Note from the Attorney General's Office:

1954 Op. Att'y Gen. No. 54-3917 was modified in part by 1957 Op. Att'y Gen. No. 57-959.

3917

1. EDUCATION, COUNTY BOARD OF—OFFICERS AND EMPLOYES APPOINTED OR EMPLOYED—POSITIONS NOT HELD BY CONTRACT—NO VESTED INTEREST OR PRIVATE RIGHT OF PROPERTY IN RESPECTIVE POSITIONS.

2. STENOGRAPHER—AUTHORIZED TO BE EMPLOYED FOR COUNTY SUPERINTENDENT—EMPLOYE NOT GRANTED TENURE OF OFFICE — WHERE STENOGRAPHER EMPLOYED FOR TERM OF TWO YEARS—BOARD HAS AUTHORITY TO ABOLISH POSITION OR DISCHARGE EMPLOYE AT ANY TIME—SECTION 3315.06 RC.

3. COUNTY ELEMENTARY SUPERVISOR—MAY BE APPOINTED BY BOARD FOR TERM NOT EXCEEDING FOUR YEARS—BOARD MAY ABOLISH POSITION—RIGHTS OF EMPLOYE — DAMAGES — INDIVIDUAL MEMBERS OF BOARD—SECTION 3319.02 RC.

SYLLABUS:

1. Officers and employes appointed or employed by a county board of education pursuant to law, do not hold their positions by contract, and have no vested interest or private right of property in their respective positions.

2. A county board of education is authorized by Section 3315.06, Revised Code, to employ a stenographer for the county superintendent, but is not authorizezd to grant such employe any tenure of office. Accordingly, where such board has employed a stenographer for a term of two years the board has authority to abolish her position or discharge her at any time.

3. A county elementary supervisor may under authority of Section 3319.02, Revised Code, be appointed by a county board of education for a term not exceeding four years; but said board may at any time during such term abolish such position, and if such action is taken in good faith and in the public interest, such appointee can have no right of action for damages against said board or its members as individuals. However, if such action should be taken as a subterfuge for the purpose of getting rid of such employe and with the intention of recreating such position and appointing another person thereto, such original appointee would have a right of action for damages against the individual members of such board but none against the board.

Columbus, Ohio, June 2, 1954

Hon. Dorothy Kennedy, Prosecuting Attorney
Brown County, Georgetown, Ohio

Dear Madam:

I have before me your letter requesting my opinion and reading in part as follows:

> "I would appreciate your opinion on the following questions as soon as possible:
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> "By a majority vote, the Brown County Board of Education abolished the position of stenographer to the Brown County Superintendent of Schools, the said stenographer having then a contract at $2600.00 per year, which would run two years before its expiration, which she entered into with another board of education before the majority of the members of the present board of education took office. I do not believe any matter of inefficiency or incompetency was in issue. The position was merely abolished for an indefinite period of time.
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> "At the same time, the said board abolished the position of county elementary supervisor, who also had a contract which had three years to run before its expiration, and which she also entered into with the old board of education. Likewise, I do not believe there was any inefficiency or incompetency involved."

As to each of these employes you raise the question whether the board of education will be liable in an action for damages for breach of contract.

I note that the two positions to which you refer to wit, (a) stenographer for the county superintendent and (b) county elementary supervisor, are positions which are not established by statute or by any mandatory requirement of law but relate to employes whom the board of education is *authorizezd to employ.*

In each case it appears that the positions were abolished by the board during the term for which the appointee was employed. Accordingly, the same principles of law will be applicable to both.

In the case of the stenographer it is provided in Section 3315.06, Revised Code:

> "The board of education of each county school district * * * may employ stenographers and clerks for such superintendent."

In the case of the county elementary supervisor authority is found in Section 3319.02, Revised Code, reading in part as follows:

> "The board of education of each county, city, or exempted village school district may appoint one or more assistant superintendents and such other administrative officers as are necessary. An assistant county superintendent or county supervisor employed on a part-time basis may also be employed by a local board as a teacher. In the case of assistant superintendents appointments shall be made, and in the case of other administrative officers may be made, upon nominations of the superintendent of schools for a term not to exceed four years except as authorized by sections 3319.08 and 3319.09 of the Revised Code. * * *."

The section quoted authorizing the appointment of a stenographer and clerk for the county superintendent does not mention any term for such employment. As to the county supervisor, the statute limits the term to four years.

Your statement of facts refers to the appointment of each of the employes mentioned, as a "contract;" and in several of the cases to which you refer, the courts, dealing with appointments to public offices or public employment, use the phrase "contract of employment." It seems therefore that it will assist in arriving at the answer to your questions, to determine whether the relationship between a board of education and one who has been appointed to a public office or employed in a certain public position, has in it any of the elements of a contract. Certainly, to "employ" in private business, implies a contract between employer and employe. There are mutual agreements which impose binding obligations on both parties. But does the same principle apply to public offices or employments?

