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1. MUSIC—COUNTY BOARD OF EDUCATION—WITHOUT AUTHORITY TO EMPLOY PERSON TO TEACH VOCAL OR INSTRUMENTAL MUSIC IN LOCAL SCHOOL DISTRICT OF COUNTY SCHOOL DISTRICT—MAY EMPLOY PERSON TO SUPERVISE TEACHING OF SUCH SUBJECTS IN SEVERAL LOCAL SCHOOL DISTRICTS.
2. PERSON MAY BE EMPLOYED TO SUPERVISE TEACHING OF MUSIC IN LOCAL SCHOOL DISTRICTS ALTHOUGH EMPLOYEE DOES NOT HOLD SPECIFIED TEACHING CERTIFICATE—SECTIONS 4842-1, 4857-1 G. C.
3. SALARY OF PERSON EMPLOYED TO SUPERVISE TEACHING OF MUSIC—PART OF OPERATING EXPENSE PRORATED—DEDUCTED BY STATE DEPARTMENT OF EDUCATION—SAME MANNER AS OTHER EXPENSES FROM MONEYS DUE SEVERAL LOCAL SCHOOL DISTRICTS FROM STATE PUBLIC SCHOOL FUND.
4. INCOMPATIBLE—POSITIONS ASSISTANT COUNTY SUPERINTENDENT AND TEACHER OF LOCAL SCHOOL DISTRICT.
5. INSTRUCTIONS IN PENMANSHIP FOR TEACHERS—INSTRUCTIONAL PROGRAMS FOR EMPLOYED PERSONNEL OF LOCAL SCHOOL DISTRICTS—SECTION 4844-2 G. C.

## SYLLABUS:

1. A county board of education is without authority to employ a person to teach either vocal or instrumental music in the local school districts of the county school district, but may employ a person to supervise the teaching of such subjects in the several local school districts.

2. A person may be employed by a county board of education under Section 4842-1, General Code, to supervise the teaching of music in the local school districts

of the county school district although such employee does not hold any of the teaching certificates specified in Section 4857-1, General Code.

3. The salary of a person employed by a county board of education to supervise the teaching of music in the local school districts of the county school district is a part of the operating expense of the county board of education and would be included in the budget of operating expenses of the county school district and prorated among all the various districts of the county school district and deducted by the State Department of Education in the same manner as other expenses from the moneys due the several local school districts from the state public school fund.

4. The positions of assistant county superintendent and teacher of a local school district are incompatible and may not be held by one person at the same time.

5. Boards of education of cities or exempted villages are authorized to provide instruction in penmanship for the teachers of such school districts pursuant to the provisions of Section 4844-2 of the General Code of Ohio, but there is no authority in law for local boards of education to provide instructional programs for employed personnel of local school districts.

Columbus, Ohio, December 15, 1949

Bureau of Inspection and Supervision of Public Offices  
Columbus, Ohio

Gentlemen :

Your letter requesting my opinion on several questions therein contained reads as follows :

“May we respectfully request your opinion upon the following questions :

1. Is there any legal authority for a county board of education to employ a person to supervise and/or teach both vocal and instrumental music in the individual school districts comprising the county school district ?

(a) If you hold the county board has such authority, would such person be required to be certificated to teach both instrumental and vocal music ?

(b) If you hold such employment legal, would the salary of such person be prorated among the school districts comprising the county school district by the State Department of Education on the same basis as other expense of operation of the county board of education ?

(c) In the event one or more individual districts did not conduct music classes, and did not use the services of such music teacher or supervisor, would such districts be required to pay a proportionate share of such person's salary ?

(d) This same person was employed by an individual member of the county school district and was paid for music

teaching services direct by such board in addition to the salary paid by the county board of education. Would this be legal? If not, should findings be made for recovery of salary paid by the individual district?

(2) Would it be legal for a group of boards of education in a county in this state to subscribe to and pay a firm in Pennsylvania for penmanship instruction or supervision? A representative of this firm meets at regular intervals with teachers of the boards subscribing to this membership for instruction in writing. The districts pay this firm on the basis of the number of enrolled pupils."

