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TEACHERS IN PUBLIC SCHOOLS — “SUBSTITUTE TEACHERS” — “REGULAR TEACHERS” — CERTIFICATION, YEARS OF SERVICE — CONTINUING CONTRACTS — BOARD OF EDUCATION, POWER TO EMPLOY TEACHERS ON YEARLY CONTRACTS, SUBSTITUTES FOR ABSENT TEACHERS — COMPENSATION, PER DIEM — SCHOOL ENROLLMENT FOR CURRENT YEAR, MEASURE TO DETERMINE IF SCHOOL DISTRICT UNDER EIGHT HUNDRED PUPILS — WHEN “BEGINNING TEACHER” ELIGIBLE FOR “SECOND CONTRACT” — “NEW TEACHER” OR “BEGINNING TEACHER” WHEN ELIGIBLE FOR “FIVE YEAR CONTRACT” — QUALIFICATIONS FOR RE-EMPLOYMENT.

COUNTY SUPERINTENDENTS OF SCHOOLS, “TEACHERS” ENTITLED TO EMPLOYMENT UNDER “CONTINUING CONTRACT,” SAME EXTENT, SAME MANNER AS OTHER TEACHERS — SECTION 7690-2 G.C., HOUSE BILL 121, 94 GENERAL ASSEMBLY.

## SYLLABUS:

1. *So-called "substitute teachers" in the public schools who qualify as to certification and years of service for continuing service status, as provided by Section 7690-2, of the General Code of Ohio, are entitled to the tender of continuing contracts by their employing boards of education the same as teachers who are known as "regular teachers."*

2. *The term "teacher," as used in the Act of the General Assembly relating to contracts with teachers in the public schools (House Bill No. 121 of the 94th General Assembly), includes so-called "substitute teachers" as well as those who are commonly referred to as "regular teachers."*

3. *It is within the power of a board of education to employ teachers on yearly contracts to substitute for absent teachers and agree to pay such substitute teachers a stipulated compensation per diem for the days only that they are actually employed.*

4. *The measure to be used for determining whether or not a school district is under eight hundred pupils, as the expression is used in the proviso or exception relating to contract systems in districts of under eight hundred pupils as contained in Section 7690-2, General Code, should be school enrollment for the current year wherein contracts for teachers are made for the ensuing year.*

5. *A "beginning teacher" or a "new teacher," as the terms are defined in the exception contained in Section 7690-2, General Code, as enacted in House Bill No. 121 of the 94th General Assembly, effective September 1, 1941, relating to districts of under eight hundred pupils, who is employed after September 1, 1941, for teaching service covering the school year 1941-1942, will be eligible for a "second contract" as the term is used in sub-paragraph "d" of said exception, at or near the end of the said school year, provided he has fulfilled his educational requirements and his work has been satisfactory.*

6. *A "new teacher" or a "beginning teacher," as the terms are used in the exception contained in Section 7690-2, General Code, relating to districts of under eight hundred pupils will, after the termination of a "second contract," be eligible for a five year contract or a continuing contract as*

*provided in sub-paragraph "d," of the said exception.*

7. *By the provision contained in sub-paragraph "c" of the exception relating to districts of under eight hundred pupils found in Section 7690-2, General Code, as enacted in House Bill No. 121 of the 94th General Assembly, which reads, "provided that the teacher's educational qualifications have been fulfilled and the teacher's work has been satisfactory," is meant that in order for a teacher to which it applies, to qualify for re-employment after the termination of a "first contract" the teacher must meet such local standards of educational qualification and satisfactory work as may be fixed by the local board of education.*

8. *County superintendents of schools are "teachers" within the meaning of the term as used in the law relating to contracts with teachers in the public schools (House Bill No. 121 of the 94th General Assembly) and if such superintendents qualify as to certification and years of service, as provided by the law, they are entitled to employment under a "continuing contract" as the same is defined in the law, to the same extent and in the same manner as are other teachers.*

Columbus, Ohio, September 17, 1941.

Hon. Kenneth C. Ray, Director of Education,  
Columbus, Ohio.