It was held by our Supreme Court in the case of Cleveland v. Luttner, 92 Ohio St., 493, that a public officer whether elected or appointed, did hold his position by virtue of a contract. The action was by a policeman who had been discharged and later restored to his position. He sought to recover his salary for the period during which he was deprived of his position. The Supreme Court in sustaining his claim said:

> "A public officer is a public servant, whether he be a policeman of a municipality or the president of the United States. His candidacy for appointment or election, his commission, his oath, in connection with the law under which he serves, and the emoluments of his office *constitute the contract between him and the public he serves.*" (Emphasis added.)

That proposition, although viewed by the court with some reservation in later decisions, was apparently accepted, until the Supreme Court in State ex rel. Gordon v. Barthalow, 150 Ohio St., 499, expressly overruled the Luttner case, holding as shown by the first branch of the syllabus:

> "A public officer *or public general employee* holds his position *neither by grant nor contract,* nor has any such officer or employee a vested interest or private right of property in his office or employment. (The holding in the case of City of Cleveland v. Luttner, 92 Ohio St., 493, to the effect that there is a contract between a public officer and the public he serves, overruled.)" (Emphasis added.)

In the course of the opinion it was said:

> "The principle that a public officer or public general employee does not hold his position ex contractu not only rests upon the great weight of authority but upon sound reason and logic. To constitute a valid contract there must be mutuality in the agreement, and yet it is obvious that, if a public officer or public general employee resigns before his term expires, the political subdivision which he served has no recourse against him."

Further, the court said:

> "* * * it is universally held that, in the absence of constitutional or other legal restraint, the terms, emoluments and the duties of the office or employment may be changed or employment abolished *without right of redress* upon the part of the holder thereof." (Emphasis added.)

If, therefore, there is no contractual relation between the board of education and its appointees, it is inconceivable that an employe whose position has been abolished by the board which created it, could have any action for damages *for breach of contract.*

Although Section 3319.02, relative to employment of a county supervisor, speaks of "officers," I cannot consider that the appointees mentioned are such, within the technical meaning of that term. They are merely employee occupying "positions" created by the board and appointed thereto by the board of education. Referring to "county supervisors," see State ex rel. Saltsman v. Burton, 91 Ohio App., 271, where it was held:

> "The creation and continuation of a position such as *elementary supervisor* by a county board of education do not require such board to keep that position filled at all times, and it is discretionary with such board to either fill the position, permit it to remain vacant, *or abolish it.*" (Emphasis added.)

There is a well recognized distinction between "officers" and "employes" in that an officer is endowed by law with "some of the sovereign functions of the government, to be exercised by him for the benefit of the public" while an employe has nothing of such power, but is a mere agent or servant of the appointing authority. See 32 Ohio Jurisprudence, page 874.

However, in my opinion, it makes no difference whether either or both of the appointees mentioned in your letter are to be regarded as officers or employes. Neither, under the holding in the Barthalow case supra, has any contractual rights by virtue of his appointment. Furthermore, it is well settled that unless limited by the Constitution or by the law under which such employments are authorized, the legislative body or administrative body which is authorized to create the position or make the appointment of the officer or employe, has authority, if it deems it conducive to the public interest, to abolish the office or position which it has created. In 32 Ohio Jurisprudence, page 1072, it is said:

> "It is well settled that an office of legislative creation may be abolished by the power which created it except in so far as its powers in this respect are restrained and limited by some higher authority—such as constitutional provisions thereon. * * *"

It is further said at page 1074, of the same work:

> "Likewise, the repeal of an ordinance or statute establishing an office abolishes all appointive offices under it.
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> "The effect of the abolition of an office always is to terminate the term of the incumbent, since he cannot be an officer or incumbent of an office which has ceased to exist; in other words, he cannot be a de facto officer of an office no longer in existence. He can recover no salary thereafter; and it is his duty to transfer to the proper authorities all property connected therewith."

To like effect, see 42 American Jurisprudence, page 904.

It appears to me that anyone accepting an appointment to a position created by a board of education must do so with the knowledge that the power vested by law in the board to create the position, carries with it the right to abolish it.

The abolition of an office or appointive position is frequently accomplished merely by repeal of the statute or ordinance or resolution by which such office or position was created. The effect of such action is set forth in a number of Ohio cases.

In State ex rel. Attorney General v. Jennings, 57 Ohio St., 415, it was held:

> "An office created by an ordinance is abolished by the repeal of the ordinance and the incumbent thereby ceases to be an officer."

The so-called "officers" involved in this case were fireman (other than the chief), and the court held that they were not, in the eyes of the law, officers, but mere employes, and therefore were not subject to removal by quo warranto. But the court said in the opinion:

> "There is no question but that the council had the power to repeal the former ordinance; and this being so, and all the offices created by it, *whatever they were*, being thus abolished, the incumbents ceased to be officers, for there can be no incumbent without an office." (Emphasis added.)

