

1513.

SCHOOLS—APPOINTMENT OF SUPERVISOR AND TEACHER OF HYGIENE BY BOARD OF EDUCATION FOR TERM OF FOUR YEARS, IN PLACE OF SCHOOL PHYSICIAN, IS ILLEGAL—SEE SECTION 7692 G. C. FOR DUTIES OF SCHOOL PHYSICIAN—WHEN BOARD OF EDUCATION OF CITY SCHOOL DISTRICT REQUIRED TO MAKE APPOINTMENTS FROM CIVIL SERVICE LIST.

1. *The appointment of a supervisor and teacher of hygiene by a board of education for a term of four years, in the place of the school physician provided by law (7692 G. C.), is illegal. Boards of education cannot change the title of a statutory position while the duties remain the same, in order to increase the time of tenure.*

2. *The duties of the school physician in a school district are clearly set forth in section 7692 G. C. et seq., and a person performing such duties authorized by the statutes can be appointed for a term of but one year and may be discharged at any time by the employing board.*

3. *The board of education of the city school district of Dayton is compelled, under the civil service act of the state, to make its appointments of employes of the board from eligible lists prepared by the civil service commission of the city of Dayton, including all positions which are not specifically exempted by the civil service act of Ohio.*

COLUMBUS, OHIO, August 24, 1920.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Acknowledgment is made of the receipt of your letter reading as follows:

“We are referring you to copy of records and communication submitted to this office by a school examiner of this bureau, same being now in your possession.

Question 1. Can the supervisor or teacher of hygiene herein described legally be appointed for a period of four years?

Question 2. Should such appointment legally be made by civil service procedure?

Question 3. Under the civil service laws of the state, is not the board of education of the city of Dayton obliged to make appointments in the classified service by proper procedure through the civil service commission of the city of Dayton, Ohio?”

An analysis of the records submitted by you in connection with your request shows that Dr. L. F. B. was elected to the board of education from a ward in the city of Dayton in November, 1909, for a term of four years, and was sworn in as a member January 3, 1910; he was appointed as “Medical Inspector” May 12, 1910, for one year beginning September 1, 1910, at \$2,000.00 per annum; reappointed medical inspector May 25, 1911, for two years at \$2,500.00 per annum; reappointed medical inspector May 1, 1913, for four years at \$2,500.00 per annum; reappointed medical inspector May 24, 1917, for three years at \$3,600.00 per annum. On September 18, 1919, a little over two years after his last election as medical inspector on May 24, 1917, Dr. B. was named as “Supervisor and Teacher of Hygiene” for four years, the appointment to date from September 22, 1919. The resolution adopted by the board of education of the city school district of Dayton on September 18, 1919, reads as follows:

“Resolved, That a department of physical education be created which shall teach and supervise the teaching of hygiene and concern itself with the physical welfare of the entire student body of the grade, high and special schools and which shall be known as the department of school hygiene.

To direct this department, a supervisor and teacher of hygiene shall be appointed. His duties shall be:

- (1) Teach hygiene.
- (2) Supervise physical training in the grade and high schools.
- (3) Supervise the medical inspection of school children, the work of the dental clinic, the work of the school nurses.
- (4) Examine children.
- (5) Make regular sanitary inspections of all school buildings.
- (6) Maintain office hours on all school days.

I hereby appoint, subject to your approval, Dr. L. F. B. as supervisor and teacher of hygiene for the remainder of the school year 1919-1920, and for the school years 1920-1921, 1921-1922, 1922-1923, the appointment to date from September 22, 1919.

(Signed), FRANK W. MILLER,
Superintendent of Instruction.

Resolved, That the salary of Dr. L. F. B. be fixed at \$4,000.00 annually, to be paid in twenty-four semi-monthly installments.”

The records further show that Dr. L. F. B., who had been a member of the board of education until April 28, 1910, and thereafter occupied the position only of medical inspector until September 23, 1919, was given a city elementary teacher's certificate and a city high school teacher's certificate, both issued as of September 12, 1919, and both expiring as of September 1, 1922.

