

**OPINION NO. 81-036****Syllabus:**

1. A position of instructor or instructor assistant with a county board of mental retardation is a classified civil service position unless expressly designated by the board as one of the three unclassified positions permitted under R.C. 124.11(A)(2).
2. The superintendent of a county board of mental retardation has authority to enter into a written employment agreement with a person holding the position of instructor or instructor assistant, but is not required to do so.

3. An employment agreement between the superintendent of a county board of mental retardation and an instructor or instructor assistant may not abridge the terms and conditions of employment guaranteed by the civil service laws; the agreement must provide benefits equal to or exceeding the benefits provided by statute to such employee.

**To: John F. Holcomb, Butler County Pros. Atty., Hamilton, Ohio**  
**By: William J. Brown, Attorney General, July 10, 1981**

I have before me your request for my opinion on the following issues:

1. Are the positions of Instructor and/or Instructor Assistant, with the County Board of Mental Retardation, included in the civil service and in the classified service of the county?
2. May a County Board of Mental Retardation enter into a written agreement with a person for the position of Instructor and/or Instructor Assistant?
3. Is a written agreement mandatory or discretionary?
4. Does the written agreement or do the statutes regarding civil service govern the relationship between the employer and the employee?

R.C. 124.01(A) defines the term "civil service" for the purposes of R.C. Chapter 124, as follows:

"Civil service" includes all offices and positions of trust or employment in the service of the state and the counties, cities, city health districts, general health districts, and city school districts thereof. (Emphasis added.)

Inasmuch as employees of a county board of mental retardation are county employees (1969 Op. Att'y Gen. No. 69-045), I must conclude that such employees are included in the civil service. In 1973 Op. Att'y Gen. No. 73-077, I specifically concluded that an administrator of a county board of mental retardation is a member of the civil service; I can see no basis for reaching a different conclusion with respect to the positions of instructor and instructor assistant with such a board.

A review of R.C. 124.11 determines that the positions of instructor and instructor assistant are classified service positions. Division (B) of R.C. 124.11 states:

The classified service shall comprise all persons in the employ of the state and the several counties, cities, city health districts, general health districts, and city school districts thereof, not specifically included in the unclassified service.

R.C. 124.11(A) expressly designates those categories of unclassified civil service. Although R.C. 124.11(A)(7) enumerates certain positions of an educational nature as unclassified, it is limited to positions "connected with the public school system. . . as determined by the governing body of said public school system." It is my understanding, based on conversations with the Butler County Board of Mental Retardation, that the instructors and instructor assistants to whom your questions refer staff the special educational programs for handicapped children established by the Department of Mental Retardation and Developmental Disabilities under the mandate of R.C. 3323.09. It may be argued that these positions are, in some sense, connected with the public school system. I cannot, however, conclude that these

are positions which have been determined to be unclassified "by the governing body of said public school system" within the meaning of R.C. 124.11(A)(7), since it does not appear that a county board of mental retardation may be characterized as "the governing body of said public school system." Moreover, R.C. 124.11(A)(20) expressly specifies that only "[s]uperintendents of county boards of mental retardation and developmental disabilities and not more than three other positions of employment with each board as designated by the board" (emphasis added) are in the unclassified service. Thus, the position of instructor or instructor assistant with a county board of mental retardation is an unclassified position only if it is one of the three positions of employment designated by the board as unclassified under R.C. 124.11(A)(20).

Your second question concerns the authority of a county board of mental retardation to enter into a written employment agreement with its instructors or instructor assistants. At the time your request was submitted, R.C. 5126.03(C) authorized county boards of mental retardation "to employ such personnel. . .as are necessary" and R.C. 5126.06 required the board to appoint an administrator or executive secretary to "appoint all other employees necessary to fulfill the duties invested in such board." These provisions were omitted when R.C. Chapter 5126 was amended by Am. S.B. 160, 113th Gen. A. (1980) (eff. Oct. 31, 1980). Authority over employment contracts of classified civil service employees is now vested in the superintendent by R.C. 5126.06(C), which provides that "the superintendent of the county board of mental retardation shall. . .approve all employment contracts and personnel actions that involve employees in the classified service." I shall, therefore, answer your question in terms of whether the superintendent of a county board of mental retardation has the authority to enter into the type of employment contracts in question. It is my understanding that the instructors and instructor assistants of the Butler County Board of Mental Retardation are currently being given written contracts since their counterparts in the public schools are given written contracts. R.C. 3319.08. Your concern is whether the practice of providing such contracts is authorized by statute.