Before discussing the questions which you have presented I should like to state the frequently quoted legal principle that boards of education, being creatures of statute, have only such powers as are specifically granted them by statute or which may necessarily be implied therefrom. The powers of county boards of education to employ personnel are contained in Sections 4842 and 4842-1 of the General Code of Ohio, and read as follows:

Section 4842:

"The board of education in each county, city, and exempted village school district shall, at a regular meeting held not later than July first of the calendar year in which the term of the superintendent expires, appoint a person possessed of the qualifications hereinafter provided, to act as superintendent of the public schools of the district, for a term not longer than five years, beginning August first and ending on the thirty-first day of July. If the superintendent is employed on a continuing contract, the board of education may, by resolution, designate that he is to continue in the position of superintendent for a term not to exceed five years, and he may not be transferred to any other position during such term. Provided, that in the event of a vacancy occurring in the office of superintendent during the term of his employment, the board of education promptly shall appoint a superintendent for a term not to exceed five years from the next preceding August first. Provided, also, that if the vacancy occur through resignation or removal for cause, the superintendent thus resigning or removed shall be ineligible for reappointment to such office until after the reorganization of the board of education following the next general election of members of such board. No person shall be appointed to the office of superintendent who is not possessed of a certificate of the superintendent type, as defined in section 4857-1 of the General Code, unless such person had been employed as a county, city or exempted village superintendent prior to August 1, 1939.

At the time of making such appointment or designation of term, such board of education shall fix the compensation of the superintendent.

Such superintendent shall be the executive officer for the board of education, direct and assign teachers and other employees of the schools under his supervision, except as provided by law, assign the pupils of the schools under his supervision to the proper schools and grades, provided, however, that the assignment of a pupil to a school outside of his district of residence be approved by the board of education of the district of residence of such pupil; and perform such other duties as the board of education may determine."

Section 4842-1:

"The board of education of each county, city or exempted village school district may appoint one or more assistant superintendents and such other administrative officers as are deemed necessary.

In the case of assistant superintendents, such appointments shall be made, and in the case of other administrative officers, may be made upon nominations of the superintendent of schools for a term not to exceed four years except as authorized by section 4842-7 of the General Code. The board of education of each city, exempted village and local school district shall appoint principals for all high schools and for such other schools as the board of education may designate."

While the word "teacher" is defined by Section 4842-7 to include superintendents and supervisors, it is pointed out that that definition was to characterize the word as it was used in the provisions of law commonly known as the "Teachers Tenure Act" (119 Ohio Laws, 451). Upon recodification and revision of the school laws this act was incorporated, with minor changes, in the recodification act, at which time the provisions of the statutes relating to the tenure of teachers were re-enacted as Sections 4842-6 to 4842-12, inclusive, General Code. The generally accepted and common use of the word "teacher" is distinguishable from "superintendent" or "supervisor" and is defined in Black's Law Dictionary, Third Edition, at page 1707 as:

"One who teaches or instructs; especially one whose business or occupation is to teach others; an instructor; preceptor."

whereas the word "superintendent" is defined in the same volume at page 1680 as:

“One who superintends or has the oversight and charge of something with the power of direction; a manager.”

The distinction between the two words appears sufficiently clear to warrant no further discussion in support of the conclusion that the authority granted county boards of education, under Sections 4842 and 4842-1, General Code, to hire superintendents, assistant superintendents and such other *administrative* officers as are deemed necessary, would not include the authority to hire or appoint teachers.

The question then arises whether or not a county board of education may employ a person as a supervisor of both vocal and instrumental music. The above quoted sections of the General Code do not contain the word “supervisor” in designating the positions of employment which the county board of education is authorized to fill. The word “super-*vise*,” however, is defined in Black’s Law Dictionary, *supra*, at page 1681 as meaning:

“To oversee; to superintend; to inspect with authority.”

I would conclude from this definition that a “supervisor” or one who supervises, would be synonymous with superintendent. It is my opinion that whether an employee of a county board of education is hired as a supervisor or as an assistant superintendent or superintendent would make little difference with respect to its authority to hire such individual. Whether or not such board had such authority would depend upon the duties which he was required to perform as a result of such employment.

Section 4842, General Code, prescribes the duties which a superintendent is required to perform, among which is the duty to direct and assign teachers and other employees of the schools under his supervision. Section 4842-1, General Code, provides for the appointment of assistant superintendents without specifying their duties. By the very nature of their designation it is apparent that their duties would be to assist the superintendent in the performance of his duties. It is conceivable that a county board of education could determine that it was necessary to retain an assistant to the superintendent to supervise the teaching of vocal and instrumental music in the schools under its jurisdiction. Whether such assistant be called a supervisor or some other identifying designation would not diminish the board’s authority to hire him nor alter the circumstance that in law and fact he would be an assistant superintendent.

