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POSITIONS OF SUPERINTENDENT OF PUBLIC INSTRUCTION, ASSISTANT SUPERINTENDENT OF PUBLIC INSTRUCTION, STATE DEPARTMENT OF EDUCATION WILL BE ABOLISHED JANUARY 3, 1956— AM HB 212, 101 GA—INCUMBENTS MAY BE TEMPORARILY RETAINED BY BOARD IN SERVICE OF DEPARTMENT UNTIL BOARD APPOINTS SUPERINTENDENT, ONE OR MORE ASSISTANT SUPERINTENDENTS AND DIVISION HEADS—ALL TO SERVE AT PLEASURE OF STATE BOARD OF EDUCATION—TEMPORARY RETENTION NOT AUTOMATIC—MAY BE ACCOMPLISHED ONLY BY AFFIRMATIVE ACTION OF BOARD—SECTIONS 3301.04, 3301.08, 3301.13 RC.

SYLLABUS:

Under the provisions of Amended House Bill No. 212, 101st General Assembly, the positions of superintendent of public instruction, assistant superintendent of public instruction, and all division heads in the state department of education as presently constituted, will be abolished on January 3, 1956. The then incumbents of such positions may be temporarily retained by the board in the service of the department as authorized by Section 3301.04, Revised Code, until the board appoints a superintendent, one or more assistant superintendents, and such number of division heads as the board deems necessary, as provided in Sections 3301.08 and 3301.13, Revised Code, all of whom will serve at the pleasure of the state board of education as provided in such sections. Such temporary retention is not automatic and may be accomplished only by affirmative action of the board.

Columbus, Ohio, December 22, 1955

Hon. R. M. Eyman, Superintendent of Public Instruction
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“I would respectfully call your attention to Amended House Bill 212, enacted by the 101st General Assembly of Ohio, with particular reference to Sections 3301.04, 3301.08 and 3301.13 of the Revised Code, and also to Section 3301.01 of the Revised Code as it existed prior to the amendment of the same by the enactment of Amended House Bill No. 212.

"In September, 1954, a vacancy occurred in the office of the Superintendent of Public Instruction or Director of Education by reason of the resignation of the person then serving in those positions. Acting under the authority of Section 3301.01 prior to its amendment, Governor Lausche on September 8, 1954, appointed me to fill this vacancy. A copy of this appointment is attached hereto. This appointment was later confirmed by the Senate.

"You will recall that before the enactment of Amended House Bill No. 212, the appointment of the directors of the several divisions in the State Department of Education was in accordance with and subject to Ohio Civil Service Regulations. Under the provisions of Section 3301.13, paragraph 5, of the Revised Code, the appointment, number, and salaries of assistant superintendents and division heads shall now be determined by the State Board of Education. Section 3301.04 of the Revised Code also states that the State Board of Education may continue to employ and determine the salary of any person holding any position or office in the Department of Education as such department was in existence immediately prior to January 3, 1956.

"In view of all of the above data, I shall appreciate it if you will let me have your informal opinion in answer to the following questions:

"1. What is the official status of the following employees in the Department of Education as of January 3, 1956?

- a. Superintendent of Public Instruction.
- b. Assistant Superintendent of Public Instruction.
- c. Each of the Directors of the twelve divisions in the Department of Education.

"2. Must the State Board of Education take some action on January 3, 1956, in order for any or all of the individuals named above to continue as employed personnel in the Department of Education subsequent to January 3, 1956, or do they automatically continue in their present positions unless and until the State Board of Education takes some action discontinuing their services."

Confining our attention initially to the provisions of presently existing statutes, it will be seen that the department of education is created in Section 121.02, Revised Code, in the following language:

"The following administrative departments and their respective directors are hereby created: * * *

"(I) The department of education, which shall be administered by the superintendent of public instruction as director thereof; * * *"

In Section 121.03, Revised Code, provision is made for the appointment of the directors of the several state departments created by Section 121.02, *supra*, but the appointment of the director of the department of education is separately provided in Section 3301.01, Revised Code, as follows:

“There shall be a superintendent of public instruction, appointed by the governor, who shall act as the director of education.

“The superintendent, while holding such office, shall not perform the duties of teacher or superintendent of a public or private school, or be employed as teacher in a college, or hold any other office or position of employment. He may, in the conduct of his official duties, travel within or without the state, and his necessary and actual expenses therefor when properly verified shall be paid by the state.”

As to the assistant superintendent of public instruction, because I find no special statutory provision for this office I assume that it exists by virtue of the following provisions of Section 121.05, Revised Code:

“In each department there shall be an assistant director, who shall be designated by the director to fill one of the offices within such department, enumerated in Section 121.04 of the Revised Code, or as the head of one of the divisions created within such department so authorized by section 121.07 of the Revised Code. When a vacancy occurs in the office of director of any department, the assistant director thereof shall act as director until such vacancy is filled.”

The appointment and term of office of such assistant directors is provided for in Section 121.06, Revised Code, as follows:

“The officers mentioned in sections 121.04 and 121.05 of the Revised Code shall be appointed by the director of the department in which their offices are respectively created, and shall hold office during the pleasure of the director.”

As to the directors of the twelve divisions, referred to in your inquiry, I find only one office of the chief of division, viz., division of film censorship, created in the department by the terms of Section 121.04, Revised Code, and so assume that the remaining offices were created under authority of Section 121.07, Revised Code, which provides:

“The officers mentioned in sections 121.04 and 121.05 of the Revised Code shall be under the direction, supervision, and con-

trol of the directors of their respective departments, and shall perform such duties as such directors prescribe.