Dear Sir:

I have before me the recent communication from your office, submitting for my consideration several questions with respect to the interpretation and application of the recently enacted law relating to contracts with teachers in the public schools. This law is contained in House Bill No. 121 of the 94th General Assembly, which was passed June 2, 1941. It became effective September 1, 1941. The questions in the form submitted by you are as follows:

*"Question 1. Section 7690-2 reads in part as follows:*

*"Teachers eligible for continuing service status in any school district shall be those teachers qualified as to certification who have taught for at least three years in the district, and those teachers who, having attained continuing contract status elsewhere, have served two years in the district, but the board of*

education, upon the superintendent's recommendation, may at the time of employment or at any time within such two-year period declare any of the latter teachers eligible. \* \* \*

Provided, however, that on or before September 1, 1941, a continuing contract shall be entered into by each board of education with each teacher holding a professional, permanent, or life certificate who, at the time of the passage of this act, *is completing five or more consecutive years of employment* by said board.

A limited contract may be entered into by each board of education with each teacher who has not been in the employ of the board for at least three years and shall be entered into, regardless of length of previous employment, with each teacher *employed* by the board who holds a provisional or temporary certificate. \* \* \* "

Is it the intent of the law, particularly the paragraphs quoted above and underscored, that continuing and limited contracts be entered into with teachers who have been employed or have served as substitute teachers as well as teachers who have been employed or serving as regular teachers under the appointment provisions of Section 7691 of the General Code of Ohio? By the term 'substitute teacher' I mean a teacher working under an agreement providing for a stipulated salary per diem for only the days actually employed. Such substitute teacher, while working under such agreement, may serve or be employed for only a fraction of the total days in the school year.

*Question 2.* Since it is provided in the second paragraph of Section 7690-1 that 'contracts for the employment of teachers shall be of two types: limited contracts and continuing contracts,' will it be possible for a board of education to employ a teacher to substitute for absent teachers, and to enter into an agreement, for an entire school year, to pay such teacher a stipulated salary per diem for only the days actually employed?

*Question 3.* An amendment to H. B. 121, and incorporated in the act at the time of its passage, reads as follows:

'Provided, however, that in school districts of under 800 pupils the following contract system shall control.'

Is '800' to be interpreted as the school enumeration, school enrollment, or average daily attendance?

*Question 4.* Sub-paragraph (c) of Section 7690-2 relates to reemployment 'after the termination of the first contract'

Will any teachers whose first year of employment is for the school year 1941-42 be eligible for the 'second' contract of employment at or near the conclusion of that year?

*Question 5.* Sub-paragraph (d) of Section 7690-2 related to reemployment 'after the termination of the second contract.' Will any teacher who completes two or more years of employment upon a corresponding number of annual contracts at the end of the 1941-42 school year be regarded as having reached the 'termination of the second contract' and, therefore, be eligible for a five-year contract upon reemployment?

*Question 6.* What interpretation is to be placed upon the clause in sub-paragraph (c), 'provided that the teacher's educational qualifications have been fulfilled'? In other words, since the first employment cannot be more than one year under sub-paragraph (a) and need not be more than one year under sub-paragraph (b), what educational qualifications can a teacher reasonably be expected to fulfill during the year of teaching service prior to reemployment after the termination of the first contract?

*Question 7.* Do county superintendents who qualify as a teacher under the provisions of Section 7690-1 come under the provisions of the continuing contract law?"

In the consideration of the specific questions submitted, certain general provisions and definitions contained in Section 7690-1, General Code, as enacted in said House Bill No. 121 should be noted. This section reads as follows:

"Each board of education shall enter into contracts for the employment of all teachers and shall fix their salaries which may be increased but not diminished during the term for which the contract is made except as provided in section 7690-3 of this act. Teachers must be paid for all time lost when the schools in which they are employed are closed owing to an epidemic or other public calamity.

Contracts for the employment of teachers shall be of two types: limited contracts and continuing contracts. A limited contract for a superintendent shall be a contract for such term as authorized by section 7702 of the General Code, and for all other teachers, as hereinafter defined, for such term as authorized by section 7691 of the General Code. A continuing contract shall be a contract which shall remain in full force and effect until the teacher resigns, elects to retire, or is retired pursuant to section 7896-34 of the General Code, or until it is terminated or suspended as provided in this act and shall be granted only to teachers holding professional, permanent, or life certificates.

