

**OPINION NO. 73-045**

**Syllabus:**

A guidance counselor in the public school system is a "teacher", within the statutory meaning of the term, and is entitled to a continuing service contract.

To: Joseph T. Ferguson, Auditor of State, Columbus, Ohio  
By: William J. Brown, Attorney General, May 7, 1973

You have asked for my opinion as to whether a guidance counselor in the public school system is entitled to a continuing contract. This depends on whether the counselor is considered a classroom teacher or part of the administrative personnel of the school system. Your letter reads in part as follows:

A question has been raised relating to guidance counselors as follows:

"Are guidance counselors to be classroom teachers thus entitling them to an ultimate continuing contract, or are they to be considered administrative personnel and employed under written contracts of employment for terms not to exceed four years each, as provided in Section 3319.02, Revised Code?"

The Bureau of Inspection and Supervision of Public Offices has taken the position that guidance counselors are administrative personnel since they do not perform classroom teaching services for their employing board and cite State ex rel Saltsman v. Purton, et al, [91] App 271, wherein it was held that "Protection of The Teachers Tenure Act does not extend to executive or administrative officials in the school system. The term 'teachers' is limited in application to classroom teachers."

Conversely, attention to the Bureau has been called to State ex rel Fox vs. Board of Education, 11 App 2d 214, wherein it was held that "pursuant to Chapter 3319 of the Revised Code, a guidance counselor is a teacher, and the certificates issued to guidance counselors are teaching certificates and further that a teacher performing under the terms of a written contract to teach cannot acquire and maintain a vested right to perform exclusively as a guidance counselor."

As you point out, opinions of the two courts of appeals appear to be in conflict in this respect. In State, ex rel. Saltsman v. Burton, 91 Ohio App. 271, 273 (1951), one court said, "It was the intent of the Legislature that the term, 'teacher', should mean classroom teacher." But in State, ex rel. Fox v. Board of Education, 11 Ohio App. 2d 214, 215 (1966), another court held that, "By statutory definition, guidance counselors are 'teachers' \* \* \*."

In my opinion the Fox case is correct. The Saltsman case came before the Supreme Court on two different occasions, and the language used by the court makes it clear that it was concerned

in that case only with the difference between a classroom teacher and a school superintendent. But the language also indicates that the Court will consider, in the classification of administrative personnel, only those school officials whose duties are executive and discretionary in nature. I think, therefore, that the Fox case was correct in classifying guidance counselors as "teachers."

In the first Saltsman case, the relator, who was superintendent of schools in Mahoning County, sought a continuing contract as superintendent. The Supreme Court rejected the request on the ground that an administrator, such as a superintendent, is not a "teacher" as that term is used in statutory provisions covering continuing contracts. The Court said, State, ex rel. Saltsman v. Burton, 154 Ohio St. 262, 266-268 (1950):

The question before us is whether under the law of Ohio the board was compelled to give relator a continuing contract as superintendent of the Mahoning county schools and to keep him in that position until he died, resigned, retired, or was discharged under the provisions of Section 4842-12, General Code.

The Teachers' Tenure Act is designed to safeguard the employment of faithful and efficient teachers and to prevent the termination of their employment resulting from changes in the personnel or political complexion of boards of education.

We approve the following language of Judge Zimmerman in the case of State, ex rel. Bishop v. Board of Education of Mt. Orab Village School Dist., 139 Ohio St., 427, 438, 40 N.P. (2d), 913:

"In recent years, legislation in the form of teachers' tenure acts has been enacted by a number of states for the protection of those established and qualified in the teaching profession and to prevent their arbitrary dismissal. Such legislation bears a resemblance to the older civil service laws, and the general constitutionality of teachers tenure acts has been upheld by the courts as a valid exercise of legislative power."

In practice, however, it has quite generally been the custom to exempt from the classified civil service positions which entail the exercise of executive and discretionary power, upon the theory that there are in addition to ability to pass examinations qualifications which are essential to the efficient exercise of such power. Obviously, a superintendent of schools falls into such a group. Section 4842, General Code, makes him the executive officer for the board of education to direct and assign teachers and other employees of the schools, and to assign pupils

to proper schools and grades. His work is of a highly executive nature, requiring wise use of widely discretionary power.

