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1. TEACHERS IN PUBLIC SCHOOLS — CONTRACT SYSTEM — EXCEPTION, SECTION 7690-2 G.C., HOUSE BILL 121, 94 GENERAL ASSEMBLY — APPLIES TO "NEW TEACHERS" AND "BEGINNING TEACHERS" IN DISTRICTS UNDER EIGHT HUNDRED PUPILS.

2. "CONTINUING CONTRACTS."

3. CONSTRUCTION: "AT THE TIME OF THE PASSAGE OF THIS ACT" — ACT APPROVED BY GOVERNOR JUNE 2, 1941.

4. MANDATORY DUTY, BOARDS OF EDUCATION IN STATE TO TENDER CONTINUING CONTRACTS TO TEACHERS WHO HOLD PROFESSIONAL, PERMANENT OR LIFE CERTIFICATES, WHO COMPLETED FIVE CONSECUTIVE YEARS OF EMPLOYMENT, EXPIRATION SCHOOL YEAR 1940 - 1941.

SYLLABUS:

1. *The exception contained in Section* 7690-2, *General Code, as enacted in House Bill No.* 121, *of the Ninety-fourth General Assembly, effective September* 1, 1941, *with respect to a contract system for teachers in the public schools in districts of under eight hundred pupils, applies to "new teachers" and "beginning teachers" only, in the said district, as those expressions are defined in the said exception.*

2. *Under the terms of Section* 7690-2, *General Code, as enacted in House Bill No.* 121, *of the* 94th *General Assembly, effective September* 1, 1941, *teachers in the public schools of all school districts other than "new teachers" and "beginning teachers," as those phrases are defined in the exception therein relating to districts of under eight hundred pupils, are subject to the terms of the act generally, exclusive of this exception, with respect to their right to be granted what are termed therein "continuing contracts."*

3. *By the clause, "at the time of the passage of this act," as used in the third paragraph of Section* 7690-2, *General Code, as enacted in House Bill No.* 121, *of the* 94th *General Assembly, is meant the date when the act was approved by the Governor, to wit, June* 2, 1941.

4. *On September* 1, 1941, *a mandatory duty will arise for all boards of education in the State to tender continuing contracts, as the term is defined in House Bill No.* 121, *of the Ninety-fourth General Assembly, to teachers in their respective districts who hold professional, permanent, or life certificates, and who completed five consecutive years of employment in their said districts at or near the expiration of the school year* 1940-1941.

Columbus, Ohio, August 1, 1941.

Hon. F. R. Parker, Prosecuting Attorney,
Bryan, Ohio.

Dear Sir:

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

> "I have received a request from a village board of education for an opinion involving the construction of House Bill No. 121, as follows:
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> 'The West Unity Village Board of Education is requesting an opinion from the Attorney General, State of Ohio, on H. B. No. 121. The West Unity Village School District is one of the village and rural school districts that make up the Williams County School District. The Williams County School District made up of village and rural school districts has an enrollment of approximately 2700 pupils. The West Unity Village School District has an enrollment of less than 400 pupils. H. B. No. 121 provides continuing contracts for school districts of over 800 pupils. H. B. No. 121 also states "provided, however, that in school districts of under 800 pupils the following contract system shall control * * * . "
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> A teacher who is completing the fifth school year at West Unity has not been reemployed for the 1941-42 school term. H. B. No. 121 provides that any teacher who is completing his fifth year must be given a continuing contract. The following question is raised by the West Unity Board of Education: Must the West Unity Village Board of Education issue a continuing contract to those teachers who are completing their fifth year of teaching in West Unity Schools this year?' "

House Bill No. 121 of the 94th General Assembly, was passed May 15, 1941, approved by the Governor June 2, 1941, and filed in the Office of the Secretary of State on the same day. It will therefore become effective September 1, 1941.

The purpose of this legislation, as expressed in the title of the Act, is:

> "To provide for the use of limited and continuing contracts in the employment of teachers and for an orderly procedure for the termination or suspension of such contracts, and for these purposes to amend section 7690-1, of the General Code, to enact supplemental sections to be known as sections 7690-2, 7690-3, 7690-4, 7690-5, 7690-6, 7690-7 and 7690-8 of the General Code, and to repeal sections 7700, 7701 and 7708 of the General Code."

