

**Note from the Attorney General's Office:**

1976 Op. Att'y Gen. No. 76-034 was modified by  
1977 Op. Att'y Gen. No. 77-014.

## OPINION NO. 76-034

## Syllabus:

1. Pursuant to R.C. 3319.01, the county superintendent's recommendations for the office of local superintendent of schools is required, and thus may be compelled, whenever a local board of education takes affirmative action with respect to the employment or re-employment of a superintendent of schools.

2. Pursuant to R.C. 3319.01, a local board of education has the authority to take action to re-employ a superintendent as much as eighteen months prior to the expiration of the superintendent's current term of employment.

3. Pursuant to R.C. 3319.01, a local board of education has the authority to re-negotiate a superintendent's contract of employment, including salary, in the year immediately preceding the year in which his current term of employment expires, provided that, the re-negotiated contract, including salary change, does not become effective until the expiration of the superintendent's current term of employment.

4. Pursuant to R.C. 3319.01, a local superintendent of schools may be "re-employed" by operation of law if the local board of education has failed to notify him of its intent to re-employ him or to not re-employ him by March 1 in the year in which his current term of employment expires. Subsequently, the local board of education may take affirmative action to

re-employ the superintendent for a succeeding term in which case recommendations from the county superintendent of schools are required.

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To: Thomas R. Spellerberg, Seneca County Pros. Atty., Tiffin, Ohio  
By: William J. Brown, Attorney General, May 6, 1976

I have before me your request for my opinion, reading in part as follows:

A legal opinion has been requested of me by Mr. James Akenhead, County Superintendent of the Seneca County Schools. Since Mr. Akenhead is attempting to facilitate the establishment of a standard operating procedure in all of the five local districts, there have been inquiries as to when the County Superintendent's recommendation is required in the employment or re-employment of a local superintendent under Ohio Revised Code Section 3319.01 and as to the legality of different approaches taken by the different local school districts.

In your letter you set out the following specific situations for my analysis:

"Situation I

Ohio Revised Code, Section 3319.01 indicated that, contracts for superintendents may be entered into beginning August 1st for not to exceed five years ending July 31st, and may be renewed during the calendar year prior to the date of expiration of said contract. Under these provisions, and assuming that the superintendent is on more than a one-year contract, I assume that a board has as much as eighteen months prior to the date of July 31st in the year of expiration to renew a contract for a period not exceeding five years effective immediately as of August 1st, following the July 31st expiration date.

Example: Initial contract for two years awarded August 1, 1975, expires July 31, 1977. Contract may be legally renewed by the local board as early as January 1, 1976, for any length up to five years beginning August 1, 1977.

Is this correct?

Situation II

Several boards of education have initiated a method of contract negotiation under which "by mutual agreement" the contract in effect is "torn up" and a new contract and salary, generally for two years, are entered into effective the next August 1st.

Example: Contract offered for two years awarded August 1, 1975, expires July 31, 1977. Contract

re-negotiated (torn up) "by mutual agreement" in March or April of 1976 to become effective for two years beginning August 1, 1976, expiring July 31, 1980.

Although this procedure obviously allows for a new salary to be negotiated each year and for the contract to be extended an additional year, is this approach legal in light of Section 3319.01?

### Situation III

Ohio Revised Code, Section 3319.01, also seems to create a situation where a board could, in the year of contract expiration, by not taking action of any kind prior to March 1st, permit a superintendent to be re-employed for the next year by default and then prior to December 31st of that same year (being the calendar year prior to expiration) pass a resolution to extend the contract for up to five years beginning August 1st. This procedure would obviously eliminate the need to consider any action on recommendation by county superintendent relative to the local superintendent's contract.

Example: Contract expires July 31, 1975, board takes no action prior to March 1, 1975, superintendent is automatically re-employed for one year effective August 1, 1975, through July 31, 1976. Board could pass a resolution prior to December 31, 1975 (calendar year prior to expiration) to extend said contract for not longer than five years effective August 1, 1976.

Is this procedure legal especially since the contract is extended without a recommendation of the county superintendent?"

A board of education is a public body created by the legislature. The authority possessed by a board of education is limited to that expressly conferred upon it by statute and that necessarily implied from the statute in order to perform its statutory function. Schwing v. McClure, 120 Ohio St. 335 (1929); State ex rel Clark v. Cook, 103 Ohio St. 465 (1921); Board of Education v. Best, 52 Ohio St. 138 (1894); 1975 Ohio Atty. Gen. No. 37.

