OFFICIAL OPINION NO. 35

July 31, 1959

Hon. William E. Wilson
State Superintendent of Public Instruction
227 State House
Indianapolis 4, Indiana

Dear Mr. Wilson:

Your letter of June 26, 1959 has been received and reads as follows:

> "A teacher has acquired tenure status in a school corporation. Prior to May 1, 1959, the School Board adopted a salary schedule for the coming school year effective July 1, 1959, which contained the following provision:
>
> " 'Additional amounts over the above schedule may be paid to teachers for extra activities, and for extra teaching. This schedule is not effective for teaching less than full day, or for inferior performances.'
>
> "Based upon the foregoing assumed facts, an official opinion is hereby requested on the following questions:
>
> "1. Is the foregoing provision valid or does it conflict with the provisions of the teachers' minimum salary law.
>
> "2. Does the Board of School Trustees have the legal authority to fix the salary of a specific teacher on the basis of that teacher's competence and performance, so long as such salary is fixed at not less than the State minimum?
>
> "3. To what extent is this teacher obliged to accept a 1959-60 teaching contract at the State minimum salary offered to her; and to what extent will her tenure teacher's status be affected if she fails or refuses to accept a 1959-60 contract at the State minimum salary?"

Our present teachers' salary law was adopted in 1945, being Acts of 1945, Ch. 231, as amended, as found in Burns'

(1948 Repl.), Section 28-4332 *et seq.* Prior to the adoption of that statute, action of a somewhat similar nature as that referred to in your letter received the approval of our Supreme Court in the case of Board of School Trustees, School City of Peru *et al.* v. Moore (1941), 218 Ind. 386, 33 N. E. (2d) 114. However, in that case a schedule was adopted and, in addition to the usual four classifications for salary purposes, the School City had a fifth classification known as "Class E," which included teachers deficient in one or more of ten enumerated specifications, with final decision as to the teacher placement in Class E to rest with the Board of School Trustees.

While the court in the above decision held valid the placing of a tenure teacher in Classification E of said schedule, the Court on page 395 of the opinion made the following pertinent statement:

> "* * * In all walks of life it is expected that those who serve best will be appreciated most and will be best remunerated. There is no expression in the law which denies the school authorities the right to weigh such considerations in classifying teachers and fixing their compensation * * *."

If nothing further were found affecting the answer to your questions, the answers to your first and second questions would be in the affirmative. However, Acts of 1945, Ch. 231, *supra,* which was not in existence at the time the foregoing Supreme Court decision was written, and therefore, of course, could not have been considered, seriously affects the answers to your questions, as hereinafter pointed out. Section 2 of the Acts of 1945, Ch. 231, as found in Burns' (1948 Repl.), Section 28-4333, in part reads as follows:

> "The term 'professional training' shall be defined and limited by the teacher training and licensing board of the state department of education, and the various degrees conferred by the teacher training institutions or weeks of professional training provided by them may be evaluated by such board either one in terms of the other so as to bring about a more economical and efficient administration of this act.
>
> "The term 'teacher' as used in this act shall be construed to include all persons working in the public

> schools who are required by law to secure a license from the licensing board of the state department of education as a prerequisite to the performance of such work and the salary provisions of this act shall apply to all such teachers for as long a period as their work in the public school shall continue unless the trustee or board of education of any township, town, city, or county shall adopt a salary schedule for teachers not less remunerative, *which shall then be effective as a minimum schedule for all teachers within that system during the year or years for which it is adopted* * * *." (Our emphasis)

While that part of the first half of the quoted second rhetorical paragraph of said quotation which defines "teacher" has been amended and superseded by implication due to an amendment of Sec. 1 of said statute, being Acts of 1951, Ch. 293, Sec. 2, as found in Burns' (1959 Supp.), Section 28-4333, the remainder of said quoted section of said statute is, in my opinion, in full force and effect. This is true, even though the notations in brackets at the end of the quoted statute, as well as the footnotes thereto (Burns' [1959 Supp.], Section 28-4333 *supra*), seem to indicate that the 1951, 1955 and 1959 amendments to said Teachers' Salary Act amended Sec. 2 of the original statute, and even though the footnotes seem to indicate a conclusion that subsequent amendments to Ch. 231 of the Acts of 1945 superseded said Sec. 2 of the original act. The reasons for my conclusions are as follows:

1. The amendments to said Teachers' Minimum Salary Act were made as follows: Acts of 1947, Ch. 358, amended Secs. 1 and 3 of the 1945 statute; Acts of 1949, Ch. 224, amended Sec. 1 of the 1947 Acts, Ch. 358; Acts of 1951, Ch. 293, amended Secs. 1 and 2 of the 1949 Act, Ch. 224; Acts of 1955, Ch. 179, amended Secs. 1 and 2 of the Acts of 1951, Ch. 293, and Acts 1959, Ch. 243, Sec. 1 amended Sec. 2 of Acts 1955, Ch. 179. It is therefore seen that at no time has there been a specific amendment of Sec. 2 of the Acts of 1945, Ch. 231. Under the rule of statutory construction Sec. 2 is therefore still in existence, unless superseded or repealed by implication, which fact I do not feel to exist from language contained in any of the foregoing amendments to the statute, except to broaden the definition of the word "teacher."