The term 'teacher' as used in this act shall be deemed to mean and include all persons certified to teach and who are employed in the public schools of this state as instructors, principals, supervisors, superintendents, or in any other educational position for which the employing board requires certification.

'Year' as applied to terms of service for the purpose of this act means actual service of not less than one hundred and twenty days within a school year, provided however that any board of education may grant a leave of absence for professional advancement with full credit for service.

'Continuing service status' for a teacher means employment under a continuing contract."

It will be observed upon consideration of the terms of the above statute that no classification is made therein of "teachers" as the word is used in the Act on the basis of whether or not they are regular full time teachers or substitute part time teachers nor is any qualification whatever, made of the term other than that it means persons certified to teach, and employed in the public schools of the State as instructors, principals, supervisors, superintendents or in some educational position for which the employing board requires certification. Nor will there be found any mention made in the statutory law of Ohio of so-called "substitute teachers" or "regular teachers" as such. The term "substitute teacher" is in common use and is generally understood to mean a teacher who, as the term implies, substitutes for or takes the place of a so-called "regular teacher" who for one reason or another is temporarily unable to fill his regular position, or one who has been transferred to a different teaching position than the one for which he originally had been employed thus necessitating the assignment of another teacher to the position. By a "regular teacher" as the term is used in common parlance, there is meant one who is given a definite assignment for a prescribed period, or, to state it another way, one who is employed for a particular teaching position for a specified term where continuity of service as to time and place is contemplated.

In maintaining an efficient school system and properly keeping the schools open occasions necessarily arise where substitute teachers must be used, and it has been a common practice especially in the larger school systems, for boards of education to provide substitutes and for that purpose to classify teachers as regular teachers and substitute teachers. In some places, for mere purposes of identification, substitute teachers are

called "supply teachers" and are further classified as "permanent supply teachers" and "temporary supply teachers." In some places a distinction is made between permanent supply or substitute teachers and casual substitutes, the latter being those who are under contract for a definite period as substitute teachers and are subject to call for service at any time and for any school in the local system for which they may be properly certificated to teach, while the former are understood to be teachers who are employed to complete the remaining portions of terms of regular teachers with definite assignments who resign or whose position otherwise becomes vacant. Recognition is given in the law to the latter mentioned class of teachers where, in Section 7691, General Code, it is provided that teachers shall be appointed for terms not longer than four years or less than one year "except to fill an unexpired term."

So that schools will not suffer temporary suspension on account of illness of teachers or otherwise, it has been a common practice for boards of education to make available teachers who may at any time be called upon to temporarily take over the work of teachers who may be absent. The usual way of doing this is to make contracts for definite periods for substitute teachers at a fixed price per day or per hour for any service that may be rendered or for a definite salary per month or per year as may be agreed upon. Although the law makes no express provision for the employment of these so-called "substitute teachers" in this manner, it can not be doubted that a board of education in the proper exercise of its duty to maintain an efficient school system in its district, may in its discretion make such contracts. Any such so-called substitute teachers who are under contract as such for a definite time must in the fulfillment of their contracts hold themselves in readiness at all times to meet any call for service that may be made.

There are times, no doubt, even where substitute teachers have been provided for by contract, that none are available, and in some places a "calling list" is maintained consisting of persons who are properly qualified and who may be called upon to fill in in emergencies where neither regular nor contract substitutes are available but with whom no definite contract exists. Such persons when called are also commonly referred to as substitute teachers. Recognition of so-called substitute teachers was made by a former Attorney General, particularly of those who were under definite contract as such, in an opinion which will be found in the reported Opinions of the Attorney General for 1920, at page 421. In that opinion the then Attorney General held:

“Where a substitute teacher is regularly employed and carried on the payroll as one of the teaching force such substitute teacher is entitled to the provisions of the teachers retirement law.”