In answer to your first question, it is my opinion that a county board of education has no authority to employ a person to teach either vocal or instrumental music in the local school districts of the county school district, but may employ a person to supervise the teaching of such subjects in the several local school districts.

In considering your second question it will be noted that Section 4857-1, General Code, provides for the types of certificates which may be issued by the state board of school examiners, among which is that of assistant superintendent. Section 4842, General Code, *supra*, requires that superintendents, appointed pursuant to the provisions of that section, shall be possessed of a certificate of the *superintendent* type, as defined in said Section 4857-1, unless such person has been employed as a county, city or exempted village superintendent prior to August 1, 1939. Section 4842-1 omits any reference to the qualifications of employees appointed pursuant to its provisions. It seems significant that the legislature deemed it necessary to specifically provide the qualifications in the one section and to omit them in the other, when both were a part of the same enactment. It is observed that by the provisions of Section 4842-1, General Code, assistant superintendents are inferred to be administrative officers by the use of the following language:

“\* \* \* may appoint one or more assistant superintendents and such other administrative officers as are deemed necessary.”

It is my thought that the legislature deemed it desirable that the employing boards exercise their discretion in employing personnel under the provisions of this section. It is my opinion that the absence of language in the statute specifying the employee's qualifications empowers the employing board in its discretion to employ a person in such capacity who does not hold any of the certificates specified in Section 4857-1.

Your third and fourth questions necessitate consideration of Section 4848-10 of the General Code of Ohio, which reads as follows:

“On or before the first day of December, of each year, each county board of education shall prepare a budget of operating expenses for the ensuing year for the county school district and shall certify the same to the superintendent of public instruction who shall apportion the cost represented by such budget among the various districts of the county school district on the basis of pupils in average daily membership. The amounts so apportioned shall be certified to the clerks of the various school dis-

districts and in the case of each district such amount shall be deducted by the superintendent of public instruction from funds allocated to the district under the provisions of sections 4848-1, 4848-3 and 4848-9 of the General Code.

The superintendent of public instruction shall certify to the auditor of state the total of such deductions of the districts of the county school district; whereupon the auditor of state shall issue his warrant in such amount on the treasurer of state in favor of the county board of education of each county, to be deposited to the credit of a separate fund, hereby created, to be known as the county board of education fund."

This section was formerly codified, in substantially its present form in Section 7595-1i of the General Code, originally enacted in 1935 by the 91st General Assembly. This former enactment was considered by one of my predecessors in office in Opinion No. 4540, Opinions of the Attorney General for the year 1935, Vol. II, at page 1015. The second and third branches of the syllabus of this opinion, in which I concur, read as follows:

"2. 'Operating expenses' as used in Section 7595-1 (i) include expenses incident to salaries as well as those which had formerly been called contingent expenses.

3. It is not necessary under the present law that boards of education within a county school district include anything in their budget to be certified to the county auditor for operating expenses of the county board of education of the county school district in which the local district is located."

In view of the fact that the present law relative to the operating expenses of county boards of education is substantially the same today as when the foregoing opinion was written, and in view of the fact that such employment would be authorized, and since Section 4848-10 directs a definite procedure by which the funds for such expenses are obtained, it necessarily follows from the conclusions reached in the foregoing opinion that such employee's salary would be included in the budget of operating expenses of the county school district and prorated among all the various districts of the county school district and deducted by the State Department of Education in the same manner as other expenses from the moneys due the several local school districts from the state public school fund.

Your fifth question presents a slightly different factual situation from that raised by your previous questions in that it raises the question as to

whether or not a person may be employed by a county board of education to supervise the teaching of certain subjects and at the same time employed by a local board of education under the jurisdiction of such county board, to teach the same subjects. There is no question but what a person who is qualified by the proper certification may be employed by a local board of education to teach vocal and instrumental music. However, whether or not he may at the same time be employed by a county board of education, under whose jurisdiction such local board is placed, to supervise the teaching of the same subjects presents the problem of incompatibility of public offices.

There is no express statutory or constitutional prohibition against one person holding the two offices here in question. However, even in the absence of such express provision, it seems to be a well settled rule of the common law that a public officer cannot hold two offices at the same time which are in their nature incompatible. An examination of the court decisions of the various states shows that the courts, when it comes to stating what constitutes incompatibility, are prone to avoid the formulation of a general definition and content themselves with discussions of specific cases and particular facts which have been looked on as creating incompatibility. They have laid down certain rules and tests for determining the matter, but it is difficult to find one sufficiently clear to be decisive in every case. See generally 2 Annotated Cases 380, et seq.; see also 42 Am. Jur., Public Officers, Sec. 70 et seq. One of the rules laid down by a group of cases is that offices are generally considered incompatible where the duties and functions of each are inherently inconsistent and repugnant so that because of the contrariety and antagonism which would result from the attempt of one person to discharge faithfully, impartially and efficiently the duties of both offices, considerations of public policy render it improper for one incumbent to retain both offices.

This, then leads us to a consideration of the duties and functions of the separate employments. A person employed by the county board of education would necessarily be limited to the supervision of the instruction in the local schools of the county school district. A person employed in a local school district within the county school district would be subject to the supervision of such county board's employee. It is apparent from the expression of the factual situation that should one and the same person hold both positions that he would be supervising his own work and that such dual employment would be inherently inconsistent and repugnant.



It is my opinion, therefore, that the same person may not be employed by a county board of education as a supervisor or assistant superintendent and at the same time be employed as a teacher of music in a local school district within the county school district.

Whether or not findings should be made against the local school district for the payment of such person's salary will depend upon several factors. First, if such employee did not possess the proper certificate provided for by Section 4857-1, General Code, the payment of his salary by such board was clearly illegal and in conflict with Section 4857-9 of the General Code which reads:

"No person shall receive any compensation for the performance of duties as teacher in any school supported wholly or in part by the state or by federal funds who has not obtained a certificate of qualification for the position as provided for by law and which certificate shall further certify to the good moral character of the holder thereof. Any teacher so qualified may, at the discretion of the employing board, receive compensation for days on which he is excused by such board for the purpose of attending professional meetings, and the board may provide and pay the salary of a substitute teacher for such days."

Under such circumstances findings should be made against such local board of education. Second, assuming such employee had such certificate and assuming he was employed by the county board of education as a supervisor or assistant superintendent his dual employment as pointed out above would be incompatible, and after having accepted his first employment he would be incapacitated from accepting his second employment. In which event the second employment would be illegal and the findings should be made against that board of education which employed him in the last instance. Thirdly, assuming he held the proper certificate to qualify him to teach the subjects which the local board of education employed him to teach but that the county board of education had employed him as a teacher. In this latter situation the county board's employment, as pointed out above, would be illegal and would not prevent his employment by the local board, in which event the findings which should be made, if any, should be against the county board of education.

Coming now to your last inquiry, it is noted that you have not specified whether the boards of education which are employing the services of a firm for penmanship instruction or supervision are local, city or exempted

village boards. Since you have stated that they are boards of education in a county, I shall assume that they are not county boards of education.

Authority for certain boards of education, other than county boards, to provide instructional programs for the employed personnel of their school districts may be found in Section 4844-2 of the General Code. This section reads as follows:

“The board of education of each city and exempted village school district may provide an instructional program for the employed personnel of such district. For the purpose of carrying out such instructional program the board of education of each city and exempted village school district is authorized to provide the necessary bulletins and instructional material in connection therewith and to pay the cost of meetings held for the purpose of carrying out such a program.

The board of education of each city, exempted village or county school district may provide bulletins and other materials necessary for the effective administration of the schools of such district.

Boards of education of local school districts may prior to April 15, 1949, authorize their county board of education to purchase or to accept upon donation supplies and equipment for such local school districts and to pay for the transportation, handling and storage charges involved in securing such supplies and equipment for the local school districts. Upon such authorization the county board of education may make such purchases or accept such donations and pay from the county board of education fund the cost of such supplies and equipment and the transportation, handling and storage charges involved. The local boards of education shall reimburse in full the county board of education for all such expenditures on their behalf.”

From a reading of this section it is apparent that local school districts are not authorized thereunder to provide this type of instructional program. I am not apprised of any section of the General Code which would grant them such authority. It would appear reasonably clear from the wording of this section of the General Code that city and exempted village boards of education are authorized to provide such a program. In authorizing such a program the statute does not limit the type thereof or prescribe the manner in which it is to be conducted.

In answer to your last question you are advised that it is my opinion that boards of education of cities or exempted villages are authorized to provide instruction in penmanship for the teachers of such school districts

pursuant to the provisions of Section 4844-2 of the General Code, but that there is no authority in law for local boards of education to provide for instructional programs for employed personnel of local districts.

Respectfully,

HERBERT S. DUFFY,  
Attorney General.