By the terms of Section 7690, of the General Code of Ohio, the control and management of all the public schools in each city, village or rural school district are reposed in the board of education for the district. Each such board of education is directed by Section 7690-1, General Code, which remains in effect until September 1, 1941, to fix the salaries of all teachers within the district. Section 7691, General Code, provides:

> "No person shall be appointed as a teacher for a term longer than four school years, nor for less than one year, except to fill an unexpired term, the term to begin within six months of the date of the appointment. In making appointments teachers in the actual employ of the board shall be considered before new teachers are chosen in their stead."

Section 7690-1, General Code, was amended in House Bill No. 121 of the 94th General Assembly. As so amended, it provides as follows:

> "Each board of education shall enter into contracts for the employment 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 7690-3 of this act. 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.
>
> Contracts for the employment of teachers shall be of two types: limited contracts and continuing contracts. A limited contract for a superintendent shall be a contract for such term as authorized by section 7702 of the General Code, and for all other teachers, as hereinafter defined, for such term as authorized by section 7691 of the General Code. A continuing contract shall be a contract which shall remain in full force and effect until the teacher resigns, elects to retire, or is retired pursuant to section 7896-34 of the General Code, or until it is terminated or suspended as provided in this act and shall be granted only to teachers holding professional, permanent, or life certificates.
>
> The term 'teacher' as used in this act shall be deemed to mean and include all persons certified to teach and who are employed in the public schools of this state as instructors, principals, supervisors, superintendents, or in any other educational position for which the employing board requires certification.

'Year' as applied to terms of service for the purposes of this act means actual service of not less than one hundred and twenty days within a school year, provided however that any board of education may grant a leave of absence for professional advancement with full credit for service.

'Continuing service status' for a teacher means employment under a continuing contract."

Supplemental Section 7690-2 as enacted in House Bill No. 121, reads as follows:

"Teachers eligible for continuing service status in any school district shall be those teachers qualified as to certification who have taught for at least three years in the district, and those teachers who, having attained continuing contract status elsewhere, have served two years in the district, but the board of education, upon the superintendent's recommendation, may at the time of employment or at any time within such two-year period declare any of the latter teachers eligible.

Upon the recommendation of the superintendent of schools that a teacher eligible for continuing service status be re-employed, a continuing contract shall be entered into between a board of education and such teacher unless the board by a three-fourths vote of its full membership rejects the superintendent's recommendation. However, the superintendent may recommend re-employment of such teacher, if continuing service status has not previously been attained elsewhere, under a limited contract for not to exceed two years but upon subsequent re-employment only a continuing contract may be entered into.

Provided, however, that on or before September 1, 1941, a continuing contract shall be entered into by each board of education with each teacher holding a professional, permanent, or life certificate who, at the time of the passage of this act, is completing five or more consecutive years of employment by said board.

A limited contract may be entered into by each board of education with each teacher who has not been in the employ of the board for at least three years and shall be entered into, regardless of length of previous employment, with each teacher employed by the board who holds a provisional or temporary certificate.

Any teacher employed under a limited contract and ineligible for a continuing contract shall at the expiration of such limited contract be deemed re-employed under the provisions of this act for the succeeding school year at the same salary plus any increment provided by the salary schedule unless the employing board shall give such teacher written notice on or before the thirty-first day of March of its intention not to re-employ

him. Such teacher shall be presumed to have accepted such employment unless he shall notify the board of education in writing to the contrary on or before the first day of May, and a contract for the succeeding school year shall be executed accordingly.

Provided, however, that in school districts of under eight hundred pupils the following contract system shall control:

a. Beginning teachers, who have not previously been employed as a teacher in any school, shall be hired for one year.

b. New teachers, who have had at least one year's experience as teachers in other schools, shall be employed for a period of time commensurate with their past experience at the discretion of the hiring board of education, provided that no such control shall be for more than five years.

c. Upon re-employment after the termination of the first contract, the new contract shall be for not less than three years nor more than five years provided that the teacher's educational qualifications have been fulfilled and the teacher's work has been satisfactory.

d. Upon re-employment after the termination of the second contract, the teacher's contract shall be for five years and subsequent renewal thereof shall be for five year periods, or the board of education may at any time grant a continuing contract."