“With the approval of the governor, the director of each department shall establish divisions within his department, and distribute the work of the department among such divisions. Each officer created by section 121.04 of the Revised Code shall be the head of such a division.

“With the approval of the governor, the director of each department may consolidate any two or more of the offices created in his department by section 121.04 of the Revised Code, or reduce the number of or create new divisions therein.

“The director of each department may prescribe regulations for the government of his department, the conduct of its employees, the performance of its business, and the custody, use, and preservation of the records, papers, books, documents, and property pertaining thereto.”

Coming now to the provisions of Amended House Bill No. 212, 101st General Assembly, it will be seen that Sections 121.02, 121.03, and 121.04, Revised Code, were amended so as to delete all reference to the department of education or to any offices therein. Following the effective date of that enactment, therefore, Sections 121.05, 121.06, and 121.07, Revised Code, will have no application to the department of education for which provision is made in Amended House Bill No. 212, *supra*.

Following such date, a department of education will exist by virtue of the following provision of Section 3301.13, Revised Code, as amended:

“The department of education hereby created, shall be the administrative unit and organization through which the policies, directives and powers of the state board of education and the duties of the superintendent of public instruction are administered by such superintendent as executive officer of the board.

“The department of education shall consist of the state board of education, the superintendent of public instruction, a staff of such professional, clerical and other employees as may be necessary to perform the duties and to exercise the required functions of the department.” * * *

The state board of education thus referred to is created by the provisions of Section 3301.011, Revised Code, enacted effective July 12, 1955. Sections 3301.021 and 3301.031, Revised Code, effective on that date, provided for the election of the members of such board at the November 1955 election. Such members are required by the terms of Section 3301.04,

Revised Code, to meet for the purpose of organization, etc., on January 3, 1956, the effective date of the remaining provisions in Amended House Bill No. 212, *supra*. That section provides in part:

“A meeting of the members elected to the state board of education at the general election in November, 1955, shall be held on January 3, 1956, in Columbus, Ohio, at 1:30 p.m. eastern standard time at the office of the superintendent of public instruction, at which time the board shall organize, select the term of members as provided by section 3301.021 (3301.02.1) of the Revised Code, adopt rules of procedure, elect a president and a vice-president each of whom shall serve for two years or until his successor is elected and qualified, and transact such other business as the board deems advisable. *At such initial organization meeting the state board of education may continue to employ and determine the salary of any person holding any position or office in the department of education as such department was in existence immediately prior to January 3, 1956, until such time as appointments of personnel are made under the provisions of sections 3301.08 and 3301.13 of the Revised Code. Thereafter, between the first and fifteenth day of January of each year immediately following the general election at which board members are elected, the board shall hold an organization meeting at which time it shall adopt rules of procedure, elect a president and a vice-president each of whom shall serve for two years or until his successor is elected and qualified, and transact such business as the board deems advisable.*” (Emphasis added.)

The provisions thus made for transition from the operation of the department as presently organized to operation under the direction of the board, considered in light of the repeal of Section 3301.01, Revised Code, and the provision in Section 3301.08, Revised Code, for the appointment of the superintendent of public instruction by the board, make it necessary to conclude that the presently existing office of that designation will be abolished effective January 3, 1956 and that such office is included within the term “office within the department of education as such department was in existence immediately prior to January 3, 1956,” the incumbent of which the board may continue to employ “until such time as appointments are made under the provisions of Sections 3301.08 and 3301.13.”

The transition provision above noted in Section 3301.04, Revised Code, considered in light of the amendments of Sections 121.02 and 121.03, Revised Code, which amendments will make inapplicable the provisions of Sections 121.05, 121.06, and 121.07, Revised Code, to the department of education as hereafter to be constituted, impels the conclusion in like man-

ner that the presently existing office of assistant superintendent of public instruction will be abolished on January 3, 1956, and that the then incumbent thereof may likewise be retained temporarily in the employment of the department as provided in such section until the board makes an appointment, as provided in Section 3301.13, Revised Code. In this connection this section provides in part:

* * * "The superintendent of public instruction shall recommend for approval by the board the organization of the department of education, and the assignment of the work within such department. The appointment, number, and salaries of assistant superintendents, and division heads shall be determined by the state board of education after recommendation of the superintendent of public instruction. Such assistant superintendent and division heads shall serve at the pleasure of the board." * * *

What has been said of this officer is equally applicable to the several presently existing positions of "directors of division" mentioned in your inquiry, for Section 121.07, Revised Code, pursuant to which these positions were created, will no longer be applicable to the department of education on and after January 3, 1956. The individual incumbents of these positions may be temporarily retained in service, of course, as authorized by Section 3301.04, Revised Code, but it is clear that under the provisions of Section 3301.13, Revised Code, noted above, the board may appoint division heads as well as assistant superintendents and that all such employees will serve at the pleasure of the board.

Accordingly, in specific answer to your inquiry, it is my opinion that under the provisions of Amended House Bill No. 212, 101st General Assembly, the positions of superintendent of public instruction, assistant superintendent of public instruction, and all division heads in the state department of education as presently constituted, will be abolished on January 3, 1956. The then incumbents of such positions may be temporarily retained by the board in the service of the department as authorized by Section 3301.04, Revised Code, until the board appoints a superintendent, one or more assistant superintendents, and such number of division heads as the board deems necessary, as provided in Sections 3301.08 and 3301.13, Revised Code, all of whom will serve at the pleasure of the state board of education as provided in such sections. Such temporary retention is not automatic and may be accomplished only by affirmative action of the board.

Respectfully,
C. WILLIAM O'NEILL
Attorney General