of the statute discloses a clear intention on the part of the General Assembly to settle a previous controversy over the legal status of the fair grounds and the fair board by (1) declaring that the fair grounds property is held by the State as "trustee," see § 11, and (2) granting to the Indiana State Fair Board created by the Act the sole and independent right to manage the property so owned, as well as other property accumulated by the previous fair boards. The statute makes such management subject only to approval by the Governor of bond issues, § 12, as amended; an annual report to the Governor delivered to the Auditor of State and inspection of books and accounts by the State Board of Accounts, § 9; and the public depository laws, § 13. If only

the statute itself were to be considered, there would be no question whatever that the secretary and the superintendent of grounds and buildings would be appointed by the State Fair Board pursuant to § 5 thereof. However, as pointed out in the 1943 Attorney General's Opinion previously cited, consideration must also be taken of cases concerning the management of the state's real estate, the power to appoint state officers, and other cases concerning the state fair board's predecessors.

The title to the Indiana state fair grounds is in the State of Indiana.

“When the Indiana State Board of Agriculture made the conveyance, as set forth in the finding of facts, if it was valid to convey anything, it conveyed the fee-simple title to the property therein described to the State of Indiana and the Indiana board of agriculture, attempted to be created by the act, was a governmental agency, providing for the management and control of said property, and their management and control of the property was the management and control of it by the state.” Judge Willoughby's opinion in *Scott v. Indiana Bd. of Agriculture*, 192 Ind. 311, 326, 327, 136 N.E. 129, 134 (1922).

Judge Willoughby's opinion that the entire 1921 Act under which the State took title was unconstitutional did not prevail, and the *per curiam* opinion issued did not touch upon the manner in which the title of the state was held. However, there is no question but that title is in the State of Indiana “for and on behalf of the people of the State of Indiana,” § 1 of 1947 Act, or for “the interest of agriculture and allied industries as expressed in the said instrument of conveyance,” § 11, which creates no different title in the state than an unqualified conveyance to it, except for perhaps a moral obligation to devote the property or its proceeds to agricultural benefits, *Busby v. Indiana Bd. of Agriculture*, 85 Ind. App. 572, 154 N.E. 883 (1927); *Chicago Stadium Corp. v. State*, 123 F. Supp. 783 (S.D. Ind. 1954), modified to permit an amended complaint, 220 F. 2d 797 (7th Cir., 1955).

OPINION 25

Under Acts 1921, ch. 77, and Acts 1923, ch. 6, the members of the controlling and managing fair board were "nominated" by agricultural societies and appointed by the Governor. The board was given control of the fair grounds by the statute.

In 1927, the Appellate Court said of that board:

"The Indiana Board of Agriculture was created as *an agency of the state* for the purpose of managing and conducting a *department of the state*. . . ." *Busby v. Indiana Bd. of Agriculture*, 85 Ind. App. 572, 575, 154 N.E. 883, 884 (1927). (Emphasis added.)

In 1933, the Legislature changed the control and management of the state fair to a board of agriculture which was "a non-executive board in an advisory capacity to the division of agriculture" created by the act, Acts 1933, ch. 257. Such control and management was made subject to the approval of the Governor, 1933 O.A.G. 210. The members of the board were selected from districts, by "agricultural conferences." The power of the Legislature to so designate their selection was not questioned in the opinion. The Governor had the sole power of appointment of all division of agriculture employees except those who were exclusively state fair employees, and with respect to the latter, the Governor had a veto power. *Id.* The Governor was given by the statute authority to transfer or reassign the duties of the division to any other department or agency of the state.

In 1941, the Legislature again changed the control of the fair grounds and fair. The division of agriculture was abolished, and all of its rights, powers and duties were transferred to the Lieutenant Governor, who was designated as the Commissioner of Agriculture. The Indiana Board of Agriculture remained a "non-executive board in an advisory capacity." The board, subject to the approval of the Governor and Lieutenant Governor, was empowered to hold and control the state fair, but the Lieutenant Governor was granted the power to take charge of and manage the fair buildings and grounds, which specifically included the power to appoint the superintendent of grounds and buildings and other employees, who served at the pleasure of the Lieutenant Governor. Acts

1941, ch. 126. The name of the Indiana Board of Agriculture was changed to the Indiana State Fair Board by Acts 1941, ch. 230.

In 1943, the Attorney General was advised that there was a bill pending in the Legislature seeking to restore to the Indiana State Fair Board the control over the fair grounds which the Indiana Board of Agriculture had under the 1921 and 1923 Acts.