Your inquiry involves the question of the proper construction to be placed upon those provisions of Section 7690-2, General Code, contained in the proviso or exception relating to school districts of under eight hundred school pupils. If it should be determined that the contract system therein provided for in school districts of under eight hundred pupils relates only to contracts with "beginning teachers" and "new teachers" as therein defined, and makes no provision for contracting with other teachers not included in those definitions the further question arises as to whether or not the provisions of the statute relating to the granting of continuing contracts on or before September 1, 1941, apply to such *other teachers* and the force and effect to be given this provision of the statute. It will be observed that clauses "a" and "b" of the exception relating to districts of under eight hundred pupils, relate expressly to those teachers described therein as "beginning teachers" and "new teachers" and provide as to the former who have not previously had teaching experience "in any school" that contracts with such teachers shall be limited to one year. As to the "new teachers" being those who have had at least one year's experience in *other schools* contracts are limited to not more than five years, at the discretion of the hiring board. No provision is made,

at least not expressly, for such teachers as may have had previous experience in the hiring board's local school system. The question therefore arises whether or not clauses "c" and "d" are to be construed as having reference to clauses "a" and "b" only, or whether the words "first contract" appearing in clause "c," and "second contract" appearing in clause "d," refer to the first and second contracts made with the same persons spoken of in clauses "a" and "b."

The primary rule of statutory construction is to construe legislation so as to reflect the intention of the lawmaking body by which it was enacted. It is equally fundamental that that intent is to be gathered from the language used in the light of the ends sought to be attained by the enactment, its context and its relation to other enactments bearing on the same or similar subject matter. Where the language contained in a statute is such as to constitute a complete expression of legislative intent, words may not be added to or taken therefrom to establish what may have been the legislative intent. That intent is limited to that expressed in the light of other pertinent considerations. It has oftentimes been said by courts in construing statutory enactments that the intent is to be gleamed from what the legislature said and not from what it may have meant to say or what it might have said to express what it may have intended. To speculate on what the legislature meant to say, where it has clearly expressed itself in unambiguous language is not the province of construction or interpretation.

Black on Interpretation of Laws, p. 45;

Crawford on Statutory Construction, Section 164;

Ohio Jurisprudence, Volume 37, p. 511.

While the statutory provision here under consideration is introduced into the act by the word "provided," the provision with respect to a "contract system" which shall prevail in school districts of "under eight hundred pupils" is in effect, at least, an exception rather than a proviso. Courts and textwriters point out a technical distinction between provisos and exceptions in statutes. Oftentimes, however, the terms are used interchangeably and where an exception to general provisions of law is really made it makes little difference so far as construction or interpretation is concerned what it may be called, as practically the same rules of law

apply in either case, except perhaps where penal provisions of a statute are concerned.

Crawford on Statutory Construction, Section 91;
Black on Interpretation of Laws, page 427 et seq;
Ohio Jurisprudence, Volume 37, pages 775, 784 and 788;
25 Ruling Case Law, page 984.

It has been very generally held by courts that an exception to the general provisions of a legislative act is subject to the rule of strict but reasonable construction. That is to say that any doubt will be resolved in favor of the general provisions and against the exception and anyone claiming to be relieved from the application of the general provisions must establish clearly that he comes within the exceptions.

Kroff v. Amrhein et al., 94 O.S., 282;
State ex rel. Keller v. Forney, et al., 108 O.S., 463;
Bruner v. Briggs, 39 O.S., 478, 484;
Ruling Case Law, Volume 25, page 985.

The manifest purpose of the exception here under consideration, is as expressly stated therein, to provide a "contract system" for school districts of "under eight hundred pupils" different than that provided generally for school districts, as provided in the act exclusive of the exception. If the legislature meant the expressions "first contract" and "second contract" as used in clauses "c" and "d", to apply to all teachers, that is, "new teachers", "beginning teachers" and teachers with previous teaching experience in the particular district, it failed to fix any limitations for the first contract for teachers of the third class named and the "system" would be incomplete for that reason. We may therefore conclude that the latter named class of teachers was not intended to be included in the system.

