

2555.

APPROVAL, BONDS OF TOLEDO CITY SCHOOL DISTRICT, LUCAS COUNTY, OHIO—\$34,000.00.

COLUMBUS, OHIO, April 23, 1934.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

2556.

APPROVAL, BONDS OF CITY OF TOLEDO, LUCAS COUNTY, OHIO—\$31,000.00.

COLUMBUS, OHIO, April 23, 1934.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

2557.

TEACHER'S CERTIFICATE—BOARD OF EXAMINERS IN CITY SCHOOL DISTRICT MAY NOT ANTEDATE CERTIFICATE—CLERK OF BOARD OF EDUCATION AUTHORIZED TO INVESTIGATE VALIDITY OF CERTIFICATE—DUTY TO WITHHOLD TEACHER'S SALARY IF CERTIFICATE INVALID—RELATION TO SUPERINTENDENT OF SCHOOLS.

SYLLABUS:

1. *The clerk of a board of education is not bound by the written statement of a city superintendent of schools to the effect that a certain teacher has filed with him a proper and legal certificate to teach the subjects and grades which he is teaching, which statement was made in pursuance of the provisions of Section 7786, General Code. The said clerk may in his discretion investigate to determine whether or not the statements made by the superintendent are erroneous.*

1-a. *If it should come to the attention of the clerk of a board of education that a certain teacher does not hold a proper and legal certificate to teach the subjects and grades which he or she is teaching, it is the duty of the clerk to withhold payment of his or her salary, regardless of the fact that he has received a written statement from the superintendent of schools to the effect that the said teacher has been properly certificated and that the said certificate or a copy thereof is on file with him.*

2. *By reason of the provisions of Sections 7847 and 7817 of the General Code of Ohio, boards of examiners in city school districts are not permitted to antedate teachers' certificates.*

2-a. *It is the duty of a clerk of a board of education to withhold payment of teachers' salaries if he is apprised of the fact that the teacher does not have a proper and legal certificate to teach the subjects and grades which he is in fact*

teaching covering the period following the time when the certificate was granted.

3. *Under Section 7849, General Code, which provides that a city board of school examiners at its discretion may grant temporary certificates to teachers which shall be valid only until the next regular examination held by the board after the issuance thereof, the said board is without power after such examination to grant another temporary certificate to a person who had been teaching under a former temporary certificate granted by the board, but who had neglected to take, or failed to pass the next regular examination held by the board after the issuance of the temporary certificate first above referred to.*

COLUMBUS, OHIO, April 23, 1934.

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

GENTLEMEN:—This will acknowledge receipt of your request for my opinion, which reads as follows:

“Section 7786 of the General Code, provides that no clerk of a board of education shall draw an order for the payment of a teacher for services until the teacher files with him such reports as are required by the Director of Education, the board of education, and the superintendent of schools, and a written statement from the county, city or exempted village superintendent of schools that the teacher has filed with him a teacher’s certificate (or a true copy thereof) to teach the subjects or the grades taught, with the dates of its validity.

QUESTION 1: Is the clerk of a board of education bound by the written statement of a city superintendent, made in accordance with the provisions of this section; or may such clerk investigate to determine whether the teachers have valid certificates to teach the subjects or grade for which he or she is employed?

1(a) If it is held that the clerk is not bound by the written statement of the superintendent, and, upon investigation it is found that a teacher does not have a certificate to teach the subjects which he or she is in fact teaching, should the clerk withhold payment of such teacher’s salary?

Section 7817 of the General Code, provides, with reference to county school examiners, that ‘in no case shall the board hold any private examinations or antedate any certificates’. Section 7847 of the General Code, relating to city school examiners, provides that all provisions of the preceding and following sections pertaining to county school examiners and applicants for county teachers’ certificates, shall apply also to city examiners and applicants for city teachers’ certificates, unless there are specific provisions of law applying to the latter.

QUESTION 2: Do the provisions of Section 7847 make the provisions of Section 7817 relating to antedating certificates applicable to city school examiners?

2(a) If so, are antedated certificates illegal; and should the clerk withhold the pay of a teacher holding such certificate? Section 7849 of the General Code, provides that a city board of school examiners, at their discretion, may issue temporary certificates which shall be valid only until the next regular examination held by the board after the issuance thereof.

