OPINION NO. 74-045

Syllabus:

A board of education is without power to enter into a supplemental contract with its non-teaching employees. Such an agreement may not be treated as a binding contract for purposes of R.C. Chapter 3319. (Opinion No. 156, Opinions of the Attorney General for 1959, page 70, approved and followed)

To: Joseph J. Baronzzi, Columbiana County Pros. Atty., Lisbon, Ohio
By: William J. Brown, Attorney General, May 31, 1974

I have before me your request for my opinion, which reads as follows:

> "The Crestview Board of Education adopted a resolution to enter into a supplemental contract with bus drivers in October 1971 for the 1971-72 school year. The supplemental contract called for wages based on fifteen minutes of addition per day. In May 1972 the Board adopted a resolution granting the same fifteen minute per day supplemental contract for the 1972-73 school year. In each case regular and substitute contracts were signed by drivers.

"No supplemental contract resolution was adopted in 1973 for the 1973-74 school year and, thus, no supplemental contracts issued. Drivers were not notified in writing that the supplemental contract would not be granted the 1973-74 school year. The Board merely took no action in regard to the supplemental contract.

"The bus drivers have filed a grievance. They contend that based on Section 3319.082 they cannot receive less salary the 1973-74 school year than the previous year.

"In regard to this matter please give your opinion on the following questions:

"(1) Does the Board have a right to grant supplemental contracts to bus drivers?

"(2) Must a supplemental contract be treated the same as a regular contract in respect to the provisions of notification of termination as specified in Section 3319.083?

"(3) Must a supplemental contract be treated the same as a regular contract in regard to the provision of the first contract being for one year, the second being for two years and a continuing contract thereafter as specified in Section 3319.081?

"(4) Specifically is the Board required to pay the fifteen minute supplemental contract for the 1973-74 school year?"

Boards of education , like other public bodies created by the legislature, have only such powers as are expressly conferred upon them by statute together with the powers necessarily implied therefrom. Schwing v. McClure, 120 Ohio St. 335 (1929); Board of Education v. Best, 52 Ohio St. 138 (1894).

R.C. 3319.081, which provides for contracts for non-teaching employees, reads in part as follows:

"Except as otherwise provided in division G of this section, in all school districts wherein the provisions of sections 143.01 to 143.48 [124.01 to 124.64] 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 em-

ployment, 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.

"* * * * * * * * *

"(D) All employees who have been employed by a school district where the provisions of sections 143.01 to 143.08 [124.01 to 124.11], inclusive, of the Revised Code do not apply, for a period of at least three years on November 24, 1967, shall hold continuing contracts of employment pursuant to this section."

R.C. 3319.082, which requires each board of education to give notice of annual salary to non-teaching employees, provides as follows:

"In all school districts wherein the provisions of sections 143.01 to 143.48 [124.01 to 124.64], 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 a 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."

R.C. 3319.083, which provides for notice of contract termination, reads as follows:

"In all school districts wherein the provisions of sections 143.01 to 143.48 [124.01 to 124.11], inclusive, of the Revised Code do not apply, each board of education shall cause notice to be given of its intention not to re-employ said non-teaching employee, at the expiration of his contract. If such notice is not given the non-teaching school employee on or before the first day of June, said employee shall be deemed re-employed."

In light of the foregoing statutory provisions, the answer to your first question seems reasonably clear. Although the powers conferred upon boards of education are rather sweeping in scope, the statutes make no reference to supplemental contracts, nor am I able to discern any basis upon which such authority might be reasonably implied.

The silence of the statutes with respect to supplemental contracts assumes greater significance when it is realized that R.C. 3319.08, which concerns employment contracts between teachers and boards of education, specifically authorizes such boards to enter into limited supplemental contracts with teachers who are to perform additional duties.

One of my predecessors reached a similar result in Opinion No. 156, Opinions of the Attorney General for 1959, page 70. In concluding that the board of education lacked the necessary power to enter into a supplemental contract with its non-teaching employee. Syllabus No. 1 stated as follows:

> "When a board of education has made a contract for the employment of a non-teaching employee, pursuant to Section 3319.081, Revised Code, such board is without authority to increase the compensation of such employee, as fixed by such contract, during the term thereof; the parties to such contract may, however, by mutual agreement rescind such a contract at any time and execute another in its stead."

In reaching this conclusion, my predecessor noted at page 72 as follows:

> "The General Assembly in enacting said Section 3319.081, supra, and placing it in the heart of the group of sections governing the employment of teachers, must certainly be assumed to have recognized the provision above noted as to increasing the salary of teachers during the term of their contracts, and I cannot resist the conclusion that it intended not to extend that privilege to the matter of employment of non-teaching employees. It would be idle to speculate on reasons for this discrimination, but it is well settled that a statute which is not ambiguous in its language must be interpreted and applied in accordance with its wording, and is not subject to extension, alteration or construction, even by the courts. Slingluff v. Weaver, 66 Ohio St. 621."

Although an increase in the compensation of non-teaching employees may be effected through mutual rescission and novation of the employment contract, I think it clear that a board of education is without power to enter into a supplemental contract with its non-teaching employees. I find nothing to the contrary in Gates v. Board of Education, 11 Ohio St. 2d 83 (1967). There was no written contract at all, supplementary or otherwise, in that case, and the question was to discern the terms of employment from the statements and conduct of the parties.

It follows that these supplemental contracts can not be treated as regular contracts with respect to the provisions for notification and termination specified in R.C. 3319.083, or duration as specified in R.C. 3319.081. These contracts being unauthorized, they have no legal status under these statutes. Nor is there merit to the drivers' contention that a refusal by the school board to abide by the terms of the supplemental contract would constitute a violation of R.C. 3319.082, which prohibits a salary reduction for non-teaching employees unless such reduction is part of a uniform plan affecting all non-

teaching employees. Therefore, the supplemental contracts confer no present or future rights upon the drivers.

However, even though public funds were expended pursuant to an illegal contract, it is unlikely that the board of education would be able to recover such funds. It has been held that where a county, municipality, or other public body has accepted the benefits of an invalid contract pursuant to which public funds have been paid out, and such benefits are retained, or restoration of the benefits is impossible, recovery by the public body or by a taxpayer thereof on its behalf will in the absence of fraud be denied. State ex rel. Hunt v. Fronzier, 77 Ohio St. 7 (1907); Board of Commissioners of Hamilton County v. Noyes, 35 Ohio St. 201 (1878); Opinion No. 615, Opinions of the Attorney General for 1937, Vol. II, page 1083.

Essentially, there is a strong tendency among the courts to leave the parties where they have placed themselves. See Casey et al., v. City of Canton, 253 F. 589 (1918). The instant fact situation is distinguishable from cases wherein a statute specifies the amount of compensation under a certain public contract, and the courts allow recovery of any excess paid. See City of Cleveland v. Legal News Co., 110 Ohio St. 360 (1924).

In specific answer to your questions, it is my opinion and you are so advised that a board of education is without power to enter into a supplemental contract with its non-teaching employees. Such an agreement may not be treated as a binding contract for purposes of R.C. Chapter 3319. (Opinion No. 156, Opinions of the Attorney General for 1959, page 70, approved and followed)