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EDUCATION—TEACHER: CONTRACT

1. TEACHER HAVING A PROFESSIONAL CERTIFICATE BECOMING EFFECTIVE DURING ACADEMIC YEAR ENTITLED TO BE RECOMMENDED FOR RE-EMPLOYMENT UNDER A CONTINUING CONTRACT—§ 3319.11 RC.
2. BOARD OF EDUCATION AND SUPERINTENDENT MAY EXERCISE DISCRETION IN AWARDING CONTINUING CONTRACT ELIGIBLE TO SUCH CONTRACT—TEACHER DOES NOT ACQUIRE A RIGHT TO SUCH CONTRACT OF EMPLOYMENT—1384 OAG 1952, p. 319 APPROVED AND FOLLOWED.
3. TEACHER IS UNDER NO AFFIRMATIVE DUTY TO INFORM SUPERINTENDENT OR EMPLOYING BOARD OF EDUCATION THAT HE POSSESSES A PROFESSIONAL CERTIFICATE—SUCH FAILURE MAY BE GIVEN WEIGHT IN EXERCISING OR FAILING TO EXERCISE DISCRETION IN AWARDING A CONTINUING CONTRACT.

SYLLABUS:

1. A teacher who holds a professional certificate which will become effective on or before the beginning of the academic year for which he has been employed to teach, is qualified as to certification for continuing service status under Section 3319.11, Revised Code, and may, if qualified as to teaching experience, be recommended by the superintendent of schools for re-employment under a continuing contract even though such professional certificate is not yet effective on the date of the contract for re-employment.

2. The superintendent of schools and the board of education may exercise their discretion in awarding a continuing contract to an eligible teacher; and such eligible teacher does not, solely by virtue of his eligibility, acquire a clear right to such contract. Second paragraph of the syllabus, Opinion No. 1384, Opinions of the Attorney General for 1952, page 319, approved and followed.

3. Chapter 3319., Revised Code, imposes no affirmative duty upon a teacher to notify the superintendent or the board that he has in his possession a professional certificate, and the question of whether the failure to give notice will estop him from asserting a contract right is not a proper issue for administrative determination, although the superintendent and the board in the proper exercise of their discretion regarding the award of a continuing contract, may consider the question of bad faith on the part of a teacher who knowingly withholds such notice.

Columbus, Ohio, October 7, 1957

Hon. William H. Irwin, Prosecuting Attorney
Belmont County, St. Clairsville, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“On April 10, 1957, pursuant to the superintendent’s recommendation, the Board of Education of a local school district reemployed a teacher under a limited contract for two years. At the time of reemployment, the teacher’s current contract was expiring during the school year 1956-1957. The teacher is completing four years with the district. On April 10, 1957, the teacher had in his possession a professional certificate issued to him by the State Board of Education. Such certificate states on its face that it is effective September 1, 1957. At the time of the April 10 reemployment, the teacher did not advise the board of education nor the county superintendent that he had the professional certificate. At such time the board and superintendent did not know that he had a professional certificate. The first information that the superintendent had that the teacher had a professional certificate was when he presented it to the superintendent subsequent to the April 10 reemployment date. There is no question but that he had qualified as to years of service. The teacher contends that he was entitled to be reemployed under a continuing contract.

“Several interesting legal questions are raised by the above facts. One basic question to be determined is whether or not, within the provisions of Section 3319.11 of the Revised Code, the teacher was eligible for a continuing service status at the time of his reemployment on April 10. The unanswered question is whether or not he was qualified as to certification at the time of reemployment. Was he qualified as to certification by reason of the fact that he possessed a professional certificate and is the date of September 1, 1957 material in making such a determination?

“Another question that we would like to have determined is whether or not there is a duty on the part of a teacher to notify

the superintendent or the board that he has in his possession a professional certificate prior to being considered for reemployment by the board.”

You have also indicated that the school district involved is one of over 800 pupils, and that the teacher in question had a four-year provisional certificate when employed on April 10, 1957. Was the teacher eligible to be re-employed under a continuing contract on April 10, 1957?

For the purpose of this discussion, I will assume that the contract signed on that date was for the school year of 1957-1958, beginning in September of the current year, since Section 3319.11, Revised Code, designates April 30th of each year as the deadline for the re-employment or rejection of teachers serving under a limited contract, for the coming school year. Taking this view, the teacher will actually perform his duties under the April 10th contract at some time shortly after September 1, 1957, the effective date of his professional certificate.

Section 3319.08, Revised Code, provides in pertinent part that :

“* * * A continuing contract * * * shall be granted only to teachers holding professional, permanent, or life certificates.”

Accordingly, the teacher in the case you describe could not be employed under a continuing contract unless he holds at least a professional certificate at the time of his employment under such a contract. The precise question, then, in determining his eligibility, is whether the time of his employment is to be construed as the date of his contract with the board of education, or the date upon which he actually begins to teach for the contract term.