The leading case in Indiana on the question of executive power versus legislative power had been decided two years previously, *Tucker v. State*, 218 Ind. 614, 33 N.E. 2d 582, 35 N.E. 2d 270 (1941). The court there held that all executive power of the state is lodged in the Governor. The court then decided that managing the property of the state is an executive function:

“The Legislature does not have general authority over the property of the state, and that it has such general authority has never elsewhere been asserted to our knowledge. The management of the state’s property is an executive function. The General Assembly may legislate concerning the state’s property, the courts may adjudicate concerning it, but the Governor, vested with the executive power, must manage the state’s property.” 218 Ind. at 681, 35 N.E. 2d at 295.

The court also held that the Governor, and only the Governor, as the sole constitutional repository of executive power, has the power to appoint officers in the executive-administrative department of the state. Administrative officers may appoint only “their own deputies and employees whose duties are incidental to the carrying out of the administrative functions of the offices they occupy.” 218 Ind. at 652, 35 N.E. 2d at 284. Although this statement was directed to the powers of the constitutional administrative officers, the court later stated that the appointive powers of non-constitutional administrative and ministerial officers in any department are also so limited. The Legislature can create officers not created by the Constitution, and determine whether such officers must be elected or appointed, 218 Ind. at 665, 35 N.E. 2d at 289.

OPINION 25

However, once the determination is made by the Legislature that officers will be appointed, then the Governor has sole appointive power, 218 Ind. at 653, 35 N.E. 2d at 284, 285, unless the officer concerned was selected by the Legislature at the time the Constitution was adopted, 218 Ind. at 664, 35 N.E. 2d at 289. The appointing power must be lodged somewhere within the executive department, and in that department with some officer who has executive power. The Governor is the only officer who has such power, 218 Ind. at 679, 35 N.E. 2d at 294, 295.

The Attorney General in 1943 was faced with interpreting a state fair bill similar to the 1921 Act which, like the 1947 Act, would create a fair board made up of members nominated by agricultural societies and appointed by the Governor, and with reconciling its provisions, if he could, with the *Tucker* decision. He points out that:

“No question apparently was raised in . . . [*the Scott*] case as to the method of appointment of the various members of the Board. . . .” 1943 O.A.G. 55, 56.

The Attorney General concluded that the state fair board created by the 1921 Act was an agency of the state in the executive or administrative department, and the power to select and appoint board members must be in the Governor under the *Tucker* rule. See also 1943 O.A.G. 118, in which a similar conclusion was reached concerning the appointment of members of the State Egg Board of Indiana. He also concluded that the superintendent of grounds and buildings, about whom inquiry was specifically made, must be selected and appointed by the Governor, although the secretary-treasurer could be appointed by the board. 1943 O.A.G. 55, 61.

The *Tucker* case specifically overruled the case of *Overshiner v. State*, 156 Ind. 187, 59 N.E. 468 (1901), which had upheld a statute authorizing the Indiana Dental Association, a private association, to appoint the controlling numbers of the members of the board of dental examiners, a state agency. The court in *Tucker*, discussing the three departments of government, stated that the Constitution has left

“ . . . no discretion in the Legislature to distribute governmental power outside of those three departments. It is true that the Legislature may create new offices, within the departments, and provide for the selection of officers to operate those offices, but it is unthinkable that the Legislature may have discretion to vest a part of the sovereign power in some agency outside the government, as set up and established by the Constitution. The appointment to office is universally held to be an exercise of the sovereign power.” 218 Ind. at 697, 35 N.E. 2d at 301, 302.

The *Tucker* case decision concerning the executive department's appointive powers has been held to be restricted to officials of the state and to departments of the state as distinguished from county and circuit officers, see *State ex rel. Buttz v. Marion Cir. Ct.*, 225 Ind. 7, 72 N.E. 2d 225, 170 A.L.R. 187 (1947). That case also overruled *Tucker* to the extent, if any, that the latter would prohibit county political party chairmen from selecting the persons to be appointed by a circuit judge as county voter registration board members. The court points out that the political parties select our candidates for the most important public offices, and act thereby as state agencies, that the selection of a county chairman is made by the county committee and regulated by statute, and that conferring on the county chairman the right to make this nomination is the exercise of “a reasonable police regulation to promote the public welfare.” 225 Ind. at 19, 72 N.E. 2d at 231.

The state fair is a function of the Legislature under the education section of the Constitution, Art. 8, § 1. *Busby v. Indiana Bd. of Agriculture*, 85 Ind. App. 572, 154 N.E. 883 (1927). The business of education is a governmental function, and a function of state government as distinguished from local government under Art. 8, § 1 of the Indiana Constitution, even when the educational corporation is a local unit. *State ex rel. Harris v. Mutschler*, 232 Ind. 580, 115 N.E. 2d 206 (1953). The *Tucker* case held that the appointment to offices established by the Legislature pursuant to Art. 8, § 1 of the

OPINION 25

Constitution must be lodged in the Governor, 218 Ind. at 704, 35 N.E. 2d at 304.

