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EDUCATION—NON-PROFESSIONAL EMPLOYEES— TERMINATION OF CONTRACTS, §3319.081 R.C., ONLY UPON BASES CONTAINED IN SAID SECTION—REDUCTION IN PERSONNEL BY REASON OF ABOLISHING POSITIONS—LIABILITY OF BOARD AND MEMBERS—DUTY OF MITIGATION UPON EMPLOYEE.

SYLLABUS:

1. Where an employee or employees are hired for a two year period in accordance with the provisions of Section 3319.081, Revised Code, such contarcts of employment may be unilaterally terminated by the board of education only for the conditions specified in said section.

2. Since abolishment of employee positions is not a condition specified in Section 3319.081, Revised Code, as a basis for termination of such employment contracts, termination of such contracts as an incident of the abolishment of employee positions would constitute a breach of contract for which the board of education may be held liable in damages, subject, however, to the obligation of such employees to mitigate damages by seeking other employment.

3. Personal liability may attach to members of the board of education only where their action in breaching such contracts is motivated by bad faith or corrupt intent, but no such bad faith or corrupt intent can be inferred where such board action is honestly designed to protect the financial position of the district by abolishment of a job or jobs which are actually no longer necessary to the operation of the schools.

Columbus, Ohio, October 3, 1958

Hon. Robert G. Tague, Prosecuting Attorney
Perry County, New Lexington, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"For some years prior to the forthcoming 1958-1959 school year, because of the considerable distance separating the elementary and high school buildings, the board of education of a local school district in Perry County has caused to be maintained and operated two distinct cafeterias or lunchrooms—one in the elementary school building to serve the pupils, teachers, and other proper patrons there, and the other in the high school building for the same purpose. Incident to the operation of each of these two cafeterias, two cooks were employed, i.e., a total of four, each of

whom, because of her having more than one year of service in the district, was employed for a period of two years, beginning with the school year 1957-1958, pursuant to a resolution of the board providing therefor adopted in 1957, although a formal written contract was not concluded with any of the employees.

"The board and district have just completed a building program, and, during the forthcoming school year and thereafter the elementary and high school facilities will have been physically consolidated into one location. So, too, the cafeterias will have been consolidated, and, with the abandonment of one of the existing cafeteria facilities, two of the four employee cook positions will have been rendered surplus and will be abolished. In filling the two remaining positions it is contemplated by the board to retain the two individuals who are senior in point of service.

"However, in construing Section 3319.081, Revised Code, your Opinion No. 959, dated August 22, 1957, would seem to dictate the retention of the surplus non-teaching personnel through the forthcoming school year, unless they should voluntarily terminate their employment, inasmuch as it is my understanding that no question is involved of the violation of board regulations.

"The board and myself are, therefore, desirous of receiving your opinion as to (1) whether, under the above facts, liability would attach to either the board or to the members thereof, were it to abolish the soon to be surplus positions of non-teaching employees and to terminate their employment, which employment, under the circumstances prevailing at the time of its inception, would have extended through the forthcoming school year; and as to (2) whether, if liability does attach and employee resignations are not received, any means are available to the board to resolve the expensive anomoly of these to be surplus non-teaching school personnel."

In view of the facts presented, I have re-examined the opinion to which you refer and am impelled to conclude that under the provisions of Section 3319.081, Revised Code, the contracts of employment can be unilaterally terminated by the board only for the conditions specified, to-wit, for violation of regulations as set forth by the board of education.

Section 3319.081, Revised Code, provides:

"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) Employees, with at least one year of service in the school district, provided their employment is continued, shall be employed for a period of not less than one year nor more than five years.

"(B) After the termination of the contract provided in division (A), and thereafter provided their employment is continued, the contract shall be for not less than two years nor more than five years.

"(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 regulations as set forth by the board of education.* Any non-teaching school employee may terminate his contract of employment thirty days subsequent to the filing of a written notice of such termination with the clerk of the board." (Emphasis added)

As to these employees, this is the only statute which specifies the period of the employment contract and the conditions under which it may be terminated. Its provisions constitute the sole elements of the contract relative to duration and termination, which, in the absence of further statutory authority, become conditions of the contract absolute in form. Applying the maxim, *expressio unius est exclusio alterius,* no other basis for termination may be implied. In this respect it is significant to note that the legislature in this same Chapter 3319., *supra,* with regard to teacher contracts, did see fit to specify conditions of termination of much greater latitude. See Section 3319.16 and 3319.17, Revised Code, which state in part as follows:

Section 3319.16, Revised Code:

"The contract of a teacher may not be terminated except for gross inefficiency or immorality; for willful and persistent violations of reasonable regulations of the board of education; or for other good and just cause. * * *"

Section 3319.17, Revised Code:

"When by reason of decreased enrollment of pupils, return to duty of regular teachers after leave of absence, or by reason of suspension of schools or territorial changes affecting the district, a board of education decides that it will be necessary to reduce the number of teachers, it may make a reasonable reduction. * * *"

Were there presently in existence analogous provisions applicable to nonteaching employees, there would be no question but that the board of education would have a legal basis for terminating the contracts here considered. However, since the legislature has chosen to bridle the board with the conditions specified, it appears that under the facts presented the latter cannot lawfully terminate these contracts.