QUESTION 3: May a city board of examiners, under this section, issue a temporary certificate, and subsequent to the next regular examination issue another temporary certificate to the same person?"

Your questions will be considered in the order asked.

In the consideration of the first question, it is necessary to note the provisions of Sections 7786, 7830, 7831 and 7832 of the General Code of Ohio. Sections 7786 and 7830, General Code, read as follows:

"Sec. 7786. No clerk of a board of education shall draw an order for the payment of a teacher for services until the teacher files with him such reports as are required by the director of education, by the board of education and the superintendent of schools, and a written statement from the county, city or exempted village, superintendent of schools that the teacher has filed with him a legal teacher's certificate (or true copy thereof) to teach the subjects or grades taught, with the dates of its validity. The director of education shall prescribe the record and administration for such filing of certificates in county school districts.

Upon notice to the clerk of a board of education given by the director of education or any superintendent of schools having jurisdiction that reports required of a teacher have not been made, the clerk shall withhold the salary of the teacher until the required reports are completed and furnished."

"Sec. 7830. No person shall be employed or enter upon the performance of his duties as teacher in any elementary school supported wholly or in part by the state in any school district who has not obtained from a certificating authority having legal jurisdiction a certificate of good moral character; that he is qualified to teach orthography, reading, writing, arithmetic, English grammar and composition, geography, history of the United States, physiology, including narcotics, literature, and elementary agriculture, and that he possesses an adequate knowledge of the principles of teaching; except as provided in sections 7807-9, 7807-10, 7807-6, 7852 and 7831-1."

The same provision with respect to the employment of teachers, and the entering upon the performance of their duties by teachers, in high schools, is made in Section 7831, General Code, as is made in Section 7830, General Code, with respect to teachers in elementary schools. Similar provisions are made in Section 7832, General Code, with respect to special teachers 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.

It will be noted by the provisions of Section 7786, *supra*, that a teacher is not required to file his certificate or a copy thereof, with the clerk of a board of education but with the superintendent of schools, whose duty it is to file with the clerk a written statement that a legal certificate to teach the subjects or grades taught for each teacher, has been filed with him.

Prior to the last amendment of Section 7786, General Code, in 1923 (110 O. L. 440), the statute provided that no clerk should draw an order for payment for a teacher's services until the teacher had filed with *him* a proper or legal certificate or a true copy thereof. (104 O. L. 234). By reason of the amendment of the

statute, the clerk was relieved of the duty of receiving and filing the certificates or copies thereof, and that duty was imposed upon the superintendent of schools. The clerk became authorized to draw proper warrants for teachers' services when he received a written statement from the superintendent that a proper certificate or a copy thereof, had been filed with him. As a matter of administrative practice, the clerk is protected under the present state of the law drawing proper warrants for the payment for teachers' services if he receives the written statement spoken of, even though the facts set forth in the statement are not true. Whether or not he is justified in drawing such warrants if he knows as a matter of fact, that the statements made by the superintendent with respect to teachers' certificates are not true, is another question. The fact that Section 7786, General Code, was amended so as to place the burden of receiving and filing of teachers' certificates or copies thereof, on the superintendent of schools instead of on the clerk, and authorizing the clerk to draw proper warrants for payments for teachers' services upon the receipt of a statement from the superintendent that proper certificates had been filed with him, does not alter the fact that the employment of teachers without proper certificates, is forbidden, and that any such employment is illegal and that the payment of a teacher for services rendered who does not have a proper certificate is an unauthorized and illegal expenditure of public funds. In an opinion of a former Attorney General, it is stated categorically, that, "A person who holds no certificate cannot be legally paid by the board of education for teaching in schools of the district over which the board has jurisdiction." See Opinions of the Attorney General for 1919, page 947.

In another opinion of the same Attorney General reported in the published Opinions of the Attorney General for 1919, page 187, it is held:

"Where a teacher is allowed to teach without the certificate demanded by statute, with and under full knowledge of the board of education, as well as the clerk of the board, the members of the board of education participating in such illegal act, the clerk of such board and the person receiving misappropriated funds under such illegal employment, are liable for any compensation paid from school funds to such person without certificate."