If the foregoing is true, the statute seems to require, if the statutory minimum salary schedule is not followed, a salary schedule for teachers not less remunerative, "which shall then be effective as a minimum schedule for all teachers within that system during the year or years for which it is adopted." From the definition of the term "professional training" contained in Sec. 2 of said statute, as well as the other provisions of said section of said statute, when considered in connection with such Sec. 1 of said original Act (Burns' [1948 Repl.], Section 28-4332), as well as its subsequent amendments, a combination of professional training and of years of teaching experience, are to be considered as the proper elements to be given credence in the formulation of such a schedule. This is further exemplified by the following language contained in each of the amendments to said statute (See Burns' [1959 Supp.], Section 28-4333, *supra*), to wit: "Computation of minimum salary shall be made each year on the basis of training, experience, and degree, completed as of the first day of service."

While the foregoing minimum salary schedule as contained in the various amendments to the statute has been changed by the Legislature by the subsequent amendments, the basis for the formula—that of professional training and of teaching experience—have been the basis for consideration for the salary increases thereby prescribed.

It would therefore seem that since the decision in the case of Board of School Trustees *ex rel.* School City of Peru *et al.* v. Moore, *supra,* the Legislature has indicated the manner in which the fixing of salaries of teachers above the minimum schedule shall be accomplished; and matters to be considered in arriving at such a schedule; and has required that such supplemental schedule be applicable to all teachers within that school system for the duration of such schedule.

In the recent case of State *ex rel.* Thurston v. School City of Anderson *et al.* (1957), 236 Ind. 649, 142 N. E. (2d) 914, in construing the right of a tenure teacher to recover salary where the Board had attempted to discharge the teacher pursuant to hearing, the Court on page 917 of the opinion said:

> "In construing the statute concerning a teacher's indefinite contract and its termination, it is to be con-

strued in favor of the teacher and against any forfeiture of vested rights. State *ex rel.* Clark v. Stout (1933), 206 Ind. 58, 64, 187 N. E. 267; School City of Brazil v. Rupp (1937), 104 Ind. App. 287, 293, 10 N. E. (2d) 924."

While the tenure statute is not a salary act, it is made supplemental to the statute concerning teachers' contracts and must be considered in *pari materia* with the other statute relating to teachers (Acts of 1927, Ch. 97, Sec. 6, as amended, as found in Burns' [1948 Repl.], Section 28-4312).

In addition to the foregoing it is submitted that Sec. 2 of the tenure teachers' statute, being Acts 1927, Ch. 97, Sec. 2, as amended, as found in Burns' (1948 Repl.), Section 28-4308, provides that any action to terminate the contract of a permanent teacher as defined in said statute could only be made pursuant to the provisions of said section and said statute. Only two procedures are outlined:

1. A dismissal pursuant to written charges filed in accordance with the detailed procedures and for the specific causes therein specified, and with right of the teacher to appeal; or,

2. The voluntary resignation of the teacher, either by mutual agreement or by written notice by the teacher, in the manner and within the time prescribed by Sec. 4 of said Act; being Burns' (1948 Repl.), Section 28-4310.

From the foregoing and in answer to your questions numbered one and two, I am of the opinion that the above schedule attempting to limit its application to teachers for "inferior performances" is violative of the provisions of said Teachers' Minimum Salary Law; that the requirement of a salary schedule is contemplated under the foregoing statute; and, that where the schedule fixes salaries higher than the minimum salary law, the only basis of such a schedule can be one computed on the basis of training, experience, and degree completed as of the first day of service, and that any teacher in that class holding a contract for further service, or a tenure teacher being thereby entitled to a contract for further service, is entitled to the salary fixed in such schedule for her class, based upon the foregoing factors, and that the same may not be reduced by rule or otherwise by the school board on the basis of "inferior performances."

If the teacher is, either through incompetency, or some other manner, guilty of infractions of the requirements of the statute or rules of the school corporation constituting grounds for dismissal of a tenure teacher, as above referred to, the only manner in which this could be tried and determined would be by preferring charges under the foregoing statute and could not be indirectly accomplished by action of the school board through the medium of reducing her salary pursuant to both rule or schedule for "inferior performances."

In answer to your third question, I am of the opinion the teacher is not obligated to accept a 1959-60 teaching contract at the state minimum salary where there is a salary schedule in effect in said school corporation fixing a higher salary for her class of teachers, based upon the training, experience, and degree completed as of the first day of service, but could insist upon a contract containing the proper stated salary. If the contract were refused the teacher, I am of the opinion she should offer her services when school starts and reasonably keep such offer open and then if necessary pursue her remedies in court to secure the execution to her of a proper contract. However, I am of the further opinion should she accept such a contract containing only the minimum salary schedule, and served under the same, she could, during or after service, successfully maintain an action for the difference in salary due her under such schedule, without consideration for the limitation therein prescribed, or any reduction for "inferior performances."

OFFICIAL OPINION NO. 36

August 3, 1959

Hon. Albert A. Steinwedel
Auditor of State
238 State House
Indianapolis, Indiana

Dear Mr. Steinwedel:

Your letter of June 24, 1959 has been received and reads as follows: