

OPINION NO. 71-079

Syllabus:

A board of education may not by regulation make it mandatory that its employees retire at any earlier age than 70 as provided in Sections 3307.37 and 3309.34, Revised Code.

To: G. William Brokaw, Columbiana County Pros. Atty., Lisbon, Ohio
By: William J. Brown, Attorney General, November 18, 1971

This office was requested by your predecessor to render an opinion as to whether a local school district board of education may adopt a rule requiring mandatory retirement at an earlier age than 70 for all classes of its employees. The question arises because of the policy of one local board of education within your jurisdiction which requires mandatory retirement for its bus drivers at 60 and for all other employees at 65. Conflicting views as to the legality of this policy have been presented to the board.

The pertinent provisions of the Revised Code reveal a clear legislative intent to fix the mandatory retirement age of school employees at 70 years of age. Section 3307.37, Revised Code, applicable to teachers, as members of the State Teachers Retirement System, provides as follows:

"An employer 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."

Other employees of a school board, as members of the School Employees Retirement System, are covered by Section 3309.34, Revised Code, which provides, in pertinent part, as follows:

"An employer may terminate the employment of a member 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."

Since the General Assembly has given the boards of education the discretion to terminate the services of any employee only after he has reached the age of 70, it is clear that the boards may not force the retirement of an employee at an earlier age simply because he has reached that age. Compare Opinion No. 527, Opinions of the Attorney General for 1951.

It is true that the General Assembly, recognizing the necessity for rules and regulations for proper management of the schools, has given the boards of education a rule-making authority. Section 3313.20, Revised Code, reads, in part, as follows:

"The board of education shall make such rules and regulations as are necessary for its government and the government of its employees, pupils of its schools, and all other persons entering upon its school grounds or premises. * * *"

And Section 3313.47, Revised Code, provides, in pertinent part, as follows:

"Each city, exempted village, or local board of education shall have the management and control of all of the public schools of whatever name or character in its respective district. * * *"

It is also true that the Supreme Court has held that the authority conferred upon a board of education to adopt rules and regulations to carry out its statutory functions vests in the board a broad discretion with which the courts will not interfere in the absence of abuse. Greco v. Roper, 145 Ohio St. 243, 248-250 (1945)

On the other hand, such boards are created by statute and have only such powers as have been granted to them expressly or by necessary implication. They may not exceed specific limits upon their authority. In Verberg v. Board of Education, 135 Ohio St. 246 (1939), the Board of Education for the Cleveland City School District had adopted a mandatory retirement resolution practically identical with that stated in your predecessor's letter. The Supreme Court, holding that the board had exceeded its statutory authority, said, at pages 249 and 250, as follows:

"There is no statute authorizing boards of education, by resolution or otherwise, to fix and determine the tenure of office of their employees in the classified service or to alter or modify general statutory provisions affecting the age of involuntary retirement of such employees from service. Under the provisions of Section 7896-99, General Code [now Section 3309.34, Revised Code], a section of the retirement act, an employee may retire at sixty years of age * * * and is required thereby to retire at seventy years of age. * * * Although possibly contributing to cause inefficiency, age in itself, regardless of merit and efficiency, is not made a ground for removal.
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"* * * Obviously, the effect of the action in question, if permitted, would be to authorize the dismissal of employees who are in the classified service for reasons and upon grounds other than and in addition to those enumerated in the statute, unrestricted by the requirements of procedure prescribed by statute.

"The board of education has no such authority. * * *"

Although the Verberg case, supra, speaks specifically only

of members of the classified service, non-classified employees of the boards of education are afforded the same protection under Section 3309.34, supra.

In view of the foregoing, the earlier case of Harrison v. Board of Education, 60 Ohio App. 45 (1938), which had upheld the mandatory retirement resolution of the Cleveland Board of Education, has been overruled.

In specific answer to your predecessor's question it is my opinion, and you are so advised, that a board of education may not by regulation make it mandatory that its employees retire at any earlier age than 70 as provided in Sections 3307.37 and 3309.34, Revised Code.