From the above records it will be noticed that while Dr. L. F. B. was elected as supervisor and teacher of hygiene for a term of four years expiring on September 22, 1923, his certificates granted by the board of city school examiners expire one year before, that is, September 1, 1922.

It is the contemplation of the law that a teacher must have a certificate on file with the clerk of the board of education covering the entire time for which the teacher has been employed, as indicated in section 7786 of the General Code, which reads as follows:

“No clerk of a board shall draw an order on the treasurer for the payment of a teacher for services until the teacher files with him such reports as are required by the superintendent of public instruction and the board of education, a legal certificate of qualification, or a true copy thereof, covering the entire time of the service, and a statement of the branches taught. But orders may be drawn from the payment of special teachers of drawing, painting, penmanship, music, gymnastics, or a foreign language, on presentation of a certificate to the clerk, signed by a majority of the examiners, and the filing with him of a true copy thereof, covering the time for which the special teacher has been employed, and the specialty taught.”

It may be said that if a person is a teacher in the full sense of the word he can be appointed for a period of not exceeding four years, for section 7691 G. C. reads in part as follows:

“No person shall be appointed as a teacher for a term longer than four school years, nor for less than one year, * * *.”

This section of the statutes can apply in a city school district, but a different rule obtains in village and rural school districts, as provided for in section 7705 G. C.

Section 7691, *supra*, must mean a teacher, as such term is recognized in the dictionaries and under present Ohio law, and advantage of said section could not be taken by a person who nominally took the name of "teacher" and yet performed other duties, such as, for instance, the statutory duties of "school physician," as set out in sections 7692, 7692-1, 7692-2 and 7692-4 G. C. (103 Ohio Laws, p. 864). If the teacher of hygiene above referred to is a teacher, then necessarily he must be certificated under the laws of the state as provided in sections 7830, 7831, 7831-2 and 7840 G. C.

As indicated heretofore, Dr. L. F. B. was granted certificates, both elementary and high school, by the city board of school examiners, presumably after proper examination and in full compliance with the law. The records indicate that these were city elementary and city high school certificates and not certificates covering a special subject, though the resolution of employment provides that he shall teach "hygiene" and does not mention any other subjects that shall be taught by him in either the high schools or the elementary schools of the city school district.

The special subjects provided for in the curriculum of Ohio schools appear in section 7832 G. C., which reads as follows:

"No person shall be employed and enter upon the performance of his duties as a special teacher of music, drawing, painting, penmanship, gymnastics, German, French, Spanish, the commercial and industrial branches, or any one of them, in any elementary or high school supported wholly or in part by the state in any city, village, or rural school district, who has not obtained from a board of examiners having legal jurisdiction a certificate of good moral character that he or she is qualified to teach the special branch or branches of study, and, in addition thereto, possesses an adequate knowledge of the theory and practice of teaching."

It will be noted from the above that the special subjects recognized under Ohio law are specifically named, and "hygiene" is not one of them, such latter subject being presumed to be a branch of physiology, which is both a common school branch and a high school branch.

"A board of education cannot add to its study curriculum a branch for which there is no warrant of law. * * *"

(Opinion No. 396, Opinions of Attorney General for 1919, Vol. I, p. 653).

As indicated heretofore, section 7786 provides that the certificate held by a special teacher, teaching special subjects, must cover the entire time employed. An examination of the papers submitted in this case, both by the bureau and by the clerk of the board of education, who has answered a questionnaire submitted to him, shows that the duties assumed by Dr. L. F. B. after he received his new title "as supervisor and teacher of hygiene" were very little different than those he had performed in the approximate ten years before when he was known as "medical inspector," though his duties were the same as those performed in other school districts by the school physician provided for in sections 7692 et seq. Thus, in answer to the question:

"What were the specific duties performed during that time by Dr. B. as school physician in such district?"

the clerk of the board of education made official reply to such question as follows:

"Dr. B. examined all pupils for physical defects and through the nurses notified the parents of such defects with advice as to their treatment. He also gave a limited amount of instruction to pupils in hygiene and made sanitary inspections in all school buildings."