Regardless of what appellation may be given such teachers, they are in fact substitute teachers if they are employed for that purpose and do actually substitute for and take over the duties of one who had been employed for a definite assignment whether the substitution be casual for an hour, a day, a week, or for any longer portion of a definite term. Such teachers possess all the elements of a “teacher” as the term is used in Section 7690-1, General Code, that is, certification and employment as instructor, principal, supervisor, superintendent or other educational position for which the employing board requires certification.

The law provides in Section 7805-9, General Code, that no person shall receive any compensation for the performance of duties as a teacher in any school supported in whole or in part by the state or by federal funds who is not properly certificated for the position as well as to good moral character and Section 7786, General Code, provides that no clerk of a board of education shall draw an order for the payment of a teacher for service unless there is on file a proper legal certificate or a true copy thereof, to teach the subjects and grades during the period covered by the order.

It clearly follows in my opinion that so-called substitute teachers as hereinbefore described are teachers within the meaning of the term as used in the law relating to the granting of continuing contracts to teachers and that if such teachers qualify by certification and years of service for the attainment of continuing contract status as is provided by Section 7690-2, General Code, for teachers generally, they will be held to be eligible for continuing service status and they should be tendered continuing contracts the same as other teachers. It should be noted however, that credit for a year's service for the purpose of attaining continuing contract status will not be allowed unless the teacher render actual service for at least one hundred and twenty days within a school year.

I come now to a consideration of questions numbers 3, 4, 5, and 6, relating to contract systems in school districts of under eight hundred pupils as provided for in the proviso or exception contained in Section 7690-2, General Code. This section, after providing generally for the



granting of continuing contracts to teachers, contains the following exception:

“Provided, however, that in school districts of under eight hundred pupils, the following contract system shall control:

a. Beginning teachers, who have not previously been employed as a teacher in any school, shall be hired for one year.

b. New teachers, who have had at least one year's experience as teachers in other schools, shall be employed for a period of time commensurate with their past experience at the discretion of the hiring board of education, provided that no such contract shall be for more than five years.

c. Upon re-employment after the termination of the first contract, the new contract shall be for not less than three years nor more than five years provided that the teacher's educational qualifications have been fulfilled and the teacher's work has been satisfactory.

d. Upon re-employment after the termination of the second contract, the teacher's contract shall be for five years and subsequent renewal thereof shall be for five year periods, or the board of education may at any time grant a continuing contract.”

The legislative intent, which of course, controls in the interpretation of statutory enactments, as to what is meant by “school districts of under eight hundred pupils” as the expression is used in the above proviso or exception is somewhat obscure, to say the least. There is nothing in the statute, itself, to indicate in any way what is determinative of whether or not a district is under eight hundred pupils, nor are there any related statutes that are at all helpful as there exists nowhere in the statutory law of Ohio any classification of school districts on the basis of number of pupils unless the provision with respect to the distribution of the state public school fund on the basis of average daily attendance may be regarded as a classification of school districts on the basis of number of pupils. It apparently was the purpose of the Legislature to provide differently for a “contract system” in the smaller districts than the system provided for school districts generally in the Act exclusive of the exception. Just why the dividing line was made “districts having under eight hundred pupils” is immaterial. It is clear that it was so made and that the classification relates to local districts and not county districts as local boards of education hire the teachers and not the county boards of education. That fact however, affords no guide whatever as to the man-

ner of determining when a district is under eight hundred pupils. In the only instances where number of pupils in a school district is looked to for any purpose, the number is determined by school enumeration, school enrollment or average daily attendance. By consideration of the times and manner of making such determinations we may by a process of elimination arrive at the most probable intent of the Legislature as to the meaning of the expression, "districts of under eight hundred pupils."

Enumeration of the school youths in a district as made by virtue of Section 7794, General Code, is made annually during the four weeks ending on the fourth Saturday of May of each year, and consists generally of the tabulation of all resident youths in the district between the ages of five and eighteen years, whether they attend public or private schools. Section 7681, General Code, provides that the schools of each district shall be free to all youth in the district between six and twenty-one years of age who are children, wards or apprentices of actual residents of the district. In some districts kindergartens are maintained where children who are under six years of age attend the classes. Whether or not such schools are maintained, and the age limits for attendance therein are matters of local regulation. It would not seem to be reasonable to suppose that the Legislature had in mind "enumeration" when it provided the contract system for districts of under eight hundred pupils as the result of an enumeration of school youths does not reflect the number of public school pupils actually in the district.

