

**OPINION NO. 83-047**

**Syllabus:**

1. Pursuant to R.C. 3313.22, a board of education may not offer less than a four-year employment contract to its treasurer, even

September 1983

though the treasurer will attain the age of seventy during the term of such four-year contract.

2. Pursuant to R.C. 3309.34, a board of education may terminate its treasurer's four-year employment contract at the end of the year in which the treasurer attains the age of seventy or thereafter at the end of any quarter of the year, but is not required to do so.

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**To: Franklin B. Waller, Superintendent of Public Instruction, Department of Education,  
Columbus, Ohio**  
**By: Anthony J. Celebrezze, Jr., Attorney General, September 13, 1983**

I have before me your request for my opinion on the following questions:

1. If a treasurer [of a board of education] will attain the age of seventy during the term of a four-year contract, may the board of education offer less than a four-year contract, so that the contract will end at the end of the year the age of seventy is attained?
2. If a four-year contract must be issued, may a board of education terminate the individual's contract pursuant to section 3309.34 at the end of the year in which the age of seventy is attained?

Turning to your first question, I note that, as creatures of statute, boards of education have only those powers which are expressly granted by statute and those powers which may be implied therefrom. See Verberg v. Board of Education, 135 Ohio St. 246, 20 N.E.2d 368 (1939); 1981 Op. Att'y Gen. No. 81-052. Thus, a board of education is empowered to deal with its treasurer only as provided by statute.

R.C. 3313.22<sup>1</sup> reads in pertinent part:

[T]he board of education of each local, exempted village, city, and joint vocational school district at an organization meeting shall elect a treasurer who may not be a member of the board or otherwise regularly employed by the board. The treasurer shall initially serve for a two-year probationary term and thereafter, if reappointed, shall serve for a four-year term. Such treasurer may be removed at any time for cause by a two-thirds vote of the entire board. If reappointed as provided in this section the board shall execute a written contract of employment for such four-year term and each four-year term thereafter. A board of education that does not intend to reappoint its treasurer, either after the treasurer's probationary term or after a four-year term, shall give such treasurer written notification of the board's intention not later than the first regularly scheduled board meeting of October. If the board does not give such notice by the specified date, the treasurer is considered reemployed for a four-year term at a salary determined by the board at its first organizational meeting in January. (Emphasis added.)

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<sup>1</sup> R.C. 3313.22 was recently amended by Am. Sub. H.B. 291, 115th Gen. A. (1983) (eff. Dec. 28, 1983) to provide that a board of education may not employ a person as treasurer who does not hold a license issued pursuant to R.C. 3301.074. R.C. 3301.074, enacted by Am. Sub. H.B. 291 (eff. July 1, 1983), authorizes the State Board of Education to adopt rules establishing standards for licensing treasurers and provides for the revocation of such licenses by the Board if the holder of the license is found to be "intemperate, immoral, incompetent, negligent, or guilty of other conduct unbecoming to his position." Persons employed as treasurers on the effective date of R.C. 3301.074 are considered to meet the standards for licensure as a treasurer.

It is a well-established principle of statutory construction that the use of the word "shall" in a statute renders its provisions mandatory in nature. See Dorrian v. Scioto Conservancy District, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971). Thus, if a board of education wishes to reappoint its treasurer after his initial two-year probationary period has ended, R.C. 3313.22 requires the board to appoint its treasurer for a four-year term, and to execute a written contract for such four-year term. See 1958 Op. Att'y Gen. No. 2207, p. 363 (statute requiring teacher's reemployment contract to be for not less than two years nor more than five years prevailed over board's attempt to reemploy teacher for one year; reemployment contract, by operation of law, was for a period of not less than two years). See also 1953 Op. Att'y Gen. No. 2575, p. 172; 1946 Op. Att'y Gen. No. 978, p. 380.

R.C. 3313.22 contains no provision empowering a board of education to appoint its treasurer for any period other than for a four-year term (or two-year initial probationary term) or to execute a written employment contract with its treasurer for other than a four-year term, on the basis that the treasurer will reach a certain age during such four years; nor could I find any other provision of law so empowering a board of education. In interpreting a statute which is unambiguous on its face, words in the statute may not be deleted nor may words not used be inserted. See Dougherty v. Torrence, 2 Ohio St. 3d 69, 442 N.E.2d 1295 (1982); 1983 Op. Att'y Gen. No. 83-028. Thus, I am unable to find implied authority for a board of education to enter into an employment contract with its treasurer other than for a period of four years, even though the treasurer will become seventy years old during the course of the contract. R.C. 3313.22 contains no such qualification as to a treasurer's age in requiring the board to enter into a four-year employment contract with its treasurer.

Because I have concluded in response to your first question that a four-year contract must be issued to the treasurer of a school board, I turn to your second question, whether a board of education may terminate a treasurer's contract at the end of the year in which the treasurer becomes seventy years old. The treasurer of a board of education is a member of the Public School Employees Retirement System (SERS). See R.C. 3309.01(A) and (B); R.C. 3309.23. R.C. 3309.34 reads in part: "An employer may terminate the employment of a member [of SERS] at the end of the year in which the age of seventy is attained or thereafter at the end of any quarter of the year." In order to answer your second question, I must attempt to resolve the apparent conflict which appears between R.C. 3313.22 and R.C. 3309.34 when these statutes are applied to a treasurer who has attained the age of seventy during the term of his four-year employment contract. See generally Humphrys v. Winous Co., 165 Ohio St. 45, 133 N.E.2d 780 (1956); State ex rel. Adsmund v. Board of Education, 135 Ohio St. 383, 21 N.E.2d 94 (1939).