In answer to the question as to what specific additional duties were assumed and performed by Dr. B. that were not performed by him formerly as school physician, the clerk answered as follows:

"On the appointment of Dr. B., two assistant physicians were employed on half time who took over most of the medical inspection work. The majority of his time is given to teaching and supervising the teaching of hygiene. He has supervision of all physical training and athletic activities."

In answer to the question:

"What hours of actual teaching are performed by Dr. B. and what specific subjects in either the elementary or high school curriculum does he teach?"

the clerk made reply:

"Dr. B. gives instruction to children in physiology and hygiene for about four months of the school year. He gives instruction and supervision in the teaching of physiology and hygiene to teachers and normal school students for about two months. The remaining four months are used in medical inspection, sanitation and supervision of athletics. A total of approximately one month is given to supervision of athletics."

In answer to this direct question:

"Does the city school district of Dayton still maintain the position of school physician as required by Ohio law?"

the clerk said:

"See resolution adopted by board of education September 18, 1919.",
(which resolution has been heretofore quoted).

The minutes of the board of education of the city of Dayton also show that on September 18, 1919, when Dr. B. was appointed by resolution to be supervisor and teacher of hygiene for four years, there were also appointed Drs. W. B. and F. J. D.

"as part time medical inspectors for the remainder of the school year 1919-1920. The appointments to date from September 29, 1919. Their duties shall be such as the supervisor of hygiene directs."

It will be noted that the clerk in his answer above cited referred to these two additional employes as "two assistant physicians," indicating that if they were assistant physicians then they were assistants to some person who was the main physician

or the physician in charge of such medical inspection work. This is further indicated by the language of the appointment above quoted, which says that they are "part time medical inspectors" and "their duties shall be such as the supervisor of hygiene directs."

It would appear from an examination of the duties placed upon the supervisor and teacher of hygiene herein referred to that his duties are very largely the same as those provided for in sections 7692, 7692-1, 7692-2 and 7692-4 G. C., which read as follows:

"Sec. 7692. Each and every board of education in this state may appoint at least one school physician; provided two or more school districts may unite and employ one such physician, whose duties shall be such as are prescribed in this act. Said school physician shall hold a license to practice medicine in Ohio. School physicians may be discharged at any time by the appointing power whether the same be a board of education or of health or health officer, as herein provided. School physicians shall serve one year and until their successors are appointed, and shall receive such compensation as the appointing board may determine. Such boards may also employ trained nurses to aid in such inspection in such ways as may be prescribed by the board. Such board may delegate the duties and powers herein provided for to the board of health or officer performing the functions of a board of health within the school district if such board or officer is willing to assume the same. Boards of education shall co-operate with boards of health in the preventing of epidemics."

Sec. 7692-1. School physicians may make examinations and diagnosis of all children referred to them at the beginning of every school year and at other times if deemed desirable. They may make such further examination of teachers, janitors and school buildings as in their opinion the protection of health of the pupils and teachers may require. Whenever a school child, teacher or janitor is found to be ill or suffering from positive open pulmonary tuberculosis or other contagious disease, the school physician shall promptly send such child, teacher, or janitor home, with a note, in the case of the child, to its parents or guardian, briefly setting forth the discovered facts, and advising that the family physician be consulted. School physicians shall keep accurate card index records of all examinations, and said records, that they may be uniform throughout the state shall be according to the form prescribed by the state school commissioner, and the reports shall be made according to the method of said form; provided, however, that if the parent or guardian of any school child or any teacher or janitor after notice from the board of education shall within two weeks thereafter furnish the written certificate of any reputable physician that the child, or teacher or janitor has been examined, in such cases the services of the medical inspector herein provided for shall be dispensed with, and such certificate shall be furnished by such parent or guardian from time to time, as required by the board of education. Such individual records shall not be open to the public and shall be solely for the use of the boards of education and health or other health officer. If any teacher or janitor is found to have positive open pulmonary tuberculosis or other communicable disease, his or her employment shall be discontinued upon expiration of the contract therefor, or, at the option of the board, suspended upon such terms as to salary as the board may deem just until the school physician shall have certified to a recovery from such disease."