Moreover, teachers are usually employed sometime before the fourth Saturday in May, the time fixed for the completion of the enumeration, although as a matter of fact an enumeration is not completed in many districts until considerably later. It is oftentimes advisable to employ teachers earlier than that date. They may be employed for the ensuing school year as early as February of a calendar year. See Section 7691, General Code.

It would not seem consistent with a reasonable legislative intent to think that the Legislature meant the enumeration of school youths to be the criterion by which it should be determined whether or not a school district was under eight hundred pupils, and thus have its contract system controlled by the exception above mentioned.

For a somewhat similar reason, "average daily attendance" may be

eliminated as "average daily attendance" can not be determined until school sessions for a year are ended. Usually, this is the latter part of May and sometimes the early part of June. The Legislature should not be charged with having intended that the determination of whether or not a district is under eight hundred pupils and thus have the manner of employment of its teachers postponed until so late a date as it is not consistent with efficient and proper school administration in many instances at least, to wait until so late a date to employ teachers for the following school year.

This leaves "enrollment" which I believe is the proper measure to be applied to determine whether or not a school district is under eight hundred pupils. Of course, there is no way of determining enrollment for an ensuing school year for which teachers are to be employed. The current enrollment for the year within which the teachers are employed for the ensuing school year should control.

In the consideration of your fourth and fifth questions, it should be noted that under a proper construction of the proviso or exception relating to a contract system in districts of under eight hundred pupils, the system is confined to the making of contracts in the first instance with "beginning teachers" and "new teachers" as the terms are defined in the exception and re-employment as spoken of in clauses c. and d. of the exception is likewise limited to the re-employment of such teachers after termination of a first or second contract as the case may be, with such persons. In my opinion No. 4025, rendered under date of August 1, 1941, and addressed to the Prosecuting Attorney of Williams County, it is held:

"The exception contained in Section 7690-2, General Code, as enacted in House Bill No. 121, of the Ninety-fourth General Assembly, effective September 1, 1941, with respect to a contract system for teachers in the public schools in districts of under eight hundred pupils, applies to 'new teachers' and 'beginning teachers' only, in the said districts, as those expressions are defined in the said exception."

In the course of that opinion it is said:

"If the legislature meant the expressions 'first contract' and 'second contract' as used in clauses 'c' and 'd,' to apply to all teachers, that is, 'new teachers,' 'beginning teachers' and teachers with previous teaching experience in the particular district, it

failed to fix any limitations for the first contract for teachers of the third class named and the 'system' would be incomplete for that reason. We may therefore conclude that the latter named class of teachers was not intended to be included in the system. \* \* \*

"I know of no reason for saying that the expressions, 'upon re-employment after the termination of the first contract' and 'upon re-employment after the termination of the second contract' as used in clauses 'c' and 'd' of the exception or proviso relating to districts of "under eight hundred pupils' refer to anything other than the re-employment after the first and second contracts made with the teacher referred to in clauses 'a' and 'b'."

House Bill No. 121, including the exception about contract systems in districts of eight hundred pupils became effective September 1, 1941. Until that time the terms, "beginning teachers" and "new teachers" were unknown to the law so far as legal expressions classifying teachers for any purpose was concerned. Prior to September 1, 1941, the statute and exception were of no force or effect. Under the law as contained in Section 7691, General Code, which was in full force and effect until September 1, 1941, boards of education in districts of under eight hundred pupils, as well as in other districts had a clear legal right to employ teachers in their districts for as long as four years, regardless of their teaching experience in the employing district or elsewhere.

It is highly probable that in many districts teachers were employed before September 1, 1941, and when such employment was made prior to September 1, 1941, the teachers so employed should not for any purpose be regarded as either a "new teacher" or a "beginning teacher," as the terms are used in the exception and will not be so regarded when the teachers for the school year 1942-1943, are employed, as the exception will not be construed as being retroactive. As to teachers in this class of districts not employed until after September 1, 1941, the situation is different. In any case, the answer to your fourth and fifth questions depends largely upon the circumstances existing in each instance, and for that reason a categorical answer to these questions is somewhat difficult.