Construing the present Act, the Attorney General in 1951 O.A.G. 168 stated that the management and control of the fair grounds, and the activities of the fair board, are an executive-administrative function of government. Therefore, a member of the Legislature by serving as a State Fair Board member would violate the separation of powers provision of the Constitution, Art. 3, § 1. This opinion also stated that membership on the fair board is a lucrative state office. In 1953, my immediate predecessor opined that 1951 O.A.G. 168 was correct, but nevertheless members of the fair board may be selected by the associations designated in the 1947 statute. His theory was that the fair board is within the exception to the rule which prescribes that the appointing power in the executive-administrative department be lodged with the Governor. The exception is known as the "now is" clause, and reads as follows:

"All officers, whose appointment is not otherwise provided for in this Constitution, shall be chosen in such manner as now is, or hereafter may be, prescribed by law." Art. 15, § 1. (Emphasis added.)

Under this section of the Constitution, it has been held that officers who were appointed by the Legislature at the time the Constitution was adopted may be presently appointed by the Legislature even though such appointment would otherwise violate Art. 3, § 1. See *Hovey v. State ex rel. Carson*, 119 Ind. 395, 21 N.E. 21 (1889). (This rule also has qualifications and exceptions which are irrelevant to the question at hand.) The 1953 opinion bases its contention that the "now is" clause applies to the appointment of members of the fair board on the fact that the Indiana State Board of Agriculture created by the General Assembly to control the fair in 1835 and in existence when the Constitution was adopted in 1851, and as recreated as a body corporate in 1852 with perpetual succession, 1 R.S. 1852, ch. 2, § 4, was made up of members appointed by agricultural societies. However, in writing that opinion, the then Attorney General overlooked the fact that the Board of Agriculture to which he refers was held to be a

private corporation in *Downing v. Indiana State Bd. of Agriculture*, 129 Ind. 443, 28 N.E. 123, reh. den. 28 N.E. 614 (1891). Therefore, at the time the Constitution was adopted there were no state officers in charge of the management of state fairs or state fair grounds to whom the "now is" clause could apply.

Federal District Judge Steckler, in a particularly well reasoned opinion, has also held that the State of Indiana holds fee simple title to the fair grounds, and that the Legislature may at any time rewrite the statute to remove the "Trustee" status of the State, or to change the officers who operate the fair.

"The Indiana State Fair Board does not operate under a charter granted by the Legislature, and as a matter of fact, the Legislature could reorganize the Board at any time it saw fit. The Board has no vested rights in the funds with which it operates, and its organization is subject to change by the Legislature at any time." *Chicago Stadium Corp. v. State of Indiana*, 123 F. Supp. 783, 789 (S.D. Ind. 1954).

The question in that case was the sovereign immunity from suit of the fair board members and the State of Indiana as Trustee. The power of the Legislature to grant nominating power over state officers to agricultural societies was not in question. But "In conclusion, the Court holds that the Indiana State Fair Board is an inseparable agency and not a separate entity of the State of Indiana; . . ." 123 F. Supp. at 790.

There is, in my opinion, no doubt that the state fair board is an agency of the State of Indiana, and is part of the executive-administrative department of government. The various details which lead to this conclusion are spelled out in both the *Busby* and *Chicago Stadium Corp.* cases, as well as in the 1951 and 1953 Attorney General's Opinions cited herein.

There is also, in my opinion, no question but that appointment of members of the state fair board falls within the general rule announced in the *Tucker* case, which is that the Governor must appoint state officers not elected by the people. However, it must be considered whether *State ex rel. Buttz*

OPINION 25

v. Marion Cir. Ct., supra, incorporating *Bullock v. Billheimer*, 175 Ind. 428, 94 N.E. 763 (1911), concerning the executive's appointing power varies the general *Tucker* rule in this instance. *Bullock* involved an interpretation of a statute concerning an appropriation to Purdue University and the restrictions upon its use, Acts 1909, ch. 167, § 3:

"The work outlined in this act . . . shall be carried out by the said agricultural experiment station of Purdue University along lines to be agreed upon by the director of the said experiment station of said university, and an advisory committee of five persons. . . ."

The advisory committee was named by specified agricultural organizations, which were held to be public or *quasi*-public corporations. An objection was made that the advisory committee was attempting to control the affairs of Purdue University by appointing the board of trustees and appointing the advisory committee. Apparently, the board of trustees was, at the time of the decision, appointed by the Governor, pursuant to Acts 1875, ch. 81, three on his nomination and three on the nomination of two agricultural societies. However, the court ignored that aspect of the case. It construed only the 1909 appropriation act, and held that it gave the advisory committee appointed by the agricultural societies only advisory power.

"We are also in accord with appellant upon the proposition that political or public power cannot be delegated to private persons or corporations over whom or which there is no supervision and no liability to account, nor can others be appointed to discharge the duties of public officers. [The court here cites *State ex rel. Workman v. Goldthait*, 172 Ind. 210, 87 N.E. 133 (1909)] . . .