One of my predecessors in Opinion No. 1247, Opinions of the Attorney General for 1933, p. 1166, in considering a somewhat similar question regarding the authority of a school board to terminate teaching contracts has stated:

> "Contracts between school boards and teachers stand on the same basis, so far as the obligations created thereby are concerned, as contracts between individuals, subject, of course, to applicable statutory provisions with reference thereto. *The manner of cancelling or abrogating such contracts is fixed by statute and they can not be cancelled or terminated in any other way.* * * *" (Emphasis added)

This pronouncement of the law is amply supported by the case of *Board of Education* v. *Waits,* 119 Ohio St., 310, where the sole issue considered was whether the basis presented for terminating a teacher's contract was within the purview of the statute permitting termination. The Supreme Court in upholding the action of the board in that case did so only because it found that the basis presented for termination was included in the statute. In this foregoing pronouncement of my predecessor I concur and as applying to nonteaching employees also.

Having concluded that the board of education under the facts presented cannot unilaterally lawfully terminate these contracts, I am of the opinion that if the board does so proceed it will be liable in damages for their breach. There is certainly no immunity from suit since Section 3313.17, Revised Code, specifically provides that the board of education of each school district may sue and be sued. This section has been construed to mean amenability to suits contractual in nature. *Board of Education* v. *Volk,* 72 Ohio St., 469, 485.

Briefly considering the liability of the individual board members, the law is clear that no "contractual" liability attaches. See 32 Ohio Jurisprudence, 968, in which the following is stated:

> "It is too clear to be controverted that when a public agent acts in the line of his duty and by legal authority his contracts made on account of the government are public, not personal. They accrue to the benefit of, and are obligatory on, the government, not the officers. * * *"

However, there is the possibility that the individual board members may subject themselves to liability *ex delicto* in nature where the action taken by them is predicated upon bad faith or corrupt intent. See *Gregory*

v. *Small,* 39 Ohio St., 346. In that case a school teacher sought to hold the local directors of a school district personally liable for damages for dismissing him prior to the expiration of his teaching contract. In upholding the action of the local directors, the Supreme Court, through Johnson C. J., at page 349 stated:

> "* * * If there was a valid contract of employment, followed by a subsequent dismissal, for sufficient cause, the plaintiff was without remedy even at common law; but if there was no sufficient cause for such dismissal, the directors are not personally liable when they acted in good faith, in what they supposed was the honest discharge of official duty. They are personally liable, only when they act with a corrupt intent."

In view of my opinion that the contracts under consideration are valid and cannot be unilaterally terminated by the board under the facts presented, if, nevertheless, the board does proceed to terminate these contracts, it is conceivable that the members of the board could subject themselves to personal liability for acting in bad faith. However, if a breach of these contracts would result in minimizing the financial loss to the school district, taking into account the principle of mitigation of damages, I feel quite confident that the board members would not be considered as having acted in bad faith since their primary function is to act for the best interests of the district which they serve.

In answer to your second question, I am unable to find any statutory means to which the board may avail itself in resolving its present problem. As a practical matter I can only suggest that the board attempt to effect a novation of the present contracts so that these employes may be utilized in some capacity which will be of benefit to the school system, thereby minimizing the financial loss.

In summation, it is my opinion and you are advised that:

1. Where an employee or employees are hired for a two year period in accordance with the provisions of Section 3319.081, Revised Code, such contracts of employment may be unilaterally terminated by the board of education only for the conditions specified in said section.

2. Since abolishment of employee positions is not a condition specified in Section 3319.081, Revised Code, as a basis for termination of such employment contracts, termination of such contracts as an incident of the abolishment of employee positions would constitute a breach of contract

for which the board of education may be held liable in damages, subject, however, to the obligation of such employees to mitigate damages by seeking other employment.

3. Personal liability may attach to members of the board of education only where their action in breaching such contracts is motivated by bad faith or corrupt intent, but no such bad faith or corrupt intent can be inferred where such board action is honestly designed to protect the financial position of the district by abolishment of a job or jobs which are actually no longer necessary to the operation of the schools.

Respectfully,
WILLIAM SAXBE
Attorney General