The requirement of the law that teachers in the public schools must have a certain type of teachers certificate in order to qualify for a teaching position is not in itself a limitation on what may be required by a local board of education in districts of under eight hundred pupils, for qualification to teach in the district within which the board has juris-

diction. Under its power to make reasonable rules and regulations by authority of Section 4750, General Code, a board of education in a district of under eight hundred pupils may fix a standard of training and educational achievement for its teachers as it sees fit. This standard may be above the qualifications required generally by the state as to certification. Such board may in its discretion require that teachers in any grade must meet certain set standards in addition to being properly certificated, and the Legislature having this possibility in mind left the door open for boards of education in districts of under eight hundred pupils to require "new teachers" and "beginning teachers" to meet certain fixed standards as to educational qualifications and satisfactory work before they may be granted a second contract by the clause contained in subparagraph "c" of the exception relating to such teachers, which reads as follows:

"provided that the teacher's educational qualifications have been fulfilled and the teacher's work has been satisfactory."

The continuing contract law (House Bill No. 121) of the 94th General Assembly, applies to all "teachers," as the term is defined in the Act. It is there defined as meaning and including all persons certified to teach, and who are employed in the public schools of this state as instructors, principals, supervisors, superintendents, or in any other educational position for which the employing board requires certification. Inasmuch as county superintendents of schools must be certificated to teach in order to qualify for the position (Section 7702, General Code), it follows that they come under the provisions of the law.

I am therefore of the opinion in specific answer to your questions:

1. So-called substitute teachers in the public schools who qualify as to certification and years of service for continuing service status as provided by Section 7690-2, of the General Code of Ohio, are entitled to the tender of continuing contracts by their employing board of education the same as teachers who are known as regular teachers.

2. It is within the power of a board of education to employ teachers on yearly contracts to substitute for absent teachers and agree to pay such substitute teachers a stipulated compensation per diem for the days only that they are actually employed.

3. The measure to be used for determining whether or not a school district is under eight hundred pupils, as the expression is used in the proviso or exception relating to contract systems in districts of under eight hundred pupils as contained in Section 7690-2, General Code, should be school enrollment for the current year wherein contracts with teachers are made for the ensuing year.

4. A "beginning teacher" or a "new teacher," as the terms are defined in the exception contained in Section 7690-2, General Code, as enacted in House Bill No. 121, of the 94th General Assembly, effective September 1, 1941, relating to districts of under eight hundred pupils, who is employed after September 1, 1941, for teaching service covering the school year 1941-1942, will be eligible for a "second contract" as the term is used in sub-paragraph (d) of said exception, at or near the end of the said school year, provided he has fulfilled his educational requirements and his work has been satisfactory.

5. A "new teacher" or a "beginning teacher," as the terms are used in the exception contained in Section 7690-2, General Code, relating to districts of under eight hundred pupils will, after the termination of a "second contract," be eligible for a five year contract or a continuing contract as provided in sub-paragraph "d," of the said exception.

6. By the provision contained in sub-paragraph "c" of the exception relating to districts of under eight hundred pupils, found in Section 7690-2, General Code, as enacted in House Bill No. 121 of the 94th General Assembly, which reads, "provided that the teacher's educational qualifications have been fulfilled and the teacher's work has been satisfactory," is meant that in order for a teacher to which it applies to qualify for re-employment after the termination of a "first contract" the teacher must meet such local standards of educational qualification and satisfactory work as may be fixed by the local board of education.

7. County superintendents of schools are "teachers" within the meaning of the term as used in the law relating to contracts with teachers in the public schools (House Bill No. 121 of the 94th General Assembly) and if such superintendents qualify as to certification and years of service, as provided by the law, they are entitled to employment under a "con-

tinuing contract" as the same is defined in the law, to the same extent and in the same manner as are other teachers.

Respectfully,

THOMAS J. HERBERT,

Attorney General.