"Sec. 7692-2. The state school commissioner and the state board of

health, shall jointly pass rules for the detailed enforcement of the purposes of this act, which rules shall bear the seals of said board and commissioner, the said rules to be printed and promulgated by the state printer; promulgation to consist in supplying a reasonable number of copies to each school superintendent, from whom all that are interested may receive copies."

"Sec. 7692-4. Each board of education by the affidavit of an officer thereof or otherwise shall prove to the satisfaction of the state school commissioner that it has complied with the requirements of sections seven thousand six hundred and ninety-two, seven thousand six hundred and ninety-two-one, and seven thousand six hundred and ninety-two-two, of the General Code."

Apparently the only difference between the duties performed by the persons herein mentioned and those duties mentioned in the sections quoted are—

- (1) Teach hygiene
- (2) Supervise physical training in the grade and high schools.

Relative to (2), that is covered by another section of the General Code, (section 7721), which reads as follows:

"Physical training shall be included in the branches regularly to be taught in public schools in city school districts, and in all educational institutions supported wholly or in part by money received from the state. Boards of education of city school districts, and boards of such educational institutions must make provisions in the schools and institutions under their jurisdiction for teaching physical training, and adopt such methods as will adapt it to the capacity of pupils in the various grades therein. Other boards may make such provisions. The curriculum in all normal schools of the state shall contain a regular course on physical education."

Seemingly, there is no connection whatever, as far as the statutes are concerned, between the teaching of physical training (7721) and those duties taken over by the "school physician." The sections are widely separated in the statutes, section 7721 G. C. having been enacted in 97 Ohio Laws, 364, and section 7692 G. C. et seq. having been enacted in 103 Ohio Laws, 864. In spite of this, however, the board of education of the city of Dayton apparently ignored the fact that these activities were separate as contemplated under the law, and combined the same under one head to be known as the "Supervisor and Teacher of Hygiene."

It may be pointed out that Dr. B. during the year 1913 was not eligible to be employed as school physician or the "medical inspector," which is the same thing, for the reason that section 7692-3 G. C. reads as follows:

"No member of the board of education in any district in this state shall be eligible to the appointment of school physician *during the period for which he or she is elected.*"

As pointed out heretofore, Dr. B. was sworn in as a member of the board of education on January 3, 1910, and his term therefore would have ended in January, 1914; yet on May 1, 1913, he was reappointed medical inspector for four years at a salary of \$2,500.00, which appointment was made "during the period for which he * * * is elected." This section of the law was enacted on May 13, 1913, (and of course governed a part of that year, which was a part of the term for which Dr. B.

was elected). As far as the law is concerned after 1913 his eligibility to the position of school physician could not be questioned, but his election or eligibility during 1913 could be seriously questioned.

Referring to section 7692 providing for the appointment of at least one school physician by each and every board of education, it is noted that the duties are there set out very clearly, especially in the sections which follow, but such school physician can serve but one year and may be discharged at any time by the appointing power. It is important also to note that section 7692 provides that where the board does not appoint a school physician

“Such board may delegate the duties and powers herein provided for to the board of health or officer performing the functions of a board of health within the school district if such board or officer is willing to assume the same.”

Nothing appears that will give any authority for the board of education to delegate the powers of a school physician to a so-called department in the local school system to be presided over and controlled by one who has been certificated as a teacher. Further, it may be said that while section 7692 provides that the board of education may appoint the school physician, section 7692-4 seems to indicate that this duty is mandatory, for this latter section provides that

“Each board of education by the affidavit of an officer thereof or otherwise *shall prove* to the satisfaction of the state school commissioner (superintendent of public instruction) *that it has complied* with the requirements of sections seven thousand six hundred and ninety-two, seven thousand six hundred and ninety-two-one, and seven thousand six hundred and ninety-two-two, of the General Code.”

