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Cross-Certification Teacher Tenure Problems in Ohio

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NOTES

CROSS-CERTIFICATION TEACHER TENURE PROBLEMS IN OHIO

I. INTRODUCTION

CROSS-CERTIFICATION IS THE PROCESS by which a teacher seeks to satisfy the statutory requirements of tenure by relying on a professional, permanent, or life certificate in a field other than the field in which the teacher is employed. The Ohio Revised Code does not directly address the question of whether a teacher can cross-certify to obtain tenure. The appellate courts of Ohio are evenly divided on the question of whether cross-certification is statutorily permissible: three decisions have concluded that it is permissible, and three have concluded that it is not. This note will examine the decisions and statutes which pertain to cross-certification and will suggest that the better statutory interpretation is to permit cross-certification.

II. THE PROCESS BY WHICH TENURE IS OBTAINED IN OHIO

Since familiarity with the process by which tenure is obtained in Ohio is a prerequisite to understanding the concept of cross-certification, it is necessary first to examine the relevant portions of Title 33 of the Ohio Revised Code which establish the requirements for obtaining tenure. Ohio Revised Code section 3319.08 provides that a teacher may be employed under either a limited contract or a continuing contract.[1] A limited contract is statutorily defined as a term contract which cannot exceed five years.[2] It offers no tenure protections; at the expiration of the term, the board of education can elect not to renew the contract if proper notice is furnished to the teacher prior to April 30th.[3] Further, the contract is subject to nonrenewal without regard to the length of

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[1] Section 3319.08 states:

> Contracts for the employment of teachers shall be of two types, limited contracts and continuing contracts. A limited contract for a superintendent is a contract for such term as authorized by section 3319.01 of the Revised Code, and for all other teachers for a term not to exceed five years. A continuing contract is a contract which shall remain in effect until the teacher resigns, elects to retire, or is retired pursuant to section 3307.37 of the Revised Code or until it is terminated or suspended and shall be granted only to teachers holding professional, permanent, or life certificates. . . .

OHIO REV. CODE ANN. § 3319.08 (Page 1978).

[2] *Id.*

[3] *See id.* § 3319.11 ¶ 5, set out at note 8 *infra*.

previous employment.[4] A teacher possessing only a provisional or temporary certificate,[5] as opposed to a professional, permanent, or life certificate,[6] may be employed only under a limited contract.[7]

An individual obtains tenure by becoming employed under a continuing contract, as opposed to a limited contract.[8] To become eligible for

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[4] *See id.* ¶ 4, set out at note 8 *infra*.

[5] State Bd. Educ. Reg. EDb-3301-21-10 provides that a provisional teacher's certificate will be issued to the holder of a bachelor's degree.

[6] *See* notes 10-12 *infra* and accompanying text. To avoid unnecessary repetition throughout the text of this article, all discussions pertaining to professional certificates apply equally to permanent and life certificates.

[7] OHIO REV. CODE ANN. § 3319.08 (Page 1978), set out at note 1 *supra*.

[8] Ohio Revised Code section 3319.11 establishes the requirements for obtaining tenure by Ohio teachers. Because of its importance in this discussion, this section is presented in its entirety:

> 3319.11. Continuing service status and contract, limited contract; failure of board or superintendent to act.
>
> Teachers eligible for continuing service status in any school district shall be those teachers qualified as to certification, who within the last five years 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 recommendation of the superintendent of schools, may at the time of employment or at any time within such two-year period, declare any of the latter teachers eligible.
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> Upon the recommendation of the superintendent that a teacher eligible for continuing service status be re-employed, a continuing contract shall be entered into between the board and such teacher unless the board by a three-fourths vote of its full membership rejects the recommendation of the superintendent. 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, provided that written notice of the intention to make such recommendation has been given to the teacher with reasons directed at the professional improvement of the teacher on or before the thirtieth day of April, and provided that written notice from the board of education of its action on the superintendent's recommendation has been given to the teacher on or before the thirtieth day of April, but upon subsequent re-employment only a continuing contract may be entered into. If the board of education does not give such teacher written notice of its action on the superintendent's recommendation of a limited contract for not to exceed two years before the thirtieth day of April, such teacher is deemed re-employed under a continuing contract at the same salary plus any increment provided by the salary schedule. Such teacher is presumed to have accepted employment under such continuing contract unless he notifies the board in writing to the contrary on or before the first day of June, and a continuing contract shall be executed accordingly.
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> A teacher eligible for continuing contract status employed under an additional limited contract for not to exceed two years pursuant to written notice from the superintendent of his intention to make such recommendation, is, at the expiration of such limited contract, deemed re-em-

employment under a continuing contract, a teacher must first possess either a professional, permanent, or life certificate.[9] To convert the basic provisional certificate into the more desirable professional or permanent certificate, a teacher must meet the standards of preparation, experience, and teaching success established by the State Board of Education.[10] Currently, to convert a provisional certificate into a professional

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ployed under a continuing contract at the same salary plus any increment granted by the salary schedule, unless the employing board, acting on the superintendent's recommendation as to whether or not the teacher should be re-employed, gives such teacher written notice of its intention not to re-employ him on or before the thirtieth day of April. Such teacher is presumed to have accepted employment under such continuing contract unless he notifies the board in writing to the contrary on or before the first day of June, and a continuing contract shall be executed accordingly.

A limited contract may be entered into by each board 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 not eligible to be considered for a continuing contract, is, at the expiration of such limited contract, deemed re-employed under the provisions of this section at the same salary plus any increment provided by the salary schedule unless the employing board, acting on the superintendent's recommendation as to whether or not the teacher should be re-employed, gives such teacher written notice of its intention not to re-employ him on or before the thirtieth day of April. Such teacher is presumed to have accepted such employment unless he notifies the board in writing to the contrary on or before the first day of June, and a written contract for the succeeding school year shall be executed accordingly. The failure of the parties to execute a written contract shall not void the automatic re-employment of such teacher.