In City of Elyria v. Vandemark, 100 Ohio St., 365, it was said:

> "When a public office is abolished by a duly constituted authority the incumbent thereof ceases to be an officer for he cannot be a de facto officer of an office no longer in existence."

In State ex rel. Schmidt v. Colson, 7 Ohio App., 438, it was held:

> "The repeal of an ordinance passed pursuant to the provisions of Section 4404, General Code establishing a board of health, abolishes all appointive positions under such board."

A case which appears to be a close parallel to the situations presented by your letter is Thomas v. Euclid, 43 Ohio App., 52. The facts in the case were as follows: The village, later city, of Euclid, acting under authority of the statutes, created the office of engineer, and Thomas was appointed thereto for a term of two years. At the end of one year the council repealed the ordinance creating such office. Thereupon, Thomas brought suit for two months salary covering a period after such repeal. Recovery was denied, the court holding:

> "Office of municipal engineer held created by ordinance rather than by statute, so that engineer was not 'officer' in sense entitling him to recover contractual salary despite municipality's abolition of his office by repealing ordinance, creating it, and engineer's consequent failure to perform any work. Sections 4364 and 4366, General Code."

In the course of the opinion the court said:

> " * * * it has been well recognized that one can always get rid of an officer by repealing the law that created the office, and while one cannot interfere with a man's office nor his right to the usufructs of the office, to wit, the salary attached to it, unless he is impeached and removed from office or otherwise removed in accordance with law established for that purpose, the office itself can always be abolished."

Your letter raises one more question, viz. whether an employe whose position has been abolished during the term for which he was employed, could successfully maintain an action for damages if the board should subsequently recreate the position and appoint someone else to fill it.

As to the position of stenographer to the county superintendent, the law does not authorize the board to appoint for a term, and accordingly, in my opinion the board is without power to establish anything in the nature of a term by employing a person for a two year period. It is said in 42 Ohio Jurisprudence, page 1035:

> "The word 'term' when used in reference to the tenure of office, ordinarily does not apply to appointive offices held at the pleasure of the appointing power."

Accordingly, I can conceive of no situation whereby a board of education could by employing such stenographer for a period of years, make itself or its members liable by a summary dismissal of such employe, or by appointing some other person in her place.

As to the county elementary supervisor, a somewhat different conclusion must be reached. There the legislature has authorized the board to establish a possible tenure of four years—subject however, as already indicated, to termination at any time by abolition of the position. If the board members should conspire to get rid of the incumbent and install some other person by abolishing the position and then recreating it and making such new appointment, I have no doubt that they would subject themselves individually but not as a board, to an action for damages, not for breach of contract, but for such illegal conspiracy.

The answer to your question would in that event depend upon the original appointee's ability to prove that the action of the board in abolishing the position was not in good faith and amounted merely to a subterfuge to get rid of him, with a view to the subsequent action indicated. In

the absence of such proof, his action would probably fail; for the right of the board to abolish the position which it has created, if it deems it proper for the sake of economy or better administration, is certainly well settled. Likewise, it is equally certain that with a change of conditions the position may at a later time lawfully be re-established. As I have indicated, the question as between the board and the former employe becomes one of good faith.

This proposition has been applied to civil service officers and employes whose tenure is during good behavior and efficient service, and certainly applies equally to those whose tenure is for a limited term. In 7 Ohio Jurisprudence, page 594, it is stated:

> "The civil service law cannot be given the effect of requiring the head of a department to find work for an employee in the civil service whom he considers to be unnecessary, nor of requiring the retention in the service of persons whose positions it is desirable to abolish in the interest of economy. In such case the position may be abolished and the incumbent discharged even though he is wholly without fault and no charges are made against him. It is essential, however, that the position be actually abolished in good faith, * * *."

See State ex rel. Miller v. Witter, 114 Ohio St., 122; Tiernan v. Cincinnati, 18 Oh. N. P. (N. S.) 145.

Accordingly, it is my opinion and you are advised:

1. Officers and employes appointed or employed by a county board of education pursuant to law, do not hold their positions by contract, and have no vested interest or private right of property in their respective positions.

2. A county board of education is authorized by Section 3315.06, Revised Code, to employ a stenographer for the county superintendent, but is not authorized to grant such employe any tenure of office. Accordingly, where such board has employed a stenographer for a term of two years the board has authority to abolish her position or discharge her at any time.

3. A county elementary supervisor may under authority of Section 3319.02, Revised Code, be appointed by a county board of education for a term not exceeding four years; but said board may at any time during such term abolish such position, and if such action is taken in good faith

and in the public interest, such appointee can have no right of action for damages against said board or its members as individuals. However, if such action should be taken as a subterfuge for the purpose of getting rid of such employe and with the intention of recreating such position and appointing another person thereto, such original appointee would have a right of action for damages against the individual members of such board but none against the board.

Respectfully,
C. WILLIAM O'NEILL
Attorney General