It is not believed that the board of education has authority to detail these duties to some other person than the one provided for by law, and the law plainly says that the duties which seemingly are now being performed by the supervisor and teacher of hygiene in the city school district of Dayton are the duties of a school physician as provided by law.

“It is not believed that the vocation bureau in the public school system of the city of C. can be called a department in its full legal sense * * *.”

“It is not the contemplation of the civil service law that any board, commission or head of a department shall create a number of subdivisions covering minor activities and then call them departments * * *.”

“There is a tendency, when any new activity is started in a public school system or otherwise, to call the head of such activity a director, a supervisor or some other title chosen on the spur of the moment, as fitting the case; but the law can take no notice of such titles but must consider the words director, superintendent, principals and teachers in the light of other sections of the statutes which give a clear view as to what class of persons are the ones that are meant when these terms are used.”

“Teachers’ certificates are granted only to teachers on the presumed basis that they are teaching or belong to that profession, and certificates must be issued by examining boards in strict compliance with the statutes, and a person to be classed as a teacher on a payroll in a city school district must be engaged in teaching and not other activity * * *.”

(Opinion No. 945, issued January 15, 1920).

That the changing of the title of a physician or employment, without particularly changing the duties thereof, is contrary to the intentment of the law is well illustrated in the rules of the state civil service commission, speaking of the classified service, as follows:

Rule III.

"Section 2. Titles of all positions in the classified service shall be as nearly as possible descriptive of duties attached thereto, and indicative of the character thereof, and shall be the same for all offices and places requiring the same kind of service, regardless of location of employment. A change of title shall not operate to remove an officer or employe from the classification or grade of his position unless the duties of the position are changed."

Coming to your second question, which reads

"Should such appointment legally be made by civil service procedure?"

you are advised that it is the opinion of this department that the person designated as supervisor and teacher of hygiene is in reality the school physician of the city school district of Dayton, and therefore falls within the language of section 7692, supra, which provides specifically for a term of one year and that he may be discharged at will by the employing board. The intent of the general assembly seems to have been that with the changes which might occur in a board of education, the board each year should have some leeway as to who should be the school physician and therefore there was fixed a specific term with the power to discharge at any time.

An examination of the facts shows that Dr. B. was elected by a board of education in his city school district, which board retired almost as a whole in January, 1920, and such board was succeeded by a new board elected by the people at the November election, 1919, there having been enacted at the last session of the legislature a new school board act applying to the city of Dayton reducing the number of members of the board of education from fourteen to seven. It thus appears that in giving to Dr. B. an appointment for four years from the fall of 1919 the retiring board of education practically blanketed the entire term of office of the newly elected board, and in fact did blanket the two years of the short term members, three in number, who retire in 1922. The effect of this would be that the newly elected board of education would have had their school physician employed by a retiring board, which provided that his duties should be under another name, although in reality they were the same. Since the supervisor is performing the duties of school physician, for which a definite term is provided with the right to discharge at will, such appointment can not be made by civil service procedure.

Your third question reads:

"Under the civil service laws of the state, is not the board of education of the city of Dayton obliged to make appointments in the classified service by proper procedure through the civil service commission of the city of Dayton?"

The answer to this question is in the affirmative, having been covered in several prior opinions of this department.

Attention is invited to the following prior holdings of the attorney-general:

"The civil service commission of a city has control and supervision of the city school district in which said city is located.

Janitors of school buildings are in the classified service under the provisions of section 486-8, subdivision b, G. C., as amended 106 O. L. 418."

(Opinion No. 1229, Opinions of Attorney-General, 1916, Volume I, p. 185)

"The term "civil service" includes all offices and positions of trust or employment in the service of the state and the counties, cities and city school districts thereof."