The above opinion was rendered prior to the amendment of Section 7896, General Code, in 1923, noted above.

Courts, without exception, hold that where statutes in general terms provide that no teacher shall be employed who does not hold the prescribed certificate or license, contracts with unlicensed teachers are wholly void. See Ruling Case Law, Vol. 24, page 616; Corpus Juris, Vol. 56, page 370; McQuillin on Municipal Corporations, 2nd Ed., Section 2603; Vorhees on Public Schools, Section 63; A. L. R., Vol. 30, page 890, note; 42 L. R. A. (N. S.) 412, note; *Board of Education of West Perkins School District vs. Beckley*, 40 O. App., 66.

In an early case which has frequently been cited in later decisions—*Harrison Township vs. Conrad* (1866), 26 Ind., 337, the court in discussing the effect upon a contract for services rendered by an unlicensed teacher, of a statute expressly prohibiting the employment of a teacher having no certificate, said:

"The officer having authority to employ the teacher cannot nullify this law. It was intended by the requirement of a certificate of qualifi-

cations, to guard against the squandering of a sacred public fund upon persons assuming to teach without being capable of performing a teacher's duties, and to insure the employment of competent persons only, as teachers, thereby making the schools useful instruments for the education of the young. That an officer can, either expressly or by implication, set at defiance an express statute defining and limiting his official authority and by doing what he is forbidden to do, waive what the law positively requires, is a proposition which is best answered by merely stating it."

By reference to Section 4752, General Code, it will be found that the board of education makes all provisions for employing and paying teachers. The clerk may draw warrants for the payment of teachers only when duly authorized by his board of education to do so, by action taken by said board in accordance with the provisions of said Section 4752, General Code.

It has been suggested that the clerk performs a ministerial act merely when he draws warrants for the paying out of school funds after being duly authorized by the board of education to do so. In my opinion, the clerk of a board of education is more than a ministerial officer in the paying of teachers or in disbursing the public funds of a school district for any purpose, not only because of the provisions of Section 7786, General Code, which positively forbids his paying for teachers' services until there is filed with him a statement by the superintendent that the teacher is properly licensed, but also because of the fact that he is by law constituted the "fiscal officer", not of the board of education, but of the "school district" in which he and the board of education function. See Section 5625-1, General Code. The term "fiscal" is defined by Black, in his Law Dictionary, as: "Relating to accounts or the management of finances". Webster defines it as, "financial, relating to finances". Bouvier defines the term as: "Belonging to the fisc or public treasury".

As the fiscal officer of a subdivision, the clerk of a board of education surely owes some duty with respect to the protection and preservation of the public funds of the subdivision, at least, to the extent of not paying out those funds illegally, if he knows the claim for which payment is demanded is an illegal claim, even though he may be duly authorized to do so by the board of education and the law, in so far as the law prescribes the routine for paying claims against the district.

Under the law, and especially in view of the provisions of Section 7786, General Code, as amended, I have no doubt the clerk of a board of education could not be charged with culpableness if he should pay a claim for teachers' services which had been regularly allowed by the board of education in pursuance of Section 4752, General Code, and he had on file a written statement signed by the superintendent of schools that the teacher whose services were being paid for was properly certificated, if he had no knowledge or suspicion that the facts stated in the superintendent's statement were erroneous; but if it had come to his attention that the teacher was not properly licensed and that the statement of the superintendent to that effect was wrong, and for that reason the claim for services was illegal, the clerk would, in my opinion, be guilty of a violation of a public trust if he should pay out the public revenues in his custody to satisfy such an illegal claim.

In the case of *Crane Township, ex rel. Stalter, Pros. Atty., et al. vs. Secoy, et al., Twp. Trus. et al.*, 103 O. S., 258, the Supreme Court of Ohio said with reference to public officers, and I think this observation would apply to any public servant:

"It is pretty well settled under the American system of government that a public office is a public trust, and that public property and public money in the hands of or under the control of such officer or officers constitute a trust fund, for which the official as trustee should be held responsible to the same degree as the trustee of a private trust fund. Surely the public rights ought to be as jealously safeguarded as the rights of any individual made the beneficiary of a trust by the private party creating such trust."