Moreover, some significance must be attached to the use by the legislature of the word "the" preceding the words "first contract" and "second contract" in clauses "c" and "d". Legislators must be regarded as knowing the rules of grammar and the meaning and significance of words used in legislative enactments. The word "the" is defined in Webster's New International Dictionary as follows:

> "A demonstrative adjective used chiefly before a noun to individualize, specialize, or generalize its meaning, having a force thus distinguished from the indefinite distributive force of *a, an,* and from the abstract force of the unqualified noun. Thus, *the* man points to a particular man, as distinguished from *a* man and from the generic *man.* Special uses are: 1. Indicating identity with someone or something previously mentioned."

I know of no reason for saying that the expressions, "upon re-employment after the termination of the first contract" and "upon re-employment after the termination of the second contract" as used in clauses "c" and "d" of the exception or privso relating to districts of "under eight hundred pupils" refer to anything other than the re-employment after the first and second contracts made with the teacher referred to in clauses "a" and "b". To construe these expressions otherwise would imply a complete break in the continuity of thought which prompted the exception. To say that a "first contract" and "second contract" spoken of in clauses "c" and "d", includes contracts with other teachers who are not within the classifications mentioned in clauses "a" and "b", would necessitate a pure assumption of an intent of the legislature for which there is no justification in the statute, so far as the language used is concerned, nor do I find anything in the purpose of the law or in related statutes to justify such a conclusion.

This brings us to the question which is involved in your inquiry as to the continuing contract status of teachers in districts of under eight hundred pupils, who hold professional, permanent or life certificates, and who, at the time of the passage of the said House Bill No. 121, were completing five or more consecutive years of employment in the said district. This involves the meaning and application of that part of Section 7690-2, General Code, as contained in House Bill No. 121, which reads as follows:

> "Provided, however, that on or before September 1, 1941, a continuing contract shall be entered into by each board of education with each teacher holding a professional, permanent, or life certificate who, at the time of the passage of this act, is completing five or more consecutive years of employment by said board."

The above quoted proviso is the third paragraph of Section 7690-2, General Code, as enacted in House Bill No. 121, and of course, like the rest of the act is not effective until September 1, 1941. The two pre-

ceding paragraphs of the statute deal generally with the matter of eligibility of teachers for continuing service status, and when any such teacher may be granted a continuing contract and when he or she must be granted or tendered a continuing contract. Under the terms thereof, eligibility for continuing service status depends on experience and qualifications as to certification. What constitutes a continuing contract is set out in Section 7690-1, General Code, as contained in said House Bill No. 121, and "continuing service status" is therein defined as "employment under a continuing contract."

Speaking generally, under the provisions of the two paragraphs mentioned, the unqualified right of a teacher having continuing contract status or, to state it another way, being eligible for continuing service status, is dependent upon the recommendation of the superintendent of schools, which recommendation is concurred in by the employing board by its failure to reject the recommendation of the superintendent by a three-fourths vote of its full membership.

The proviso quoted above, contained in the third paragraph of the statute, constitutes practically an exception to the general provisions contained in the two preceding paragraphs applicable to teachers who are qualified as to certification and who are, upon the passage of the act, completing five or more consecutive years of employment by the employing board. This proviso is couched in mandatory language in that it provides that as to such teachers a continuing contract *shall* be entered into with them and their rights so fixed with respect to the matter are not in any wise qualified by or made dependent upon a recommendation of the superintendent or anything else except years of service and certification.

The natural and appropriate office of a proviso in a statute is to restrain or qualify the generality of the language that it follows. Ruling Case Law, Volume 25, page 984; Black on Interpretation of Laws, Section 126. In Ruling Case Law, Volume 25, page 985, it is said;

> "It is contrary to the nature of a proviso to enlarge the operation of the statute. But, notwithstanding that it is the true office of a proviso to restrict the sense or make clear that which has gone before and which might be doubtful because of the generality of the language used, provisos have frequently been held to bring in new matter rather than to limit or explain that which has gone before. It is a common practice in legislative proceedings, on the consideration of bills, for parties de-

> sirous of securing amendments to them to precede their proposed amendments with the term 'provided,' so as to declare that, notwithstanding existing provisions, the one thus expressed is to prevail, thus having no greater signification than would be attached to the conjunction 'but' or 'and' in the same place, and simply serving to separate or distinguish the different paragraphs or sentences."