This paragraph specifies what offices, positions and employments are included in the civil service law of the state and it is exclusive. It will be observed that it does not include offices or positions in villages or village school districts."

(Opinion No. 1772, Opinions of Attorney-General, 1916, Volume II, p. 1186.)

"A physician employed by the county commissioners under section 2546 of the General Code is not under the civil service laws."

(Opinion No. 154, Opinions of Attorney-General for 1917, Volume I, p. 394.)

"The money necessary to carry out the provisions of the civil service act in a city and city school district is to be appropriated by the council and paid from the city treasury. The board of education has no authority to contribute thereto out of the funds of the school district."

(Opinion No. 1124, Opinions of Attorney-General for 1918, Volume I, p. 523.)

"1. Under section 486-19 G. C. the municipal civil service commission in each city in the state is the civil service commission of the city school district in which such city is located, and such municipal civil service commission has authority to conduct examinations for all positions and employments under the board of education of such city school district unless the positions clearly come within the exemptions mentioned in section 486-8 General Code.

2. In city school districts all persons in the employ of the board of education of such city school district are in the classified civil service unless they are directors, superintendents, principals, instructors or teachers, as provided in paragraph 7 of section 486-8 of the General Code.

* * * *

4. In any city school district of the state it is unlawful for the fiscal officer of such city school district to issue any warrant on the disbursing officer of such city school district to pay any salary or compensation to any employe in the classified service, unless such payroll has been approved by the municipal civil service commission of the city in which such city school district is located, as provided in section 486-21."

(Opinion No. 945, issued January 15, 1920).

" * * * the state, while granting wide powers to charter cities in other matters, has ever kept control of the public school system and all boards of education are operating under the laws of the state, * * *"

(Opinion No. 396, Opinions of Attorney-General for 1919, Volume I, p. 653.)

Based upon the facts presented and the sections of the statutes quoted, it is therefore the opinion of the attorney-general that

(1) The appointment of a supervisor and teacher of hygiene by a board of education for a term of four years in the place of the school physician provided by law (7692 G. C.) is illegal. Boards of education can not change the title of a statutory position while the duties remain the same, in order to increase the time of tenure.

(2) The duties of the school physician in a school district are clearly set forth in section 7692 G. C. et seq., and a person performing such duties authorized by the statutes can be appointed for a term of but one year and may be discharged at any time by the employing board.

(3) The board of education of the city school district of Dayton is compelled, under the civil service act of the state, to make its appointments of employes of the board from eligible lists prepared by the civil service commission of the city of Dayton, including all positions which are not specifically exempted by the civil service act of Ohio.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1514.

DISAPPROVAL, FINAL RESOLUTIONS FOR ROAD IMPROVEMENTS IN
MAHONING AND HOCKING COUNTIES.

COLUMBUS, OHIO, August 24, 1920.

HON. A. R. TAYLOR, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—Enclosed I return without my approval the following resolution sent me, among others, with your letter of August 21, 1920:

North Lima-East Palestine road, I. C. H. No. 89, section N-2, Mahoning county.

I note that the auditor's certificate of funds on hand is dated August 13, 1920; whereas it appears by the certificate of the clerk of the board of county commissioners that the commissioners undertook to pass their resolution on the 6th day of August, 1920. By reason of the provisions of sections 5660 and 1218 G. C., the certificate of the auditor should be made on the same day or prior to the date on which the final resolution is passed.

I also return without my approval the following final resolution which I find attached to those enclosed with your letter of August 21, 1920, although not noted in said letter:

Logan-Chillicothe road, I. C. H. No. 363, section N, Hocking county.

I note that the county auditor undertakes to change the form of the certificate provided to be signed by him in connection with the final resolution, so that said certificate shows that bonds will be offered for sale after September 1, 1920, and that local banks have agreed to purchase them. Such an arrangement by no means comes within the terms of section 5660 relative to "bonds sold and in process of delivery."

Respectfully,
JOHN G. PRICE,
Attorney-General.