Prior to 1973 R.C. 3319.01 read in pertinent part, as follows:

The board of education in each county, city, local, and exempted village school district shall, at a regular meeting held not later than the first day of May of the calendar year in which the term of the superintendent expires, appoint a person possessed of the qualifications provided in this section, to act as superintendent of the public schools of the district, for a term not longer than five years beginning the first day of August and ending on the thirty-first day of July. Such superintendent is, at the expiration of his current term of employment, deemed re-

employed for a term of one year at the same salary plus any increments that may be authorized by the board of education, unless such board, on or before the first day of March of the year in which his contract of employment expires, either re-employs the superintendent for a succeeding term or gives the superintendent written notice of its intention not to re-employ him. If the superintendent is employed on a continuing contract, the board may, by resolution, designate that he is to continue for a term not to exceed five years, and he may not be transferred to any other position during such term. If a vacancy occurs in the office of superintendent during the term of his employment, the board promptly shall appoint a superintendent for a term not to exceed five years from the next preceding first day of August.

The board of education may at any regular meeting held during the calendar year immediately preceding the year of expiration of the term of employment of a superintendent of the public schools, re-employ such superintendent for a succeeding term for not longer than five years, beginning on the first day of August immediately following the expiration of his current term of employment and ending on the thirty-first day of July of the year in which such succeeding term expires.

The foregoing language clearly manifests a legislative intent to place the entire authority to employ or re-employ local school district superintendents with the local boards of education. Each board, be it a county, city, local or exempted village, had the sole statutory authority to hire its own superintendent of schools.

In 1973 the legislature amended R.C. 3319.01 to the form in which it appears today. The amendment left the language in the two paragraphs which appear above virtually in tact. However, the following paragraph was inserted between the two paragraphs:

Except as otherwise provided in this section the employment or re-employment of a superintendent of a local school district shall be only upon the recommendation of the county superintendent, except that a local board of education, by a three-fourths vote of its full membership, may, after considering two nominations for the position of local superintendent made by the county superintendent of schools, employ or re-employ a person not so nominated for such position.

As a result of the 1973 amendment local boards of education no longer possess sole, unrestricted authority to employ or re-employ a local superintendent of schools. However, even though a board of education is no longer the sole authority in the matter of employing superintendents, it remains the final authority. The net effect of the amendment is the creation of a statutory relationship between the superintendent of schools of the county

school districts and the local boards of education with regard to the employment of local school superintendents.

The main thrust of the amendment language with regard to the employment of superintendent is that "the employment or re-employment of a superintendent of a local school district shall be only upon the recommendation of the county superintendent." (Emphasis added.) The import of this statement is two-fold. First, whenever a local school board desires to employ or re-employ a superintendent, it must first get the recommendation of persons for the position from the county superintendent. Second, the person selected by the local board of education for the position must be one of those persons recommended by the county superintendent (with one exception, discussed below).

The paragraph that was added by the 1973 amendment begins "Except as otherwise provided in this section". There is a situation provided in the section in which a local superintendent may be "re-employed" without first obtaining the recommendation of the county superintendent. A local superintendent who is not re-employed or given written notice of the local board's intention not to re-employ him by March first of the year in which his term of employment expires is "at the expiration of his current term of employment, deemed re-employed for a term of one year" (Emphasis added.). In this case the superintendent is "re-employed" by operation of the statute rather than by action of the board of education and, therefore, the recommendation of the county superintendent is useless and unnecessary. However, in any situation where a local board of education desires to take affirmative action with respect to the employment or re-employment of a superintendent, obtaining the recommendation of the county superintendent is a mandatory pre-requisite to the board's exercise of its statutory authority to employ or re-employ a superintendent.

As noted above, under R.C. 3319.01, as amended, a local board of education no longer possesses the sole authority to select a superintendent, but it is still the final authority. The amendment expressly protects the board's pre-eminence in this matter. As a rule, the amendment requires a local board to select a superintendent only from among those persons recommended for the position by the county superintendent. The board may, however, employ or re-employ a person not recommended by the county superintendent if it has considered at least two persons recommended by the county superintendent. Further, at least three-fourths of the full membership of the board must vote in favor of employing a person not recommended by the county superintendent. This is a two-stage process and both steps must be complied with in order for a local board of education to validly employ a person not recommended by the county superintendent. In this manner the final authority as to who is to be a local superintendent remains with the local board of education.

Accordingly, R.C. 3319.01 provides that a local board of education in most instances must seek the recommendation of the county superintendent and must select a person from those recommended with respect to the employment of a local superintendent. A corollary to this proposition is that the county superintendent has a mandatory statutory obligation to recommend persons for the position of local school district superintendent

when a local board of education engages in the employment process. The failure or refusal of the county superintendent to make recommendations would completely negate the authority of a local board to perform its statutory function to employ a superintendent. To read the county superintendent's power to make recommendations as discretionary would be to place the exclusive authority over employment of local superintendents in his hands. Such a result is contrary to the legislative intent underlying Section 3319.01. The local board of education was the final arbiter of who was to be employed as local superintendent before the 1973 amendment. The amendment expressly recognized that authority and has carefully preserved it in the local boards by granting them the ability to override the county superintendent's recommendations by a three-fourths vote.