In 1871, the Ohio Supreme Court considered this issue in the case of *School District v. Dilman*, 22 Ohio St., 194, which was an action by a school teacher to recover upon his contract of employment. In rejecting the contention of the school board that the contract was invalid because the plaintiff had no certificate as of the date of his contract, but subsequently and before entering upon his teaching duties, procured the required certificate, the Court said, at page 194 :

“The law (S. & S. 707, sec. 7) forbids the *employment* of a teacher who has not a certificate. The teacher is not ‘employed,’ within the meaning and intent of this provision, until he engages in the discharge of his duties as teacher. The mischief intended to be guarded against was the *teaching of a school* by an incompetent

person, and not the making of the *contract* by an incompetent person.”
(Emphasis by the Court)

Although this decision, which was followed in *Youmans v. Board of Education*, 13 C.C. 207, 7 C.D., 272, was handed down 86 years ago, and with reference to a statute which has since been superseded, the reasoning on which it is based is applicable to our present statute. The purpose of the certification requirements is clearly to prevent the “teaching of a school by an incompetent (or unqualified) person,” and not to abridge their contract rights. It would seem that this view is in harmony with the present legislative policy to safeguard the privileges of teachers in our public schools, as expressed in Sections 3319.08, 3319.12, 3319.13 and 3319.14, Revised Code, all of which guarantee contract, salary, and leave rights and benefits.

It appears, then, that the teacher, at the time of his employment, that is, at the commencement of the 1957-58 academic year for which he was re-hired under the April 10th contract, will qualify as to certification in the sense of Section 3319.11, Revised Code, as it applies to teachers in school districts of over 800 pupils.

Since it is conceded that the teacher is qualified as to years of service, I conclude that he is now and was as of April 10, 1957, eligible to be re-employed under a continuing contract.

It should be noted, however, that mere eligibility as to certification and years of service do not confer upon a teacher a clear right to a continuing contract. Even though a teacher possesses these qualifications, the recommendation of the superintendent of schools and the approval of the board of education are required to award an individual a continuing contract. Section 3319.11, Revised Code, outlines their procedure in the following terms:

“Upon the recommendation of the superintendent that a teacher eligible for continuing service status be re-employed, a continuing contract shall be entered into between the board and such teacher unless the board by a three-fourths vote of its full membership rejects the recommendation of the superintendent.”

I cannot conclude that the recommendation made by the superintendent prior to the April 10th contract meets the test of the “recommendation” here referred to in the statute, since at the time it was given, the teacher was not believed eligible for continuing status and must therefore have been made with only temporary employment in mind.

The awarding of a continuing contract then, is optional with the school authorities. The words "recommendation" and "rejection" which describe the action which may be taken by the superintendent and the board, respectively, clearly imply the use of discretion and personal judgment. These functions are not ministerial in character nor automatic upon the mere attainment of eligibility by the teacher.

In this regard, I note with approval the second paragraph of the syllabus of Opinion No. 1384, Opinions of the Attorney General for 1952, page 319, which reads:

"A teacher who has taught in a district under limited contracts for four or five years and who is eligible for continuing service status, does not by reason of these facts alone, acquire a right upon re-employment, to a continuing contract."

In that opinion, the author, interpreting Section 4842-8, General Code, which is now Section 3319.11, Revised Code, concluded at page 322:

"It does not appear, however, that the mere fact that one is 'eligible' gives him any right to a continuing contract, or for that matter, to any contract."

With respect to your question as to whether or not there is a duty on the part of a teacher to notify the superintendent or the board that he has in his possession a professional certificate prior to being considered for re-employment, I fail to find any statutory provision requiring such notification. Section 3319.36, Revised Code, requires the clerk of the board of education to withhold the salary of a teacher until he has filed his certificate of qualification with the board. This section, coupled with the fact that disclosure by the teacher to the board of higher professional status normally operates to the teacher's distinct advantage, would seem to explain why the General Assembly has deemed it unnecessary to make such disclosure an affirmative duty. If, however, in a specific instance, it appears that notice was intentionally withheld to the prejudice of the interests of the board, the fact is one for consideration by the superintendent in making his recommendation, and the board in giving its approval to the applicant's contract.

I do not feel, however, that a teacher can by virtue of his failure to give proper notice of his qualifications at the time his contract was renewed, be considered to have forfeited any statutory contractual rights, short of a determination by a court to that effect, as this would amount to an admin-

istrative determination of a legal right. See third paragraph of the syllabus, Opinion No. 6174, Opinions of the Attorney General for 1943, page 350, which reads:

“Whether the conduct of a teacher in failing to enforce his rights to a continuing contract or the damages by reason of wrongful withholding of a contract amounts to such laches as will estop him from asserting his rights is, in each case, a question to be decided by a chancery court upon the particular facts and circumstances there presented.”

It is therefore, my opinion and you are advised that:

1. A teacher who holds a professional certificate which will become effective on or before the beginning of the academic year for which he has been employed to teach, is qualified as to certification for continuing service status under Section 3319.11, Revised Code, and may, if qualified as to teaching experience, be recommended by the superintendent of schools for re-employment under a continuing contract even though such professional certificate is not yet effective on the date of the contract for re-employment.

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Respectfully,

WILLIAM SAXBE

Attorney General