

OPINION NO. 71-021

Syllabus:

1. A noncertified school employee may hold a continuing contract as both a custodian and a bus driver.
2. Continuing contracts of noncertified school employees may not be altered or terminated except pursuant to a uniform plan affecting all such employees of the entire district, Section 3319.082, Revised Code, or for such other reasons as are specifically authorized by statute.
3. A teacher, who is also a bus driver, may hold a continuing contract as a bus driver after completion of three consecutive years of service as bus driver.

To: James D. Ruppert, Warren County Pros. Atty., Lebanon, Ohio
By: William J. Brown, Attorney General, May 24, 1971

I have your request for opinion addressed to my predecessor, setting forth the following questions:

"1. Can a non-certified employee hold a continuing contract in both custodial and bus driving services?

"2. Can a Board of Education, by resolution, using Section 3313.20 of the Revised Code, set a policy that non-certified employees cannot hold both the position of custodian and bus driver and consequently dismiss a bus driver who is on continuing contract status as a custodian and bus driver?

"3. Can a teacher, who is also a bus driver, hold a continuing contract as a bus driver after the completion of three consecutive years of service?"

You indicate the focus of such questions to be the liability of schools for the payment of overtime compensation, as required under the Fair Labor Standards Act, 29 U.S.C. Section 201 et seq., pursuant to decision of the Supreme Court of the United States in Maryland v. Wirtz, 392 U.S. 183.

It appears that various employees of school districts have held

more than one position under employment contracts (Opinion No. 70-041, Opinions of the Attorney General for 1970).

"Contract", as used in school employment, is a form of employment regulation and protection (48 O. Jur. 820, 839), similar to civil service (see below, the opening clauses of Section 3319.081, Revised Code, providing regulation by contract where the employment is not regulated by the civil service laws). There would seem to be no more reason to question dual responsibilities discharged by one person where contract is involved than in other areas of public employment. Such has been the view of my predecessors, who have applied the ordinary rules of compatibility to contract situations. (Opinion No. 1612, Opinions of the Attorney General for 1964; Opinion No. 970, Opinions of the Attorney General for 1964; see, also, Opinion No. 70-041, supra).

Your first and third questions pertain to the compatibility of dual responsibilities as (a) bus driver and custodial employee, both being nonteaching positions, and (b) bus driver and teacher.

No statute has come to my attention that forbids an individual to hold either of such sets of dual positions. Likewise, the common law that, in the absence of statute, may operate to forbid dual positions, would not appear to bar either set. Common law incompatibility rests on (1) subordination of one position to the other; (2) operation of one as a check upon the other; or (3) physical impossibility. (See State, ex rel. v. Wolven, 175 Ohio St. 114). In neither set of dual positions here is there any apparent potential for subordination, for check or for physical impossibility. It may be concluded therefore that a custodial employee and a teacher may each discharge the additional duties of a school bus driver.

More specifically, your first question involves the coverage in "a continuing contract" of the dual responsibilities of custodian and bus driver. Contracts of nonteaching employees are provided for and regulated in Sections 3319.081, to 3319.088, Revised Code. Section 3319.081, supra, in pertinent part, is as follows:

"In all school districts wherein the provisions of section 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.* * *"

It provides generally for a nonteaching contract to be executed initially for not more than one year; the subsequent contract, for two years; and on further renewal, the contract is to be a continuing one. (Opinion No. 68-095, Opinions of the Attorney General for 1968). A continuing contract is terminable for specified causes, as set out in the statute, quoted above.

Since the contract form of employment is a type of employment protection comparable to civil service protection, one holding "a contract" for such dual duties would be protected by it and such contract could be terminated only as provided by law. In addition to the grounds for termination set out in the statute, a question might also arise where the employee becomes ineligible to continue to drive a bus because his certificate is revoked pursuant to Section 3327.10, Revised Code.

As to your third question, the only difference is that the teaching contract would be entered into under Sections 3319.08 and 3319.09 et seq., Revised Code. Accordingly, the duties of bus driver would be covered by separate contract under Section 3319.081, supra. There would appear to be no reason that the contract under the latter Section would not be a continuing one after three years. In dealing with contracts generally, one of my predecessors arrived at a similar conclusion in Opinion No. 68-095, supra. The second and third paragraphs of the syllabus of that Opinion are as follows:

"2. Section 3319.081, Revised Code, provides that each non-teaching employee of a school be granted a continuing contract upon

the completion of three years of continuous employment.

"3. The requirement that non-teaching employees of a school district be granted a continuing contract upon the completion of three years of service is mandatory."

Your second question must be considered separately. In essence, it involves the possibility of terminating continuing contracts through general policy decisions.

My predecessor has dealt with a related problem in Opinion No. 70-041, supra. There he held that a modification of contracts might be accomplished through a uniform plan affecting nonteaching employees and, by such ruling, permitted hours of such employees to be set at a maximum of forty hours per week. The authority for such conclusion, he pointed out, was contained in Section 3319.082, Revised Code, which is as follows:

"In all school districts wherein the provisions of sections 143.01 to 143.48, inclusive, of the Revised Code do not apply, each board of education shall cause notice to be given annually not later than the first day of July to each non-teaching school employee, who holds a contract valid for the succeeding school year, as to the salary to be paid such school employee during such year. Such salary shall not be lower than the salary paid during the preceding school year unless such reduction is part of a uniform plan affecting the non-teaching employees of the entire district. This section does not prevent increases of salary after the board's annual notice has been given."

(Emphasis added)

In the absence of such uniform plan, however, my predecessor also held that a reduction in salary of a nonteaching employee was not permitted (Opinion No. 69-002, Opinions of the Attorney General for 1969 - the reduction of bus drivers' salary alone, invalid). These Opinions indicate an underlying understanding of the Sections involved here, which I share, namely, that continuing contracts may not be altered or terminated for reasons not specifically authorized, such as those grounds set out in the Sections involved here and possibly in others, such as Section 3327.10, Revised Code.

In specific answer to your questions, it is my opinion and you are advised that:

1. A noncertified school employee may hold a continuing contract as both a custodian and a bus driver.
2. Continuing contracts of noncertified school employees may not be altered or terminated except pursuant to a uniform plan

affecting all such employees of the entire district, Section 3319.082, Revised Code, or for such other reasons as are specifically authorized by statute.

3. A teacher, who is also a bus driver, may hold a continuing contract as a bus driver after completion of three consecutive years of service as bus driver.