As noted above, R.C. 5126.06(C) expressly grants the superintendent general authority over employment contracts of classified employees. The statute does not, however, specify what particular types of employees may be hired. The authority to employ instructors and instructor assistants, in particular, may be implied from a county board of mental retardation's statutory duties under R.C. 3323.09. Pursuant to R.C. 3323.09, county boards of mental retardation are charged with the function of operating and maintaining special education programs for handicapped children established under that section. The operation and maintenance of such programs necessarily requires the employment of persons to staff the programs. Furthermore, I can see no legal objection to putting such a contract into writing. Therefore, in response to your second question, I conclude that the superintendent of a county board of mental retardation has the authority to enter into a written employment contract with a person holding the position of instructor or instructor assistant.

In response to your third question, however, I conclude that a written employment agreement is not mandatory. R.C. 1335.05, Ohio's statute of frauds, specifies, as a general rule, when contracts must be in writing. Among the contracts required by R.C. 1335.05 to be in writing are those agreements "not to be performed within one year from the making thereof." Contracts of employment of an indefinite duration are generally held not to be within this provision on the theory that such contracts may be terminated by either party at any time and, thus, performance within a year is possible, regardless of whether it is probable. Nonemaker v. Amos, 73 Ohio St. 163, 76 N.E. 949 (1905). Moreover, R.C. 5126.06(C), which grants the superintendent the authority to "approve all employment contracts" does not specifically state that the contracts must be in writing. Nor am I aware of any other provision in the statutes governing county boards of mental retardation or the education of handicapped children which would require the specific contracts in question to be in writing. Although R.C. 3319.08 requires that certain teachers be given written employment contracts, it applies

only to teachers employed by a board of education of a city, exempted village, local, or joint vocational school district. Since the instructors and instructor assistants in question are employed by county boards of mental retardation rather than by boards of education, this provision is inapplicable. Accordingly, although the superintendent of a county board of mental retardation has the authority to enter into a written employment agreement with a person for the position of instructor or instructor assistant, a written agreement is not mandatory.

The final question you raise involves the relationship between the terms of such a contract and the civil service laws. It is my understanding that the Butler County Board of Mental Retardation's underlying concern is whether the civil service laws or the terms of the written employment agreement would be controlling in situations where the two conflict.

As I indicated in 1973 Op. Att'y Gen. No. 73-077, an employment contract may not abridge the terms and conditions of employment guaranteed under the civil service laws. This is not to say, however, that an employment contract would be superfluous; the civil service laws of this state do not so completely govern the employer-employee relationship that there are no terms left open for negotiation. See 1979 Op. Att'y Gen. No. 79-054. Moreover, in instances where a provision of the civil service laws is construed as merely guaranteeing a minimum benefit, an employment contract may provide for benefits in excess thereof in the absence of any constricting statutory authority. Ebert v. Stark County Board of Mental Retardation, 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980). In Ebert, the Ohio Supreme Court addressed the question of whether a county board of mental retardation had authority to adopt a sick leave policy which granted benefits greater than those prescribed by R.C. 124.38. The Court held that the sick leave provisions of R.C. 124.38 conferred a minimum benefit upon the board's employees and the board had statutory authority to provide benefits in excess of those in R.C. 124.38. Applying the Court's reasoning in Ebert to the current situation, it appears that the superintendent of a county board of mental retardation may enter into written employment contracts which confer benefits equal to or exceeding the minimum benefits provided by statute.

In specific response to your questions, it is, therefore, my opinion, and you are so advised, that:

1. A position of instructor or instructor assistant with a county board of mental retardation is a classified civil service position unless expressly designated by the board as one of the three unclassified positions permitted under R.C. 124.11(A)(20).
2. The superintendent of a county board of mental retardation has authority to enter into a written employment agreement with a person holding the position of instructor or instructor assistant, but is not required to do so.
3. An employment agreement between the superintendent of a county board of mental retardation and an instructor or instructor assistant may not abridge the terms and conditions of employment guaranteed by the civil service laws; the agreement must provide benefits equal to or exceeding the benefits provided by statute to such employee.