"No authority is claimed by, nor given to, either of these corporations, to exercise political power, or to administer public funds. The controlling power of Purdue University is in the trustees. The advisory committees of the five named associations are just

what they purport to be—advisory; for both the director of the experiment station and the advisory committees are governed and controlled by the trustees.

...

“The act of 1909, *supra* [Acts 1909, ch. 167], is not ineffective or unconstitutional by reason of the provision for an advisory committee to act with the director of the experiment station. If said committee performs any duty it is a public one, in which the public is interested. It performs no increased functions of a corporate character, for the reason that its duty ceases with its advice. It is no objection to a law that persons may be elected to advise as to the performance of a duty in which the public is interested, or that the mode of exercising the power is referred to those who may be affected by its operation.” *Bullock v. Billheimer*, 175 Ind. 428, 438, 439, 94 N.E. 763, 767 (1911).

Bullock is, therefore, not authority that the Legislature may lodge the appointing power in someone other than the executive as to officers who exercise a portion of the sovereignty of the state. The *Buttz* case can be limited on its facts to the political party chairmen, and to local as distinguished from state officers. The *Buttz* decision relies on the state's exercise of its police power to regulate elections.

It is my conclusion, in the light of the matters considered, that the members of the Indiana State Fair Board are officers of the State of Indiana, that the Indiana State Fair Board is an agency of the State of Indiana in the executive-administrative department, and that the Governor is granted by the Constitution of the State of Indiana the power and authority to appoint such officers unless the Legislature provides for their election by all electors qualified to vote under the Constitution of the State of Indiana, Art. 2, § 1.

Since the General Assembly may not deprive the Governor of his constitutional appointive power, the language in the 1947 statute which states that the Governor “shall” appoint to membership on the Indiana State Fair Board those persons nominated by the district conferences pursuant to that statute

OPINION 25

must be interpreted to mean that the Governor may accept the advice tendered by the district conferences as to the person to be appointed, but is not required to accept and appoint the person nominated, *i.e.*, the Governor has discretionary power to select the members of the State Fair Board, regardless of the statutory language.

Since the members of the State Fair Board must be appointed by the Governor, exercising his discretion, then that Board has the power to appoint a Secretary and a Superintendent of Grounds and Buildings as subordinates to administer the duties imposed on the Board by law. The fact that Governors may, in the past, have appointed to office the nominees of the district conferences, would not deprive the present board members of their authority to appoint a Secretary and a Superintendent of Grounds and Buildings to help them carry out the duties which are incidental to their principal executive-administrative department functions, 1943 O.A.G. 118.

Since your original question was submitted, you have made other inquiries concerning the management of the property of the Indiana State Fair Grounds. In general, you are interested to know whether other statutes of the state governing contracts, purchase and disposition of real estate, audit of books, and so on, are applicable to the Indiana State Fair Board and the Indiana State Fair Grounds. The following listing does not purport to be exhaustive, but does cover some of the major areas in which the State of Indiana has sought to control the management of its property for the benefit of the citizens of the state.

(1) As previously indicated, Acts 1947, ch. 214, as amended, itself makes the actions of the Indiana State Fair Board subject to review by other agencies of the state in the following particulars:

(a) Pursuant to § 9, an annual report containing "a classified and detailed report of all receipts and expenditures" for each fiscal year must be placed in the hands of the Auditor of State on or before August 10 each year, and filed with the Governor. The report

1966 O. A. G.

shall also summarize the activities and work of the board.

(b) Section 9 also makes books and accounts of the board subject to inspection by the State Board of Accounts.

(c) The obtaining of loans and the issuance of bonds purportedly authorized by the statute are made subject to the approval of the Governor, § 12, as amended by Acts 1957, ch. 224, § 1.

(d) The funds under the control of the board are deemed public funds and subject to the depository laws for public funds of the State of Indiana, § 13.

(2) The Administration Act of 1961, Acts 1961, ch. 269, Burns §§ 60-101—114, created an Indiana department of administration, hereinafter referred to as the department. The department consists of a commissioner appointed by the Governor as its executive head, and of such officers and employees as shall be appointed or employed.

“ . . . The commissioner shall be well versed in administrative management and in the affairs of state government *which by law are the responsibility of the governor*, and shall in no manner affect the separate departments of state government which by law or the Constitution of the state of Indiana are now under the jurisdiction and are the responsibility of other state *elected officials*. . . .” § 2, Burns § 60-102. (Emphasis added.)

Section 4 of the Act, Burns § 60-104, gives the department the following duties and function, among others :

“(a) . . . execute and administer all provisions of law which impose duties and functions upon the executive department of government including particularly executive investigation of state agencies supported by appropriations, and the assembly of all required data and information for the use of this department, and the legislative division.

