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SCHOOL DISTRICT—METHOD TO DETERMINE IF UNDER EIGHT HUNDRED PUPILS—SCHOOL ENROLLMENT—CURRENT YEAR—CONTRACTS FOR TEACHERS FOR ENSUING YEAR—SECTION 7690-2 NOW 4842-8 G. C.

SYLLABUS:

The measure to be used for determining whether or not a school district is under eight hundred pupils, as the expression is used in the proviso or exception relating to contract systems in districts of under eight hundred pupils as contained in Section 7690-2 (now Section 4842-8, General Code), should be *school enrollment* for the current year wherein contracts for teachers are made for the ensuing year. 1941 Opinions of the Attorney General, No. 4204, p. 749, approved and followed.

Columbus, Ohio, July 21, 1949

Hon. Clyde Hissong, Superintendent of Public Instruction  
Columbus, Ohio

Dear Sir:

Your request for my opinion is as follows:

“A question has been submitted to our Department, and I believe we need some advice from your office before giving final answer.

"I am certain that you are aware of the fact that Sections 4842-7 and 4842-8 of the General Code, specify two types of teachers' contracts for new and beginning teachers. The one type of contract is for districts of over 800 pupils. The question arises as to when a district is considered to be over 800 pupils and when it is under 800 pupils.

"A specific case is that of Cadiz Exempted Village School District. According to data submitted, the number of resident pupils within the Cadiz School District is less than 800. However, Cadiz reports approximately 65 pupils on a tuition basis from other neighboring districts. When these tuition students are counted, the total enrollment of pupils in the Cadiz School System is more than 800. However, if only the number of pupils living within the territorial boundaries of the school district is considered, it is less than 800. Which type of contract should govern the actions of the Cadiz Board of Education?"

I believe the answer to your question involves a construction of the second proviso clause of Section 4842-8, General Code. That section reads as follows:

"Teachers eligible for continuing service status in any school district shall be those teachers qualified as to certification who within the last five years have taught for at least three years in the district, and those teachers who, having attained continuing contract status elsewhere, have served two years in the district, but the board of education, upon the superintendent's recommendations, may at the time of employment or at any time within such two-year period declare any of the latter teachers eligible.

"Upon the recommendation of the superintendent of schools that a teacher eligible for continuing service status be re-employed, a continuing contract shall be entered into between a board of education and such teacher unless the board by a three-fourths vote of its full membership rejects the superintendent's recommendation. However, the superintendent may recommend reemployment of such teacher, if continuing service status has not previously been attained elsewhere, under a limited contract for not to exceed two years, provided that written notice of the intention to make such recommendation has been given to the teacher with reasons therefor on or before the thirtieth day of April, but upon subsequent re-employment only a continuing contract may be entered into.

"Provided, however, that on or before September 1, 1941, a continuing contract shall be entered into by each board of education with each teacher holding a professional, permanent or life certificate who, at the time of the passage of this act, is completing five or more consecutive years of employment by said board.

"A limited contract may be entered into by each board of education with each teacher who has not been in the employ of the board for at least three years and shall be entered into, regardless of length of previous employment, with each teacher employed by the board who holds a provisional or temporary certificate.

"Any teacher employed under a limited contract shall at the expiration of such limited contract be deemed re-employed under the provisions of this act at the same salary plus any increment provided by the salary schedule unless the employing board shall give such teacher written notice on or before the thirty-first day of March of its intention not to re-employ him. Such teacher shall be presumed to have accepted such employment unless he shall notify the board of education in writing to the contrary on or before the first day of June, and a contract for the succeeding school year shall be executed accordingly. *Provided, however, that in school districts of under eight hundred pupils the following contract system shall control:*

"a. Beginning teachers, who have not previously been employed as a teacher in any school, shall be hired for one year.

"b. New teachers, who have had at least one year's experience as teachers in other schools, shall be employed for a period of time commensurate with their past experience at the discretion of the hiring board of education, provided that no such contract shall be for more than five years.

"c. Upon re-employment after the termination of the first contract, the new contract shall be for not less than two years nor more than five years provided that the teacher's educational qualifications have been fulfilled and the teacher's work has been satisfactory.

"d. Upon re-employment after the termination of the second contract, the teacher's contract shall be for five years and subsequent renewal thereof shall be for five-year periods, or the board of education may at any time grant a continuing contract."

(Emphasis added.)

In the case of *State ex rel. Bishop v. Board of Education of Mt. Orab Village School District*, 139 O. S. 427, the court in the fifth branch of the syllabus held:

"The second proviso of Section 7690-2, General Code, relating to a contract system in school districts of less than eight hundred pupils, has reference to beginning teachers, new teachers and to their re-employment, and is without application to a certificated teacher completing five or more consecutive years of employment in such a school district."

The question remains, however, as to what is meant by the phrase, "less than 800 pupils." Does it mean less than 800 resident pupils in the school district or does it mean less than 800 pupils, considering the total enrollment?

In 1941, the then Attorney General in Opinion No. 4204, at page 749, said in the fourth branch of the syllabus:

"The measure to be used for determining whether or not a school district is under eight hundred pupils, as the expression is used in the proviso or exception relating to contract systems in districts of under eight hundred pupils as contained in Section 7690-2 (now Section 4842-8), should be *school enrollment* for the current year wherein contracts for teachers are made for the ensuing year." (Parenthetical matter and emphasis mine.)