In Jacot v. Secrest, 153 Ohio St. 553, 93 N.E.2d 1 (1950), the court addressed a situation involving the predecessor to R.C. 3307.37,<sup>2</sup> G.C. 7896-34, which read:

At the end of the school year in which they become members the retirement board shall retire all teachers who were over seventy years of age at the time they became members and shall retire all other members at the end of the school year in which the age of seventy is attained, provided in each case the consent of the employer is secured.

<sup>2</sup> In 1970 Op. Att'y Gen. No. 70-075, it was concluded that a board of education could appoint a clerk (now called treasurer) to serve for a term less than the two-year probationary term specified in R.C. 3313.22, despite the language of this provision that, "[t]he clerk shall initially serve for a two-year probationary term. . . ." The discussion above raises questions concerning the continued validity of Op. No. 70-075.

<sup>3</sup> R.C. 3307.37 reads: "An employer [of a teacher] may as of the thirtieth day of June of any year terminate the contract or the employment of any member who has attained the age of seventy or who will attain the age of seventy by the following thirty-first day of August."

153 Ohio St. at 556, 93 N.E.2d at 3. In that case, a teacher with a limited contract was not informed by the board of education by the time required under G.C. 4842-8 (now R.C. 3319.11) that, he would not be reemployed, and thus was deemed reemployed under this same statute. However, after the teacher was deemed reemployed but before the period elapsed during which the teacher had the option of declining such reemployment, the board consented to the retirement of the teacher by the retirement board. In concluding that the teacher had no right to a contract with the board, the court reiterated the well-established principle that statutes existing at the time a contract is executed form a part of the contract, and must be considered in determining the validity, construction or enforcement of the contract. The court concluded, in paragraph 2 of the syllabus: "The provisions of Section 4842-8, General Code [R.C. 3319.11], with reference to the re-employment of a teacher under a limited contract are limited by and subject to the provisions of Section 7896-34, General Code [R.C. 3307.37], with reference to the retirement of teachers 70 years of age."

In State ex rel. Boda v. Brown, 157 Ohio St. 368, 105 N.E.2d 643 (1952), an individual was appointed to a four-year term on a board of elections after he had reached the age of seventy. At that time, G.C. 486-59, the predecessor of R.C. 145.32,<sup>4</sup> read in part:

On June 30 following the date upon which he becomes a member the retirement board shall retire any employee who was over seventy years of age at the time he became a member and shall retire all other members, except elective officers, on the June 30 following the date upon which the age of seventy is attained.

157 Ohio St. at 370-371, 105 N.E.2d at 645. Pursuant to this provision, the member was informed that his position on the board of elections was vacant shortly after June 30th following his appointment. The court felt that the effect of the retirement system was "to impose a qualification on the right of relator or any other individual, except an elective officer, to hold public employment after he reaches the age of 70." 157 Ohio St. at 372, 105 N.E.2d at 646. The court continued: "an officer must be qualified to hold his office not only when he is elected or appointed thereto but also throughout his term. . . . Section 486-59, General Code [R.C. 145.32], operates to disqualify relator from holding his appointive public office." 157 Ohio St. at 373, 105 N.E.2d at 646.

Although these cases do not directly deal with the question you have raised, Jacot supports the proposition that the terms of R.C. 3309.34 must be read into, and made a part of, the contract entered into between a board of education and its treasurer, and Boda supports the conclusion that, after the treasurer reaches the age of seventy, he is subject to removal from his position, even though his four-year contract has not expired. Thus, I am led to the conclusion that a board of education may terminate a treasurer's four-year contract at the end of the year in which he reaches the age of seventy.

I note that the school board is not required to terminate the treasurer's contract of employment after he reaches the age of seventy. See 1971 Op. Att'y Gen. No. 71-079. Pursuant to R.C. 3309.34, the board "may terminate" a member's employment. The use of the word "may" in a statute indicates that the provision in

<sup>4</sup> R.C. 145.32 reads in pertinent part:

An employer may, as of the thirtieth day of June of any year, terminate the employment of any member who has attained the age of seventy years. Any such employee whose employment is not so terminated shall be required to present a certification prior to the thirtieth day of June of each year by a physician. . . that the member is physically and mentally competent to perform the duties of the particular position which he occupies.

G.C. 486-59 also provided for members to continue in their employment upon certification of physical and mental competency by a physician.

which it is contained is optional, permissive, or discretionary. See Dorrian v. Scioto Conservancy District. Thus, the board has the permissive authority to terminate the treasurer's contract of employment at the end of the year in which he reaches seventy or, thereafter, at the end of any quarter of the year, but is not required to do so.

In conclusion, it is my opinion, and you are advised, that:

1. Pursuant to R.C. 3313.22, a board of education may not offer less than a four-year employment contract to its treasurer, even though the treasurer will attain the age of seventy during the term of such four-year contract.
2. Pursuant to R.C. 3309.34, a board of education may terminate its treasurer's four-year employment contract at the end of the year in which the treasurer attains the age of seventy or thereafter at the end of any quarter of the year, but is not required to do so.