
3493

A LOCAL SCHOOL BOARD AND A LOCAL EXECUTIVE HEAD MAY MUTUALLY RESCIND A CONTRACT BETWEEN THEM AND ENTER INTO ANOTHER AT A HIGHER SALARY—AN EXECUTIVE HEAD NEED BE COMPENSATED IN ACCORDANCE WITH A TEACHER'S SALARY SCHEDULE ONLY TO THE EXTENT OF HIS TEACHING DUTIES. OPINION 3198, OAG, 1962, §§3319.08, 3319.22, R.C.

SYLLABUS:

1. When a local board of education has made a contract for the employment of a local executive head, under Section 3319.02, Revised Code, the parties to the contract may mutually agree to rescind the contract and enter into another calling for an increase in salary. (Opinion No. 3198, Opinions of the Attorney General for 1962, approved and followed.)

2. A local board of education, in order to receive state school foundation program funds under Section 3317.02, Revised Code, must under Sections 3317.07 and 3317.14, Revised Code, pay teachers in accordance with the teachers' salary schedule; but the position of local executive head, authorized under Section 3319.02, Revised Code, need be compensated in accordance with the teachers' salary schedule only to the extent that the position is occupied with teaching duties.

Columbus, Ohio, December 21, 1962

Hon. Robert O. Stout, Prosecuting Attorney
Marion County, Marion, Ohio

Dear Sir:

Your request for my opinion reads:

"Some time ago three local school districts consolidated into one district. At that time one executive head was appointed whose basic salary on the salary schedule of the school district would have been \$7,300.00 per year, plus the 3/9 additional for additional duties and the 25% addition for full time duty, the additional amounts being the result of the appointment as executive head. However, the party appointed executed a contract with the board to perform the duties as executive head for the sum of \$10,000.00 per year. This contract runs until August, 1963.

"We are aware of your recent opinion rendered Prosecuting Attorney Forest Bacon, Wyandot County, Ohio, although we have not as yet received a copy. It may well answer our queries.

- "1. Can the original contract be terminated and a new contract entered, increasing the yearly compensation? (In view of our knowledge of the above mentioned opinion, the answer is probably yes, as to this executive head.)
- "2. *Must* the board enter into a new contract increasing the compensation or can it hold to the existing contract, entered voluntarily, at the compensation of \$10,000.00 per year, even though this is less than the compensation payable under the salary schedule?"

The recent opinion to which you refer is Opinion No. 3198, Opinions of the Attorney General for 1962, issued August 10, 1962. The syllabus of that opinion reads:

“When a board of education has made a contract for the employment of a local executive, pursuant to Section 3319.02, Revised Code, such board is without authority to increase the compensation of such employee, as fixed by such contract, during the term thereof; the parties to such contract may, however, by mutual agreement rescind such a contract at any time and execute another in its stead.”

As you indicate, this disposes of your first question; the original contract may be terminated, if the parties so desire, and a new contract entered into calling for increased compensation.

From the facts stated in your letter, it appears that the salary under the existing contract is below the salary required under the salary schedule, which is the reason for your question as to whether the local board of education must rescind the old contract and enter into a new one.

Under Section 3319.02, Revised Code, upon the recommendation of the county superintendent, a local board of education may appoint a person to the position of executive head of a local school district. The qualification imposed by that section is that the person appointed be properly certified.

Section 3319.08, Revised Code, in dealing with salaries, reads in part:

“The board of education of each city, exempted village, and local school district shall enter into written contracts for the employment and reemployment of all teachers and shall fix their salaries which may be increased but not diminished during the term for which the contract is made, except as provided in section 3319.12 of the Revised Code.

* * * * *

“The board of education of each city, exempted village, and local school district may include in such contract duties beyond the regular duties and for such additional duties the salary of the teacher may be supplemented. Such boards may discontinue at any time the assignments of special duties beyond the regular classroom teaching duties and the supplemental salary allowed for such additional duties shall be discontinued upon relief from such additional duties. In addition to supplemental salary payments as provided in this section, such boards of education may grant salary increases at any time without the imposition of additional duties. Teachers must be paid for all time lost when the schools in which they are employed are closed owing to an epidemic or other public calamity, and for time lost due to illness or otherwise for not less than five days annually as authorized by regulations which each board of education shall adopt.

* * * * *

Assuming, for the purposes of this section, that "teacher" includes "executive head", it should be noted that the provisions for a written contract and payments to teachers despite time lost due to epidemics and other calamities are mandatory; yet, all other provisions concerning salaries are permissive; e.g., though the board may impose duties beyond a teacher's regular duties, the "* * * salary of the teacher *may* be supplemented." The use of the mandatory terms "shall" and "must" in regard to certain provisions contained in the same paragraph that includes the permissive term "may" in regard to other provisions is cogent evidence that the distinction was intended. Further, it should be noted that though this section requires that salaries be fixed, it omits any provision that would describe how salaries should be fixed. Therefore, I conclude that Section 3319.08, *supra*, does not require a particular salary or even the supplementation of a salary upon the imposition of additional duties.

A salary schedule is required, however, at least to the extent that the board of education desires to receive funds under the state's school foundation program. In this regard, Section 3317.14, Revised Code, reads:

"A school district, the board of education of which has not conformed with the law and the rules and regulations pursuant thereto, shall not participate in the distribution of funds authorized by section 3317.02 of the Revised Code, except for good and sufficient reason established to the satisfaction of the state board of education and the state controlling board.

