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THE BOARD OF EDUCATION MAY NOT INCREASE THE SALARY OF THE SUPERINTENDENT OF SCHOOLS DURING THE TERM FOR WHICH HE WAS APPOINTED—THE BOARD CANNOT VOID A SUPERINTENDENT OF SCHOOLS CONTRACT AND ENTER IMMEDIATELY INTO A NEW CONTRACT WITH HIM—A BOARD OF EDUCATION CANNOT RATIFY A PREVIOUSLY VOID CONTRACT—OPINION 886, OAG, 1929, OPINION 7316, OAG, 1944, §331.01, R.C.

SYLLABUS:

1. A board of education may not under Section 3319.01, Revised Code, increase the salary of the superintendent of schools during the term for which he was appointed. (Opinion No. 886, Opinions of the Attorney General for 1929, Volume II, page 1381, approved and followed; Opinion No. 7316, Opinions of the Attorney General for 1944, page 717, overruled).
2. Under Section 3319.01, Revised Code, a board of education cannot, during the superintendent's term, void the existing contract with the superintendent and immediately enter into a new contract with him to reappoint him to the office of superintendent of schools.
3. A board of education cannot ratify a previously void contract.

Columbus, Ohio, July 10, 1962

Hon. William H. Irwin, Prosecuting Attorney  
Belmont County, St. Clairsville, Ohio

Dear Sir:

Your request for my opinion concerns three questions posed by a board of education and reading as follows:

“(1) A Board of Education employs a Superintendent of Schools under a five (5) year contract, beginning August 1, 1957 and ending July 31, 1962 at an annual salary of \$10,000.00. On January 1, 1961 the board increases the salary of said Superintendent of Schools to \$11,000.00.

“Is this act legal?, in other words, can a Board of Education increase the salary of the Superintendent of Schools during the term of his contract.

“(3) With the contract mentioned above in effect on July 31, 1961 the board acts to tear up the existing contract of the

Superintendent of Schools, and grant him a new five (5) year contract beginning August 1, 1961 and ending July 31, 1966 at a higher salary than called for in the contract that is to be torn up.

“Is this act legal?, in other words, can a Board of Education void an existing contract of the Superintendent of Schools and grant him a new five year contract prior to January 1st of the year in which his existing contract expires.

(3) If act number two (2) above is illegal because of the granting of the new contract, can the Board of Education, in January 1962, ratify its action and intent, and thereby legalize the payment of the increased rate of pay for the five months that have elapsed, namely, August 1961 through December 1961?

The syllabus of Opinion No. 886, Opinions of the Attorney General for 1929, Volume II, page 1381, reads as follows :

“A board of education of a city school district may not lawfully increase the salary of the superintendent during the term for which he was appointed.”

Without overruling Opinion No. 886, *supra*, or even mentioning it, the then attorney general stated in the syllabus of Opinion No. 7316, Opinions of the Attorney General for 1944, page 717, as follows :

“The salaries of superintendents of city school districts, serving under either continuing or term contracts pursuant to the provisions of former section 7690-1, et seq., General Code, and those of county superintendents of schools serving in like manner may lawfully be increased during the term for which they were appointed. (Opinion No. 5168, Opinions of the Attorney General for 1942, page 374, overruled).”

It is apparent that the above opinions are in conflict with each other. In order to resolve the conflict, both opinions must be examined.

In Opinion No. 886, *supra*, it is stated, at page 1384, as follows :

“It will therefore be seen that the only court ruling we have to substantiate the contention that the salary of a city superintendent of schools may be increased during the term for which he was appointed is that of a Common Pleas Court. As hereinbefore indicated, it is believed that when the Legislature prescribed that the board of education should appoint a city superintendent of schools for a definite term, and fix his salary, it did not intend that such board of education was to take further action in connection with said matter. . In other words, it is believed

that the principle announced in the Cook case, *supra*, is to the effect that the power to fix a salary for a definite term does not carry with it the power to unfix that salary. Furthermore, it is believed that the statute which provides for the employment of teachers and which expressly authorizes boards of education to increase the salary during their terms is somewhat indicative of the legislative intent that such increases are not to be undertaken except in those instances wherein it was expressly so provided."

