

OPINION NO. 72-058

Syllabus:

Under Section 3319.081, Revised Code, a nonteaching employee of a board of education who has continuing contract status retains that status even though he or she is transferred to another nonteaching position.

To: Thomas C. Hanes, Pros. Atty., Darke County, Greenville, Ohio
By: William J. Brown, Attorney General, July 24, 1972

I have before me your request for my opinion which may be stated as follows:

Does a nonteaching employee of a local school district, who has attained a continuing contract status, have a right to retain such status even though transferred to another non-teaching position within the same school system?

I further understand from your letter that the specific factual situation involves a person who, after attaining continuing contract status as a secretary, was hired solely as an educational aide for the school year 1971-1972.

Contracts for nonteaching employees at local school districts are covered by Sections 3319.081 and 3319.088, Revised Code. Section 3319.081, supra, provides in pertinent part, as follows:

"In all school districts wherein the provisions of sections 143.01 to 143.48, inclusive, of the Revised Code do not apply the following employment contract system shall control for employees whose contracts of employment are not otherwise provided by law:

"(A) Newly hired regular nonteaching school employees, including regular hourly rate and per diem employees, shall enter into written contracts for their employment which shall be for a period of not more than one year. If such employees are rehired, their subsequent contracts shall be for a period of two years.

"(B) After the termination of the two-year contract provided in division (A) of this section,

if the contract of a nonteaching employee is renewed, the employee shall be continued in employment, and the salary provided in the contract may be increased but not reduced unless such reduction is a part of a uniform plan affecting the nonteaching employees of the entire district.

"(C) The contracts as provided for in this section may be terminated by a majority vote of the board of education. Such contracts may be terminated only for violation of written rules and regulations as set forth by the board of education or for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, or any other acts of misfeasance, malfeasance, or nonfeasance. In addition to the right of the board of education to terminate the contract of an employee the board may suspend an employee for a definite period of time or demote the employee for the reasons set forth in this division. The action of the board of education terminating the contract of an employee or suspending or demoting him shall be served upon the employee by registered mail. * * *"

In summary, this Section provides that, in local school districts, a nonteaching contract be executed initially for not more than one year; a renewal contract, for two years; and thereafter the contract be executed on a continuing basis. Opinion No. 68-095, Opinions of the Attorney General for 1968.

Sections 143.01 to 143.49, Revised Code, referred to in the above statute, relate to civil service. Section 143.01, supra, reads, in pertinent part, as follows:

"As used in Sections 143.01 to 143.48, inclusive, of the Revised Code:

"(A) '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."

The effect of this provision, so far as school districts are concerned, is to limit its application to employees of boards of education of city districts. Opinion No. 156, Opinions of the Attorney General for 1959. The employment contract in the present situation does not involve a city school system and thus comes within the application of Section 3319.081, supra.

"Contract", as used in school employment, is a form of employment regulation and protection similar to civil service. Opinion No. 71-021, Opinions of the Attorney General for 1971. The intent of the legislature in enacting Section 3319.031, supra, was to provide employment security. Gates v. Board of Education, 8 Ohio App. 2d 76 (1966).

Contracts for the employment of educational aides are authorized and regulated by Section 3319.088, Revised Code. This Section provides the following definition:

"As used in this section 'educational aide' means any non-teaching employee in a school district who directly assists a teacher as defined in section 3319.09 of the Revised Code, by performing duties for which a certificate issued pursuant to sections 3319.22 to 3319.30, inclusive, of the Revised Code is not required."

The Section goes on to specify the duties of educational aides, then provides as follows:

"Educational aides employed by a board of education shall have all rights, benefits, and legal protection available to other nonteaching employees in the school district, except that provisions of sections 143.01 to 143.48, inclusive, of the Revised Code shall not apply to any person employed as an educational aide, and shall be members of the school employees retirement system. Educational aides shall be compensated according to a salary plan adopted annually by the board."

This paragraph makes Section 3319.081, supra, applicable to educational aides employed by boards of education, other than boards of city districts. The Supreme Court of Ohio recently confirmed this construction in Ohio Association of Public School Employees v. Board of Education, 29 Ohio St. 2d 58, 57 Ohio Op. 2d 251 (1971), which holds that educational aides employed by a city school district are not entitled to the tenure protection provided by Section 143.27, Revised Code. In further holding that the legislature's separate classification of city school districts as opposed to all other school districts did not deprive educational aides employed by the former of equal protection of the laws, the court clearly implied that educational aides employed by school districts other than city school districts are entitled to employment protection comparable to civil service tenure. See Opinion No. 71-021, Opinions of the Attorney General for 1971. Hence, the employee who is the subject of your question is entitled to a continuing contract, provided the requirements of Sections 3319.081 and 3319.088, supra, have been met.

Although Section 3319.081, supra, does not specifically answer your question, a consideration of its language and purpose reveals that the legislature intended a transferred employee to retain tenure. Subsection (A) refers to "[n]ewly hired regular nonteaching school employees". It is difficult to see how a person who is merely transferred between positions can be considered "newly hired". Hence, this Section does not require a transferred employee to undergo the procedure of one-year, then two-year contracts, before gaining continuing contract status.

In Gates v. Board of Education, supra, the court states that the legislative intent in enacting Section 3319.081, supra, was to provide employment security for the employees covered

by the statute. If a board of education could strip an employee of status merely by transferring him or her to another position, the employment security would be illusory. Hence, the purpose of Section 3319.081, supra, can be fulfilled only by allowing a transferred employee to retain status. In view of this, and the language of that Section, I conclude that the employee in question is entitled to a continuing contract.

In specific answer to your question it is my opinion, and you are so advised, that under Section 3319.081, Revised Code, a nonteaching employee of a board of education who has continuing contract status retains that status even though he or she is transferred to another nonteaching position.