"Any board of education participating in funds authorized by section 3317.02 of the Revised Code, shall annually adopt and file with the state board of education *a teachers' salary schedule* with provision for increments based upon training and experience. A copy of such schedule shall annually be filed by the board of education of each local school district with the county superintendent of schools, who thereupon shall certify to the clerk of such local school district the correct salary to be paid to each teacher in accordance with the adopted schedule.

"Upon written complaint to the state board of education by any teacher that the board of education of the district in which he is employed has failed or refused to annually adopt a salary schedule or to pay salaries in accordance with an adopted salary schedule, such state board of education shall cause to be made an immediate investigation of such complaint. If such board finds that the conditions complained of exist, it shall order the board of education to correct such conditions within ten days from the date of the finding. The state board of education may not pay any money to such school district under the terms of section 3317.02

of the Revised Code until it has satisfactory evidence of the board of education's full compliance with such order."

(Emphasis added)

(Section 3317.02, Revised Code, mentioned in the first paragraph of Section 3317.14, *supra*, is the specific section under which school foundation funds are paid.)

In the facts presented by your letter, it appears that the executive head is being paid a salary below the salary schedule of the school district. It should be noted, however, that the requirement is only that there be a *teachers'* salary schedule. Thus, the school district would be in danger of forfeiting its share of school foundation moneys only if the position of executive head is included within the position of teacher. In this regard the statutes are somewhat inconsistent.

Section 3319.09, Revised Code, in defining "teacher" reads:

"As used in sections 3319.08 to 3319.18, inclusive, of the Revised Code:

"(A) Teacher means * * * any other educational position for which the employing board requires certification.

"* * * * * * * *"

(Emphasis added)

As Section 3319.02, Revised Code, requires that the position of executive head be filled by a certified person, an executive head is a teacher—at least for the purposes of Sections 3319.08 to 3319.18, inclusive, Revised Code. I am thus tempted to conclude that the position of executive head is included in that of teacher for the purposes of Section 3317.14, and am influenced particularly since (a) both chapters deal with education, (b) Chapter 3317, does not define "teacher", and (c) the fact that the term "teacher" includes certain positions in one chapter but fails to include these same positions in another chapter can only lead to confusion.

Chapter 3317., Revised Code, appears, however, to make a distinction between the positions of teacher and certificated employees:

- (a) Section 3317.06, Revised Code, establishes minimum annual salaries for "teaching personnel."
- (b) Section 3317.07, Revised Code, forbids the payment of school foundation program moneys to school districts that fail to pay "teachers" the amounts required by Section 3317.06, *supra*.

- (c) Section 3317.14, *supra*, requires school districts to establish “teachers” salary schedules.

On the other hand :

- (a) Section 3317.052, Revised Code, deals with the salary allowance paid school districts under the school foundation program, and provides that the allowance shall be calculated from, among other things, the number of “certificated employees.”
- (b) Section 3317.061, Revised Code, directs the superintendent of the school district to certify to the state board of education the name of each “certificated employee”—though it confuses the situation somewhat by directing that the certification must include the type of “teaching certificate” held by such employee.

The conclusion to be drawn from this distinction is that in Chapter 3317., Revised Code, unlike Chapter 3319., Revised Code, the word “teacher” is confined to its common usage; that is to say, the word there refers to a person who instructs pupils in a field of learning—a pedagogue. Accordingly, the requirement for a salary schedule and for salary payments in accordance with the schedule that is imposed under Section 3317.14, *supra*, is required only for teachers rather than for all certified employees.

The question that arises is whether an executive head is a teacher in the commonly understood sense of the word. In this regard, Section 3319.22, Revised Code, reads in part :

“Teachers’ certificates of state-wide validity shall be issued pursuant to sections 3319.22 to 3319.31, inclusive, of the Revised Code, or in accordance with standards, rules, and regulations authorized by law. The grades of certificates shall be designated as ‘temporary certificates,’ ‘provisional certificates,’ ‘professional certificates,’ and ‘permanent certificates.’ Each of such grades of certificates may be issued in each or any of the following types:

“* * * * * * * * * * * * * * *”

“(L) Executive head, valid for teaching the subjects named in such certificate and for supervision and administration in a local school district;

“* * * * * * * * * * * * * * *”

Thus, though the title of the position implies duties that are primarily administrative, the duties may include teaching. Therefore, to the extent that his duties require him to teach, and in order for the school district to receive school foundation funds, the executive head must be paid in accordance with the salary schedule, but not otherwise.

In the situation presented, you do not describe the duties of the executive head. If these are entirely administrative, there is no need for the board to rescind the old contract and enter into a new one. If, on the other hand, his duties include teaching, and the terms of the contract show that the portion of his salary stemming from his duties as a teacher are below the teachers' salary schedule, the board should rescind the old contract and enter into a new one in order to avoid losing its share of school foundation program funds.

Accordingly, it is my opinion and you are advised:

1. When a local board of education has made a contract for the employment of a local executive head, under Section 3319.02, Revised Code, the parties to the contract may mutually agree to rescind the contract and enter into another calling for an increase in salary. (Opinion No. 3198, Opinions of the Attorney General for 1962, approved and followed.)

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Respectfully,
MARK McELROY
Attorney General