A simular observation is made in Crawford on Statutory Construction, Section 297, where it is said:

> "Even though the primary purpose of the proviso is to limit or restrain the general language of a statute, the legislature, unfortunately, does not always use it with technical correctness. Consequently, where its use creates an ambiguity, it is the duty of the court to ascertain the legislative intention, through resort to the usual rules of construction applicable to statutes generally, and give it effect even though the statute is thereby enlarged, or the proviso made to assume the force of an independent enactment, and although a proviso as such has no existence apart from the provision which it is designed to limit or to qualify."

In the present instance the proviso in a sense extends the provisions which immediately precede it and in effect introduces new matter. The mere fact that it stands out as a separate paragraph in the statute and begins with the word "provided" does not when considered in the light of other provisions of the act wherein it exists render it inoperative, ineffective or void for repugnancy merely because it in effect introduces new matter and appears in the role of an independent provision.

It remains to consider what teachers completed five years of service upon the passage of the said House Bill No. 121. In other words, what is the significance to be given to the phrase "passage of this act" as found in that part of the statute here under consideration.

It is a general rule of law that words of a statute will be construed in their ordinary sense and will be accorded such meaning as is commonly attributed to them unless such a construction would defeat the manifest intent of the legislature. Ruling Case Law, Volume 25, page 988; Crawford on Statutory Construction, Section 186; Louis' Sutherland Statutory Construction, Section 358; Smith v. Buck, 119 O. S., 101.

While some courts in other states have held that an act of the legislature is not passed until it becomes effective, it will be found, upon examination of these authorities that in most cases at least, where such

a holding is made, it was done because of some peculiar provision of the law or circumstances incident to the particular case. Be that as it may, I believe that in this State it has been quite generally understood by laymen as well as lawyers that an act of the legislature is passed when it has received the approval of the legislature and of the Governor even though it may not become effective until some time later. The distinction between the *passing* of an act and the effective date of the act is made in the Constitution itself. For example, Article II, Section 1c, of the Constitution of Ohio, provides with respect to the initiative and referendum:

> "No law *passed* by the General Assembly shall go into effect until ninety days after it shall have been filed in the office of the Secretary of State, except as herein provided."
>
> (Emphasis, the writer's.)

It seems clear that the framers of the Constitution used the word "passed" in the sense that an act is passed by the General Assembly before the ninety day period spoken of begins, thus showing that one thing was meant when the passing of an act was spoken of, and another when they spoke of a law going into effect. It has been held that words used in a statute are presumed to be used in the same sense in which they are used in the Constitution. Industrial Commission v. Cross, 104 O. S. 561; State ex rel. Peters v. McCollister, 11 Ohio, 46.

In Ruling Case Law, Volume 25, page 796, it is stated:

> "The taking effect of an act is a different thing from its passage or enactment. While the pharses 'after the passage' or 'on the passage' of an act are sometimes employed in statutes in such a way that the word passage can be given no other meaning than as referring to the time when a statute takes effect, rather than to the time of its enactment, in ordinary usage the passage of an act is well understood as that time when it is stamped with the approval of the requisite vote of both houses in the constitutional manner, signed by the presiding officer of each house, and approved by the chief executive, or passed over his veto, or when it becomes a law by lapse of time. But its going into effect is an entirely different thing, as is well understood, and means its becoming operative as a law."

Courts in Ohio have recognized that passage of an act occurs when it is enacted by the legislature and approved by the Governor, rather rather than the time when the act becomes effective. In the case of

Patterson Foundry and Machine Company v. Ohio River Power Company, 99 O. S., 429, which dealt with the question of the date of the passage of an act of the legislature enacted in 1911, which was prior to the adoption of our present Constitution, the case of Cordiner v. Dear, 55 Wash., 479, 104 Pac., 780, was cited with approval, and in the said Washington case, it was held:

> "The term 'passage of this act', in the act of March 15, 1907, requiring an action to cancel a tax deed to be brought within three years from the issuance of the deed provided that the act shall not apply to actions on deeds heretofore issued if they are commenced within one year after the 'passage of this act' means the time the act was actually passed by the legislature and approved by the Governor and not the time ninety days after the adjournment of the legislature when the act went into effect, there being nothing in the act requiring a resort to technical or secondary meanings of the words to give the act meaning and effect."