I come now to the consideration of your second question. The legislature has provided in Section 7817, General Code, for meetings of county boards of school examiners, for the examination of applicants for certificates, and that no private examinations shall be held and no certificates antedated. This section provides in part, as follows:

"* * In no case shall the board hold any private examinations or antedate any certificate, except that with the consent of the director of education as to the particular individuals, special examinations may be held after September 1 for persons who were employed late or whose work was modified or who otherwise could not be certified at the regular examinations. Such applicants shall be counted in the April examination following in reporting and computing fees."

Section 7847, General Code, provides as follows:

"All provisions of preceding and following sections pertaining to county school examiners and applicants for county teachers' certificates shall apply also, to city examiners and applicants for city teachers' certificates unless there are specific provisions of law applying to the latter."

A former Attorney General applied the provisions of Section 7847, General Code, in determining the rights of a city board of examiners to revoke certificates granted by it. Section 7827, General Code, expressly provides that a county board of school examiners may revoke a certificate granted by it for certain enumerated causes, and sets forth the procedure to be followed in so doing. No corresponding express statutory provision is made with respect to the revocation of certificates granted by a city board of examiners. The Attorney General held:

"Under the provisions of Section 7847, General Code, the authority given to a county board of school examiners for the revocation of teachers' certificates, as set forth in Section 7827 of the General Code, is vested in a city school district in the board of city school examiners."
(Opinions of the Attorney General for 1922, page 508.)

The provision of Section 7817, General Code, is clear as to the antedating of certificates by a county board of school examiners and Section 7847, General Code, is equally clear as to the applicability of this provision to city boards of examiners. It is clear that a certificate granted by a city board of examiners may not be antedated. Any such antedated certificate is no certificate at all, and is entirely ineffective as a certificate, at least for any time prior to the actual date of its issuance. A clerk of a board of education is not justified in paying a teacher for services rendered prior to the time when a certificate is issued to the teacher, if he is apprised of that fact.

A recent case decided January 24, 1934, by the Court of Appeals of Greene County, and as yet unreported (*Anderson vs. Wolf et al.*) deals with matters pertinent to both your first and second inquiries. In that case, which was a taxpayer's suit to recover \$390.00 which had been paid to Mrs. Joseph Kinzer by the school board of Xenia Township Rural School District, it appeared that Mrs. Kinzer's husband who at the time of the suit was deceased, had taught in the schools of Xenia Township Rural School District. He had no certificate to teach at that time, having failed to pass an examination. About four years afterwards the board of examiners issued a certificate in his name, purporting to cover the period of his teaching. The certificate was designated "Delayed Teachers' Elementary Certificate". This "Delayed Certificate" was filed, as provided by law, and the county superintendent of schools so certified to the clerk of the Xenia Township Board of Education, whereupon a warrant was issued by the clerk for the payment to the widow of Mr. Kinzer for his services as teacher. The contention was made that inasmuch as a certificate was on file as provided by Section 7786, General Code, the payment was a legal and proper expenditure of public funds. The court, after quoting the provisions of Section 7786, General Code, said:

"This section adds nothing to nor takes nothing from the provisions of Section 7830 G. C., supra.

If Mr. Kinzer had brought himself within the provisions of the above section 7830 G. C. but had not complied with Section 7786 G. C. his payment of salary would be delayed pending such compliance.

Applying this principle to the instant case if we were able to find the provisions of 7830 G. C. complied with, we would accept the delayed filing of the certificate with the Clerk of the Board of Education as the last step requisite under the law to authorize payment of the salary. Neither of these sections standing alone are sufficient to authorize withdrawing money from the treasury of the school district.

Employment, performance and filing delayed certificate after a period of four years still admits of the question as to whether or not the employment was legal. The plain mandatory provisions of said Section 7830 G. C. seem to definitely determine the question. This section says:

'No person shall be employed or enter upon the performance of his duties as teacher who has not obtained a certificate,' * *

No other authority than the Board of Examiners can determine the qualifications to teach and issue the requisite certificate. Until the individual has such certificate, he or she must be looked upon as incompetent. The Courts are always open through mandatory orders to guard against any abuse of discretion upon the part of the examining board.

It has been judicially determined that laws must be uniform in their operation. It sometimes happens that injustice is done in isolated instances, but to avoid anticipated or threatened evils the law must be given its uniform operation. This is upon the theory of good to the greatest number.