A county superintendent of schools is considered a public officer in Ohio. State ex rel. Westcott v. Ring, 126 Ohio St. 203 (1933); Christman v. Coleman, 117 Ohio St. 1 (1927); State ex rel. Clarke v. Cook, 103 Ohio St. 465 (1921); 1935 Ohio Att'y Gen. Opinion No. 853. As has been pointed out, R.C. 3319.01 places a mandatory obligation on the county superintendent to make a recommendation and when R.C. 3319.01 places him under a clear legal duty to do so and the local board of education may compel his performance by an action in mandamus. State ex rel. Pressley v. Industrial Commission, 11 Ohio St. 28 141 (1967). However, the local board of education cannot compel the county superintendent to make a particular recommendation. His selection is within his discretion. The Board may compel him, however, to exercise his discretion where he totally fails to act. State ex rel. The Greenward Realty Co. v. Tangerle, 135 Ohio St. 533 (1939).

Therefore, in response to your inquiry as to when the county superintendent's recommendation is required and if it can be compelled, it is my opinion that R.C. 3319.01 requires the county superintendent to recommend persons for the position of local superintendent in any situation where a local board of education undertakes affirmative action to employ or re-employ a superintendent until recommendations are forthcoming from the county superintendent, except in those cases where the superintendent is automatically "re-employed" by operation of the statute in the absence of board action. Since the authority of the board in this regard is conditioned upon the county superintendent's performance of his statutory duty, the board may compel the county superintendent to make recommendations by way of an action in mandamus.

With this statutory background, I now turn the discussion to the specific situations which you have presented for my opinion.

#### Situation I

According to R.C. 3319.01, the term of employment of superintendents is from August 1 to July 31 of the next calendar year or some future year. A board of education has the authority to employ a superintendent for more than one year but it may not contract to employ him for a period in excess of five years. The statute also provides that "at any regular meeting held during the calendar year immediately preceding the year of expiration of the term of employment of a super-

intendent" the board of education may vote to re-employ the superintendent for an additional period of up to five years beginning at the expiration of his current term." (Emphasis added.) Should a board of education hold a regular meeting on January 1 of the year immediately preceding the year of expiration of the term of employment, it could at that time take action to re-employ the superintendent for a succeeding period of up to five years after the expiration of his current term of employment. Since the term of employment of a superintendent ends on July 31, if the board holds a meeting on January 1 of the preceding year it would have as much as eighteen months prior to the expiration of the superintendent's current term to take action as to his future employment.

Without restating your example at this point, suffice it to say that your conclusion is correct. For the purpose of clarity, let me point out that if in your example the board voted on January 1, 1976 to re-employ the superintendent, it possesses the authority to contract to employ him at that time until July 31, 1982. In other words, it can re-employ for a period not in excess of five years after his current term expires on July 31, 1977.

It must be noted at this point that this is an affirmative act on the part of the local board with regard to the employment of a superintendent. The board must therefore receive and consider the recommendations of the county superintendent as discussed earlier. Further, the board may not re-employ the current superintendent if he is not recommended by the county superintendent, unless it has considered at least two persons recommended by the county superintendent and at least three-fourths of the full membership of the board vote to re-employ the current superintendent.

#### Situation II

The problem you present in Situation II raises two questions. The first is whether a local board of education has the authority to "re-negotiate" a superintendent's contract of employment "by mutual agreement of the parties during the term of the employment."

Recall that a board of education as a creature of the legislature possesses only that contractual authority expressly conferred upon it by statute or that necessarily implied therefrom. Since the authority of a board of education is limited by statute, in this case by R.C. 3319.01, the "mutual consent of the parties" is of no consequence. Neither the board nor the superintendent can confer powers on the board not given to it by statute.

R.C. 3319.01 authorizes a local board of education to take affirmative action to re-employ a superintendent at a regular board meeting held during the calendar year "immediately preceding" (emphasis added) the year in which the superintendent's term of employment expires. In your example, the initial term of employment is from August 1, 1975 to July 31, 1977. Since 1976 is the calendar year immediately preceding the year in which the term of employment expires (1977), the board has the statutory authority to take action with respect to the superintendent's re-employment. If, in your example, the initial term of em-



ployment would have been for three years running from August 1, 1975 to July 31, 1978, the board could not legally act to re-employ a superintendent until at least January 1, 1977, being the year immediately preceding the year in which the current term of employment expires. The reason being that until the year immediately preceding the year of expiration there is no statutory authority for the board to act.

