

**OPINION NO. 76-068****Syllabus:**

1) A board of education may not by regulation avoid the restriction imposed by R.C. 3307.381(A)(3) on the salary which may be paid to a retired teacher who is re-employed for temporary service.

2) R.C. 3307.381(A)(3) requires that a retired teacher, who is re-employed as a substitute and is assigned to one specific position for more than sixty days, may not be paid more than the minimum salary, which pursuant to R.C. 3319.10 is paid to other substitutes, who have been assigned to one specific position for more than sixty days.

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**To: Lawrence S. Huffman, Allen County Pros. Atty., Lima, Ohio**  
**By: William J. Brown, Attorney General, September 22, 1976**

I have before me your request for my opinion concerning the compensation of retired school teachers, who have been re-employed as substitute teachers pursuant to R.C. 3307.381 and R.C. 3319.10. Pertinent to your request is Section 5.77 of the adopted regulations of the board of education in question. That provision reads:

Section 5.77 Substitute Teachers. All substitute teachers, both day to day and long term, shall be hired in accordance with provisions of the Ohio Revised Code and shall be paid according to the following schedule.

- A. For 1-5 days in the same position at \$23.00 per day.
- B. For 6-15 days in the same position at \$28.00 per day.

- C. For 16-25 days in the same position at \$32.00 per day.
- D. For 26-59 days in the same position at \$37.00 per day.
- E. For 60 or more days in the same position at a per diem salary equivalent to, and based upon, the salary of regularly salaried employees.

Given this background you have posed the following questions:

1. Does the existence of policy 5.77 as written negate the restrictions seemingly imposed by . . . [R.C. 3307.38 (A)(3)]?
2. Is it indeed both legal and proper to pay retired teachers at a per diem salary based upon their training and experience even though that salary, while consistent with this policy, does place them at rates higher than those of other teachers.

With respect to your first question R.C. 3307.381 discusses the employment of retired teachers for temporary service. It reads in pertinent part as follows:

(A) A former teacher receiving a service retirement allowance from the state teachers retirement system, and referred to in this section as a superannuate, may be employed for temporary service as a teacher, provided:

(1) At least sixty calendar days have elapsed since the effective date of his retirement.

(2) Such employment does not exceed one hundred school days, or the equivalent thereof in fractional service, during any year beginning the first day of September and ending with the thirty-first day of August next following.

(3) The compensation of any superannuate so employed shall not exceed that for persons employed for substitute service.  
(Emphasis added.)

While boards of education have broad powers under R.C. 3313.20 and R.C. 3313.47 to provide for the operation of their schools, it is well settled that these powers are to be strictly construed and limited to those expressly granted or necessarily implied by statute. Dayton Teachers Assn. v. Dayton Bd. of Edn., 41 Ohio St. 2d 127 (1975); Schwing v. McClure, 120 Ohio St. 335 (1929). In addition, in the case of substitute teachers, R.C. 3319.10 implies authority to fix compensation within the limits set forth in that section.

However, when a general provision, such as those on which a board's regulations are based, conflicts with a specific statutory provision, the specific must control. R.C. 1.51. R.C. 3307.391(A)(3) imposes a specific limitation on the salary which may be paid to a retired teacher who has been re-employed for temporary service. Therefore, in answer to your first question, a board of education may not by adopted policy or regulation negate the specific limitations imposed by the General Assembly in R.C. 3307.381.

However, while school board policy itself cannot negate the restriction in R.C. 3307.381(A)(3), your second question also requires a consideration of R.C. 3319.10 in determining the effect of R.C. 3307.381(A)(3). That section provides for the employment of teachers as substitutes and establishes a minimum salary requirement in the case of substitute teachers who are assigned to one position for more than sixty days. It reads in pertinent part:

"Teachers may be employed as substitute teachers for terms not to exceed one year for assignment as services are needed to take the place of regular teachers absent on account of illness or on leaves of absences or to fill temporary positions created by emergencies; such assignment to be subject to termination when such services no longer are needed.

"A teacher employed as a substitute with an assignment to one specific teaching position shall after sixty days of service be granted sick leave, visiting days, and other local privileges granted to regular teachers including a salary not less than the minimum salary on the current adopted salary schedule. . . ." (Emphasis added.)

It is significant that the General Assembly did not require that such substitute be paid at a rate equal to that for regular teachers with comparable experience, but only that they be paid no less than the minimum salary on the current adopted salary schedule for regular teachers.

You have indicated that aside from the retired teachers, who are employed as substitute teachers, most substitutes are teachers with five or fewer years of teaching experience. In practice then any rate of compensation based on training and experience would necessarily result in compensation being paid to the retired teacher which is in excess of that paid to other substitute teachers. Consequently, such a policy of compensation for retired teachers, who are employed as substitute teachers, is contrary to and prohibited by R.C. 3307.381(A)(3).

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

1) A board of education may not by regulation avoid the restriction imposed by R.C. 3307.381(A)(3) on the salary which may be paid to a retired teacher who is re-employed for temporary service.

2) R.C. 3307.381(A)(3) requires that a retired teacher, who is re-employed as a substitute and is assigned to one specific position for more than sixty days, may not be paid more than the minimum salary which pursuant to R.C. 3319.10 is paid to other substitutes who have been assigned to one specific position for more than sixty days.