It is not within the power of the courts in an action of this character to determine the question of the fitness of the teacher.

The legislature has gone far in its enactments to insure strict observance of the provisions of Section 7830 G. C. prohibiting employ-

ment or entering into the performance of duties as teacher before the issuing of the legal certificate.

For instance Section 7817 G. C. among other things provides that the Board shall not 'antedate any certificate.'

With respect to question No. 3, Section 7849, General Code, provides as follows:

"Between regular examinations, city boards of school examiners at their discretion, may issue temporary certificates, which shall be valid only until the next regular examination held by the board after the issue thereof."

Neither the courts in Ohio, nor this office have had before them the question you submit so far as reported decisions or opinions are concerned. In the State of Michigan there is in force a statute almost precisely the same as Section 7849, *supra*. The Supreme Court of Michigan, in the case of *Lee vs. School District No. 2*, 38 N. W., 867, held:

"Under How. St. of Michigan, Section 5154 which provides that the secretary of the board of school examiners shall have power to grant special certificates of qualification to teachers, which shall not continue in force beyond the next examination by the board, the secretary has no power, four days after such examination, to grant a special certificate to a person who had been teaching under a special certificate granted by the secretary, but who failed to pass the public examination."

I feel that the case above referred to was correctly decided and that the courts in this state would no doubt decide the same question as it was decided in the Michigan case.

I am therefore of the opinion, in specific answer to your questions:

1. The clerk of a board of education is not bound by the written statement of a city superintendent of schools to the effect that a certain teacher has filed with him a proper and legal certificate to teach the subjects and grades which he is teaching, which statement was made in pursuance of the provisions of Section 7786, General Code. The said clerk may in his discretion investigate to determine whether or not the statements made by the superintendent were erroneous.

1-a. If it should come to the attention of the clerk of a board of education that a certain teacher does not hold a proper and legal certificate to teach the subjects and grades which he or she is teaching, it is the duty of the clerk to withhold payment of his or her salary, regardless of the fact that he has received a written statement from the superintendent of schools to the effect that the said teacher has been properly certificated and that the said certificate or a copy thereof, is on file with him.

2. By reason of the provisions of Sections 7847 and 7817 of the General Code of Ohio, boards of examiners in city school districts are not permitted to antedate teachers' certificates.

2-a. It is the duty of a clerk of a board of education to withhold payment of teachers' salaries if he is apprised of the fact that the teacher does not have a proper and legal certificate to teach the subjects and grades which he is in

fact teaching covering the period following the time when the certificate was granted.

3. Under Section 7849, General Code, which provides that a city board of school examiners at its discretion may grant temporary certificates to teachers which shall be valid only until the next regular examination held by the board after the issuance thereof, the said board is without power after such examination to grant another temporary certificate to a person who had been teaching under a former temporary certificate granted by the board, but who had neglected to take or failed to pass the next regular examination held by the board after the issuance of the temporary certificate first above referred to.

Respectfully,

JOHN W. BRICKER,
Attorney General.

2558.

APPROVAL—BONDS OF CITY OF FOSTORIA, SENECA-HANCOCK
COUNTIES, OHIO—\$5100.00.

COLUMBUS, OHIO, April 23, 1934.

Industrial Commission of Ohio, Columbus, Ohio.

2559.

APPROVAL—BONDS OF CITY OF TOLEDO, LUCAS COUNTY, OHIO,
\$50,000.00.

COLUMBUS, OHIO, April 23, 1934.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

2560.

APPROVAL CONDITIONALLY—CERTIFICATE OF TITLE, WAR-
RANTY DEED, DEPARTMENT COPY OF CONTRACT ENCUM-
BRANCE RECORD NO. 13, AND CONTROLLING BOARD CERTI-
FICATE, RELATING TO A PARCEL OF LAND IN THE CITY OF
PIQUA, MIAMI COUNTY.

COLUMBUS, OHIO, April 23, 1934.

HON. WILLIAM H. REINHART, *Conservation Commissioner, Columbus, Ohio.*

DEAR SIR:—You have submitted for my examination and approval a certificate of title, warranty deed, triplicate department copy of contract encumbrance