The reasons for the above conclusion are set out at pages 757 to 759 of the 1941 Opinion and read as follows:

"The legislative intent, which of course, controls in the interpretation of statutory enactments, as to what is meant by 'school districts of under eight hundred pupils' as the expression is used in the above proviso or exception is somewhat obscure, to say the least. There is nothing in the statute itself to indicate in any way what is determinative of whether or not a district is under eight hundred pupils, nor are there any related statutes that are at all helpful as there exists nowhere in the statutory law of Ohio any classification of school districts on the basis of number of pupils unless the provision with respect to the distribution of the state public school fund on the basis of average daily attendance may be regarded as a classification of school districts on the basis of number of pupils. It apparently was the purpose of the Legislature to provide differently for a 'contract system' in the smaller districts than the system provided for school districts generally in the Act exclusive of the exception. Just why the dividing line was made 'districts having under eight hundred pupils' is immaterial. It is clear that it was so made and that the classification relates to local districts and not county districts as local boards of education hire the teachers and not the county boards of education. That fact however, affords no guide whatever as to the manner of determining when a district is under eight hundred pupils. In the only instances where number of pupils in a school district is looked to for any purpose, the number is determined by school enumeration, school enrollment or average daily attendance. By consideration of the times and manner of making such determinations we may by a process of elimination arrive at the most probable intent of the Legislature as to the meaning of the expression, 'districts of under eight hundred pupils.'

“Enumeration of the school youths in a district as made by virtue of Section 7794, General Code, is made annually during the four weeks ending on the fourth Saturday of May of each year, and consists generally of the tabulation of all resident youths in the district between the ages of five and eighteen years, whether they attend public or private schools. Section 7681, General Code, provides that the schools of each district shall be free to all youth in the district between six and twenty-one years of age who are children, wards or apprentices of actual residents of the district. In some districts kindergartens are maintained where children who are under six years of age attend the classes. Whether or not such schools are maintained, and the age limits for attendance therein are matters of local regulation. It would not seem to be reasonable to suppose that the Legislature had in mind ‘enumeration’ when it provided the contract system for districts of under eight hundred pupils as the result of an enumeration of school youths does not reflect the number of public school pupils actually in the district.

“Moreover, teachers are usually employed sometime before the fourth Saturday in May, the time fixed for the completion of the enumeration, although as a matter of fact an enumeration is not completed in many districts until considerably later. It is oftentimes advisable to employ teachers earlier than that date. They may be employed for the ensuing school year as early as February of a calendar year. See Section 7691, General Code.

“It would not seem consistent with a reasonable legislative intent to think that the Legislature meant the enumeration of school youths to be the criterion by which it should be determined whether or not a school district was under eight hundred pupils, and thus have its contract system controlled by the exception above mentioned.

“For a somewhat similar reason ‘average daily attendance’ may be eliminated as ‘average daily attendance’ can not be determined until school sessions for a year are ended. Usually, this is the latter part of May and sometimes the early part of June. The Legislature should not be charged with having intended that the determination of whether or not a district is under eight hundred pupils and thus have the manner of employment of its teachers postponed until so late a date as it is not consistent with efficient and proper school administration in many instances at least, to wait until so late a date to employ teachers for the following school year.

“This leaves ‘enrollment’ which I believe is the proper measure to be applied to determine whether or not a school district is under eight hundred pupils. Of course, there is no way of determining enrollment for an ensuing school year for which teachers are to be employed. The current enrollment for the year within

which the teachers are employed for the ensuing school year should control.”

The only other authority I have been able to find is a Pennsylvania decision, 127 A. L. R. 1320, wherein a similar situation was under consideration and it was held:

“The provision of the Teachers’ Tenure Act of Pennsylvania for termination of a teacher’s tenure contract upon a natural decrease in the number of students refers generally to enrollment in a course, school, or school district; and when there is a decrease of students in a course due to establishment of another department, such a decrease is one due to natural causes, \* \* \*” *Jones v. Holes* (1939) 334 Pa. 538, 6 A (2d) 102.

The view that enrollment should serve as the guide and not the number of resident pupils is in my opinion the better view. It would seem that the teacher’s position should be considered. Many illustrations could be cited where discrimination might result if school residence was the criterion. Thus, for example, let us assume a school district of 801 resident pupils with a total enrollment of 801 pupils and another school district of 799 resident pupils with a total enrollment of 1,000 pupils. A beginning teacher in the former instance would have an advantage under the contract system over a beginning teacher in the latter example, using residence rather than enrollment as a guide, yet the teacher in the latter example would be undertaking more responsibility and more work than the former.

For these reasons, it is my opinion that the measure to be used for determining whether or not a school district is under eight hundred pupils, as the expression is used in the proviso or exception relating to the contract system in districts of under eight hundred pupils as contained in Section 4842-8 General Code, should be school enrollment for the current year wherein contracts for teachers are made for the ensuing year. I approve and follow the opinion of the Attorney General for 1941.

Respectfully,

HERBERT S. DUFFY,  
Attorney General.