

OPINION NO. 70-103**Syllabus:**

A school bus driver who has been disqualified medically under the provisions of Section 3327.10, Revised Code, does not automatically qualify for a disability benefit under the provisions of Section 3309.39, Revised Code.

To: James O. Brennan, Executive Director, School Employees Retirement System, Columbus, Ohio

By: Paul W. Brown, Attorney General, August 13, 1970

Your request for my opinion presents the following question:

"Does a school bus driver who has been disqualified medically under the provisions of Section 3327.10, Revised Code, automatically qualify for a disability benefit under the provisions of Section 3309.39, Revised Code?"

Section 3327.10 (A), Revised Code, sets out the qualifications for a person employed as a driver of a school bus or motor van owned and operated by any school district or privately owned and operated under contract with any school district in the state. Among the requirements listed is the following:

"(A) * * *The county board or the superintendent, as the case may be, shall provide for

an annual physical examination that conforms with regulations adopted by the state board of education of each driver to ascertain his physical fitness for such employment.* * *

Section 3327.10 (B), Revised Code, lists the qualifications for a person employed as driver of a school bus or motor van not subject to the regulations of the department of education pursuant to division (A) of this section. The following appears among the requirements set forth:

"(B) * * *Each driver shall have an annual physical examination which conforms to the state highway patrol regulations, ascertaining his physical fitness for such employment.* * *

The purpose of the annual physical examination required by Section 3327.10, supra, clearly is to determine the fitness of a bus driver for performing his duties at the time the examination is given. If the driver's physical condition is such that he fails to pass the examination, he is entitled to begin receiving sick leave benefits which he has accumulated. This is explained in Opinion No. 69-057, Opinions of the Attorney General for 1969, the syllabus of which states as follows:

"A school bus driver under contract with a board of education is qualified to receive sick leave benefits which he has accumulated under Section 143.29, Revised Code, from the time he fails to pass the required physical examination for bus driver to the date of disability pension approval."

As the above quoted syllabus suggests, if a bus driver anticipates that the condition for which he has been disqualified is of a permanent nature, he may apply for disability retirement, provided, of course, that he is eligible to receive same under the criteria of Section 3309.39, Revised Code. This section provides that before an application for disability retirement is approved by the retirement board, the applicant member must submit to a medical examination for the purpose of determining the permanency of the disability in question. Section 3309.39, supra, sets forth the procedures and regulations to be followed in the conduct of this examination:

* * * * * * * *

"Medical examination of a member who has applied for disability retirement shall be conducted by a competent disinterested physician or physicians selected by the retirement board to determine whether the member is mentally or physically incapacitated for the performance of his last assigned primary duty as an employee by a disabling condition either permanent or presumed to be permanent. Such disability must have occurred since last becoming a member or have increased since last becoming a member to such extent as to make the disability permanent or presumed to be permanent. Application for disability retirement must be made within two years from the date the member's contributing service terminated. The disability for which the allowance is granted must have existed in some degree as evidenced by

medical records before the member's contributing service was terminated.

" * * * * * * * * * *"

Section 3309.39, supra, also governs the response of the retirement board to the report of the examining physician:

" * * * * * * * * *"

"If such physician or physicians determine that the member qualifies for retirement by reason of disability, and the retirement board concurs with such determination, the member shall be retired for disability and the action of the board shall be final.

"In the event an employer files a disability retirement application to retire a member on disability retirement as a result of his having been separated from service because he is considered to be mentally or physically incapacitated for the performance of his last assigned primary duty as an employee, and the physician or physicians selected by the board report to the board that the member is physically and mentally capable of performing service similar to that from which he was separated, and the board concurs in such report, then the board shall so certify to the employer and the said employer shall restore the member to his previous position and salary or to a similar position and salary."

Thus, it is clear that a school bus driver who has been disqualified medically under the provisions of Section 3327.10, supra, does not automatically qualify for a disability benefit under the provisions of Section 3309.39, supra.

Therefore, it is my opinion and you are hereby advised that a school bus driver who has been disqualified medically under the provisions of Section 3327.10, Revised Code, does not automatically qualify for a disability benefit under the provisions of Section 3309.39, Revised Code.