In your example, the contract "re-negotiated" in 1976 is to take effect on August 1, 1976. R.C. 3319.01 provides that a board of education may re-employ a superintendent for a succeeding period beginning on the first day of August immediately following the expiration of his current term of employment." (Emphasis added). In your example the current term of employment is for two years from August 1, 1975 to July 31, 1977. Therefore, although the board may make a "new contract of employment for the superintendent in 1976, the terms of the new contract do not take effect until August 1, 1977, which is the first day immediately following the expiration of his current term of employment.

At this juncture it should again be recognized that any action taken by a board of education along the lines just discussed first requires recommendations from the county superintendent. The act of re-employing a superintendent is affirmative in nature and, thus, it is mandatory that the board first defer to the county superintendent as discussed in the first portion of this opinion.

Essentially, the second question raised in Situation II is whether a board of education may alter the salary of a superintendent during his term of employment. Again, the "mutual agreement of the parties" is of no consequence for the board's authority in wholly statutory.

Section 3319.01 provides, in part, that:

" . . . At the time of making such appointment or designation of term, such board shall fix the compensation of the superintendent, which may be increased or decreased during such term. . . . (Emphasis added.)

On its face the foregoing language appears to grant a board of education the authority to increase or decrease a superintendent's salary during his term of employment. As I noted earlier in this opinion, a superintendent of schools is a public officer. As such, his salary is subject to the constitutional restrictions imposed by Section 20, Article II of the Ohio Constitution, which provides that:

"The General Assembly, in cases not provided for in this constitution, shall fix the terms of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office is abolished." (Emphasis added.)

This section of the Ohio Constitution has been held applicable to appointed officers as well as elected officers. McNamara v. Campbell, 94 Ohio St. 403 (1916). The salary of a public

officer is not subject to change once it is fixed during the current or existing term of employment. See State ex rel. Glander v. Ferguson, 148 Ohio St. 581 (1947).

The legislature must be understood to have been aware of Section 20 of Article II of the Ohio Constitution when it drafted R.C. 3319.01. Therefore, the language with regard to increases in salary of superintendents must be construed so as to be constitutional. This leads to the conclusion that in R.C. 3319.01 the legislature intended to authorize a board of education to fix the salary of a superintendent at the time that it re-employs him. There are at least two available constructions of the above-quoted portion of R.C. 3319.01, both of which are in compliance with Section 20, Article II. First, when a board fixes a superintendent's compensation it may provide for a "sliding scale" salary. That is, the compensation to be fixed may, by the terms of the contract, increase and/or decrease by designated amounts at designated points during the term of the contract. Second, it may provide for a fixed salary for the succeeding term. However, although a board of education may re-employ a superintendent and fix a new salary, which may involve a changing rate of compensation for him, up to eighteen months before the expiration of his current term of employment neither the new contract nor the new salary becomes effective until the expiration of his current term of employment.

In your example, the existing term of employment is from August 1, 1975 to July 31, 1977. In 1976 a board of education may take action to re-employ the superintendent and fix a new salary for him, but neither the new contract of employment nor the new salary become effective until August 1, 1977 when the new term of employment begins. This is the case whether the present superintendent is re-employed in 1976 or whether another is selected to take the place of the present superintendent.

### Situation III

R.C. 3319.01 provides, in part, that a "superintendent is . . . deemed re-employed for a term of one year . . . unless such board, on or before the first day of March of the year in which his contract of employment expires, either re-employs the superintendent or gives the written notice of its intention not to re-employ him". A board of education may, in effect, re-employ a superintendent by doing nothing. However, at any time, be it in the year of expiration or in another year, that a board of education desires to take affirmative action to re-employ a superintendent, it must first receive recommendations from the county superintendent. Further, the new superintendent, be he the incumbent or another person, must be selected from those recommended by the county superintendent, unless the board overrides the recommendations by a vote of at least three-fourths of its full membership. Reference should be made to the discussion on this point at the outset of this opinion.

It is therefore my opinion, and you are so advised that:

1. Pursuant to R.C. 3319.01, the county superintendent's recommendations for the office of local superintendent of schools is required, and thus may be compelled, whenever a local board of education takes affirmative action with respect to the employment or re-employment of a superintendent of schools.

2. Pursuant to R.C. 3319.01, a local board of education has the authority to take action to re-employ a superintendent as much as eighteen months prior to the expiration of the superintendent's current term of employment.

3. Pursuant to R.C. 3319.01, a local board of education has the authority to re-negotiate a superintendent's contract of employment, including salary, in the year immediately preceding the year in which his current term of employment expires, provided that, the re-negotiated contract, including salary change, does not become effective until the expiration of the superintendent's current term of employment.

4. Pursuant to R.C. 3319.01, a local superintendent of schools may be "re-employed" by operation of law if the local board of education has failed to notify him of its intent to re-employ him or to not re-employ him by March 1 in the year in which his current term of employment expires. Subsequently, the local board of education may take affirmative action to re-employ the superintendent for a succeeding term in which case recommendations from the county superintendent of schools are required.