See also, with respect to the use of the word "passage", in connection with enactments of the General Assembly, State v. Moore, 124 O. S., 256, 258.

It is a matter of common knowledge that teachers have been generally employed for periods expiring on or about the ending of a school year. While in most districts perhaps, contracts have been made to expire on June 30th, some districts have followed the rule of employing them from August 1st to July 31st, of the following year, and in other districts contracts have been made to expire on August 31st, and perhaps other similar contract periods have been used. In practically all cases, however, I believe the contract periods are made to expire at the expiration of a school year. These facts were undoubtedly known to the members of the Legislature and it was not felt necessary to be specific about the time of expiration of five or more consecutive years of employment which is made by the terms of the proviso in question, one of the conditions necessary to entitle a teacher to a continuing contract. I believe upon consideration of the provisions of that part of the statute here under consideration in the light of contemporary conditions and circumstances and the other provisions of the act in pari materia that a teacher who completed five or more years of consecutive employment in any certain district at or near the end of the school year 1940-1941 qualifies under the statute as having completed such service at the time of the passage of the act.

The act does not become effective until September 1, 1941, and of course the requirement of the statute to enter into contracts with teachers "on or before September 1, 1941" has no force until that time. It does, however, in my opinion acquire force on September 1, 1941, when the law becomes effective and at that time the obligation to enter into contracts or to at least tender contracts to teachers in accordance with the plain terms of the statute, arises. That does not mean that if it is not done precisely on the first day of September, this provision of the law becomes inoperative or ineffective. If action to comply with the statute is not taken on September 1, 1941, it must be done later, as time is not the essence of the matter. It should be done, however, in order to comply with the law, within a reasonable time after September 1, 1941.

I am therefore of the opinion:

1. The exception contained in Section 7690-2, General Code, as enacted in House Bill No. 121, of the 94th General Assembly, effective September 1, 1941, with respect to a contract system for teachers in the public schools in districts of under eight hundred pupils, applies to "new teachers" and "beginning teachers" only, in the said district, as those expressions are defined in the said exception.

2. Under the terms of Section 7690-2, General Code, as enacted in House Bill No. 121, of the 94th General Assembly, effective September 1, 1941, teachers in the public schools of all school districts other than "new teachers" and "beginning teachers", as those phrases are defined in the exception therein relating to districts of under eight hundred pupils, are subject to the terms of the act generally, exclusive of this exception, with respect to their right to be granted what is termed therein "continuing contracts."

3. By the clause, "at the time of the passage of this act" as used in the third paragraph of Section 7690-2, General Code, as enacted in House Bill No. 121, of the 94th General Assembly, is meant the date when the act was approved by the Governor, to wit, June 2, 1941.

4. On September 1, 1941, a mandatory duty will arise for all boards of education in the State to tender continuing contracts, as the term is defined in House Bill No.121, of the 94th General Assembly, to teachers in their respective districts who hold professional, permanent or life cer-

tificates, and who completed five consecutive years of employment in their said districts at or near the expiration of the school year 1940-1941.

I come now to a consideration of the specific question submitted by you, as to the duty of the West Unity Board of Education to tender continuing contracts to those teachers in the said district who are completing their fifth year of teaching in the West Unity schools this year.

Inasmuch as West Unity District to which you refer, has an enrollment of less than four hundred pupils, it clearly comes within the classification of "districts of under eight hundred pupils" and therefore, the exception in the statute applicable to such districts has application to the said district. The fact that the Williams County district of which the West Unity district is a part has a combined enrollment in all the districts comprising the said county district of approximately 2700 pupils is immaterial. County boards of education are not authorized by law to make contracts with teachers. Local boards are the hiring boards for their respective districts, and I find no reason for saying that the expression "districts of under eight hundred pupils" means anything other than the local district in which local boards of education function and employ teachers.

I am therefore of the opinion in specific answer to your question that the Board of Education of the West Unity School District will be required by law to tender "continuing contracts", as the term is defined in House Bill No. 121 of the Ninety-fourth General Assembly, to all teachers in the said district who hold permanent, professional or life certificates and who completed five or more consecutive years of employment in said district at or near the expiration of the school year 1940-1941.

Respectfully,

THOMAS J. HERBERT,

Attorney General.