It is true that Section 4842-7, General Code, provides that the term, "teacher," shall include all persons certified to teach and who are employed in the public schools as instructors, principals, supervisors, superintendents, or in any other educational position for which the employing board requires certification. But the statutes we have quoted hereinbefore recognize a difference between the classroom teacher and the superintendent.

\* \* \* \* \*

Although Section 4842-7, in its definition of the term, "teacher," is somewhat confusing in view of the provisions of Sections 4842-7 and 4842-8, it is obvious that the General Assembly intended that one employed as a superintendent of schools is subject to be not re-employed as superintendent by the board of education.

Statutes must be construed, if possible, to operate sensibly and not to accomplish foolish results. It would be foolish if a classroom teacher and a superintendent were so much the same that under Section 4842-8 the superintendent should have a continuing contract provided he recommended himself for the same, but, even if this interpretation were correct, in the present case the recommendation of relator by himself was not effective because more than three-fourths of the membership of the board rejected it.  
(Emphasis added.)

Subsequently, the relator began a new proceeding in the court of appeals, seeking to be appointed to a continuing contract as an elementary school supervisor. The court of appeals, in the opinion to which you refer (91 Ohio App. 271), held that this was not possible under the Supreme Court's prior ruling. The Supreme Court affirmed, pointing out again that there is a difference, so far as continuing contracts are concerned, between "teachers" and those who exercise executive authority in the public school system. State, ex rel. Saltsman v. Burton, 156 Ohio St. 537 (1952). In State, ex rel. Gandy v. Board of Education, 26 Ohio St. 2d 115 (1971), the court held that the relator, who was serving as both a teacher and a guidance counselor, was entitled to a continuing contract.

Lower court decisions, subsequent to Saltsman, have followed the same line of reasoning. In the Fox case, to which you refer (11 Ohio App. 2d 214), the court of appeals held that a guidance counselor is a "teacher." The court said (at page 215):

\* \* \* By statutory definition guidance counselors are "teachers" (Section 3319.09,

Revised Code), and the certificates issued to guidance counselors are "teaching certificates" (Section 3319.22, Revised Code).

In State, ex rel. Wallace v. Board of Education, the Court of Appeals for Trumbull County in an unreported decision (Case No. 1978), made the following journal entry:

Peremptory Writ of Mandamus granted.

Properly certified school psychologists held to be a teacher, as defined in Section 3319.09 (A), Ohio Revised Code, and entitled to a continuing contract pursuant to statute. No adequate remedy at law. Clear right shown to require Girard Board of Education to provide relator with a continuing contract for the school year 1971-1972 and thereafter until terminated by law. Costs to respondents.

In Iverson v. Wooster City School District, the Court of Common Pleas for Wayne County (No. 72-CI-082), unreported, February 26, 1973), held, in reliance on the Fox and Gandy cases, supra, that a guidance counselor is a "teacher" and is entitled to a continuing contract. The court's opinion holds:

Upon consideration of all of said statutory provisions and said case law applicable to the facts herein stipulated and determined by the Court herein to be true, the Court finds that the plaintiff herein has taught for at least three years out of the last five years in the Wooster City School District; that he is a holder of a Professional Certificate required under Section 3319.22 and that while his actual work was not that of a specific classroom teacher he is a teacher within the meaning of the definition set out in R.C. 3319.09 (A). Fox vs Board of Education of Springfield supra clearly holds that a guidance counselor is a teacher and that certificates issued to guidance counselors are teaching certificates. This decision is clearly upheld and supported by the Supreme Court of Ohio in Gandy vs Board of Education of Continental Local School District, supra.

As the Supreme Court pointed out in its first Saltsman opinion, the statutory definition of the term, "teacher", is confusing. But the court's two opinions interpret the statutes in such a way as to distinguish between "teacher" personnel and those who perform executive and administrative functions. The language in the court of appeals' opinion limiting "teacher" to classroom teachers alone is too restrictive, and subsequent lower court cases have held that a guidance counselor is a "teacher."

In specific answer to your request it is my opinion, and you are so advised, that a guidance counselor in the public school system is a "teacher", within the statutory meaning of the term, and is entitled to a continuing service contract.