At the time Opinion No. 886 was written there were separate, although similar, statutes relating to the appointment and fixing of the salary of county and city superintendents of schools. The writer of that opinion relied on *State ex rel. Clarke vs. Cook*, 103 Ohio St., 465, in which the Supreme Court held that the salary of a county superintendent could not be increased during his term. The Supreme Court has never ruled, however, on the question of an increase of salary for a city superintendent during his term. At the present time the appointment and fixing of the salaries of both county and city superintendents is governed by the same statute (Section 3319.01, Revised Code).

In the 1944 opinion (Opinion No. 7316), the writer noted that boards of education were expressly authorized to increase teachers' salaries during their term and that the term "teacher" included superintendents. Since Opinion No. 7316, *supra*, was written, however, the Supreme Court has decided *State ex rel. v. Burton*, 154 Ohio St. 262 (1950), in which the court held that a superintendent was not covered under the Teacher's Tenure Act despite that fact that the definition of the word "teacher" includes superintendents.

In my view, the *Burton* case abrogates Opinion No. 7316, *supra*, and reinforces the conclusion of Opinion No. 886, *supra*, that express authority to increase teachers' salaries is indicative of the legislative intent that such increases were not to be undertaken except when expressly provided in a statute. See Opinion No. 5155, Opinions of the Attorney General for 1936, Volume 1, page 160.

Thus, finding myself in agreement with the views of my predecessor in Opinion No. 886, *supra*, and believing that the effect of Opinion No. 7316, *supra*, has been abrogated by the *Burton* case, I resolve the conflict in these opinions by approving and following Opinion No. 886, *supra*, and by overruling Opinion No. 7316, *supra*.

Turning now to the second question, Section 3319.01, Revised Code, provides in pertinent part as follows:

“The board of education in each county, city, and exempted village school district shall, at a regular meeting held not later than the first day of July 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. 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 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 following the next general election of members of such board. \* \* \*

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(Emphasis added)

Thus, a board of education has no authority to appoint a person as superintendent during a term unless a vacancy occurs. Under the facts in the instant case where is the vacancy? In order to accept a new contract the superintendent would have to resign his present appointment to create a vacancy. If he resigns, however, he “shall be ineligible for reappointment to such office until after the reorganization of the board following the next general election of members of such board.” Section 3319.01, *supra*.

In answer to the second question, therefore, it is my opinion that a board of education cannot during a superintendent’s term void the existing contract with the superintendent and immediately enter into a new contract with him to reappoint him to the office of superintendent of schools.

Regarding the third question, it has been held that a void contract is a nullity and incapable of ratification. *Terrill v. Auchauer*, 14 Ohio St., 80. As we pointed out in answering the second question, the Board could not immediately enter into a new contract with the Superintendent upon his resignation. It follows, therefore, that if a new contract were entered into under these circumstances, it would be void. Since the contract in question calls for the expenditure of public funds, your attention is directed to the statement in 44 Ohio Jurisprudence, 2d, 381, Public Funds, Section 18, reading as follows :

“Public funds can be disbursed only by clear authority of law, and upon compliance with statutory provisions relating thereto. In case of doubt as to the right of any administrative

board to expend public money under a legislative grant, such doubt must be resolved in favor of the public and against the grant of power. \* \* \*”

In answer to the third question, therefore, it is my opinion that the board of education could not ratify a previous void contract.

Accordingly, it is my opinion and you are advised:

1. A board of education may not under Section 3319.01, Revised Code, increase the salary of the superintendent of schools during the term for which he was appointed. (Opinion No. 886, Opinions of the Attorney General for 1929, Volume II, page 1381, approved and followed; Opinion No. 7316, Opinions of the Attorney General for 1944, page 717, overruled).

2. Under Section 3319.01, Revised Code, a board of education cannot, during the superintendent's term, void the existing contract with the superintendent and immediately enter into a new contract with him to reappoint him to the office of superintendent of schools.

3. A board of education cannot ratify a previously void contract.

Respectfully,

MARK McELROY

Attorney General