The failure of a superintendent of schools to make a recommendation to the board of education under any of the conditions set forth in this section, or the failure of the board of education to give such teacher a written notice pursuant to this section shall not prejudice or prevent a teacher from being deemed re-employed under either a limited or continuing contract as the case may be under the provisions of this section.

OHIO REV. CODE ANN. § 3319.11 (Page 1978). For commentary pertinent to teacher tenure law in Ohio, see Baldwin's Ohio School Law § 63.06 (7th ed. 1970); Comment, *Teacher Reemployment*, 3 OHIO N.L. REV. 210 (1975).

[9] *See* OHIO REV. CODE ANN. § 3319.08 (Page 1978), set out at note 1 *supra*.

[10] Ohio Revised Code section 3319.25 states: "The state board of education may convert any provisional certificate or renewal thereof into a professional certificate of like type valid for eight years, provided the applicant has met the standards of preparation, experience, and teaching success set by the board for the conversion applied for." *Id.* § 3319.25. Similarly, "[t]he state board of education may convert any professional certificate or renewal thereof into a permanent certificate of like type provided the applicant has met the standards of preparation, experience, and teaching success set by the said board for the conversion applied for. All permanent certificates shall be countersigned by the superintendent of public instruction." *Id.* § 3319.26.

certificate the teacher must demonstrate twenty-seven months of successful teaching experience in Ohio and must complete the equivalent of thirteen semester hours in professional education subsequent to the granting of the provisional certificate.[11] To convert a professional certificate into a permanent certificate the teacher must demonstrate forty-five months of successful teaching experience under the professional certificate and must have attained a masters degree or its equivalent.[12]

Once the teacher possesses a professional certificate and has taught in the school district at least three of the prior five years, the teacher is eligible under Ohio Revised Code section 3319.11 (Teacher Tenure Act) to receive a continuing contract which provides tenure rights. Upon initially satisfying these certification and length of employment requirements, the teacher may be re-employed by the board of education in one of the following three manners. First, the superintendent may recommend that the teacher's employment be extended under a continuing contract, and the recommendation will prevail unless three-fourths of the entire school board reject it.[13] Second, the superintendent may recommend that the teacher be re-employed under an additional limited contract, which is not to exceed two years.[14] Upon the expiration of this two-year limited contract, however, the superintendent must either issue the teacher a continuing contract or terminate the teacher's employment.[15] Third, the superintendent may re-employ the teacher without qualification. When this occurs, the Ohio Supreme Court has interpreted the contract as being a continuing contract.[16]

A teacher who acquires tenure by receiving a continuing contract pursuant to section 3319.11 is entitled to automatic re-employment thereafter.[17] Termination of a tenured teacher is effectuated only upon a showing of gross inefficiency, immorality, wilful and persistent violations of reasonable regulations of the board of education, or other good and just cause.[18]

[11] State Bd. Educ. Reg. EDb-3301-21-14(E).

[12] State Bd. Educ. Reg. EDb-3301-21-14(G).

[13] *See* OHIO REV. CODE ANN. § 3319.11 ¶ 2 (Page 1978), set out at note 8 *supra*.

[14] *See id.* ¶ 3, set out at note 8 *supra*.

[15] *Id.* An individual does not automatically acquire continuing contract status simply because of eligibility. At this crucial junction the individual must be employed under a continuing contract or not re-employed at all. *See* State *ex rel.* Hura *v.* Board of Educ., 51 Ohio St. 2d 19, 364 N.E.2d 864 (1977).

[16] State *ex rel.* Gandy v. Board of Educ., 26 Ohio St. 2d 115, 269 N.E.2d 605 (1971).

[17] *See* OHIO REV. CODE ANN. § 3319.08 (Page 1978), set out at note 1 *supra*.

[18] *Id.* § 3319.16. This section also formulates notice requirements, rights to a hearing, and the right to judicial review. For a discussion of dismissal because of a teacher's unauthorized absence or tardiness see Annot., 78 A.L.R.3d 117 (1977). For a discussion of dismissal due to a teacher's sexual conduct see Annot., 78 A.L.R.3d 19 (1977). "Insubordination" is discussed at Annot., 78 A.L.R.3d 83 (1977).

III. THE PROBLEM OF CROSS-CERTIFICATION

The dispute over whether cross-certification is statutorily permissible arises from the fact that it is not specifically addressed by statute. Ohio Revised Code section 3319.11 states:

> Teachers eligible for continuing service status in any school district shall be those teachers qualified as to certification, who within the last five years have taught for at least three years in the district. . . .
>
> Upon the recommendation of the superintendent that a teacher eligible for continuing service status be re-employed, a continuing contract shall be entered into between the board and such teacher . . . .[19]

Accordingly, four requirements must be satisfied before an individual obtains tenure: (1) the individual must be a "teacher"; (2) the individual must be "qualified as to certification"; (3) the individual must have taught three of the last five years within the school system; and (4) the individual must receive the recommendation of the superintendent. No recommendation is necessary, however, when a teacher who is eligible for continuing contract status has subsequently been re-employed under a limited two-year contract and, upon its expiration, has not been given notice prior to April 30th of the superintendent's decision not to re-employ the individual.[20] The disputes which arise between a teacher and a board of education over whether the last two of these requirements have been satisfied are not pertinent to the issue of cross-certification. Also, although the question of who qualifies as a "teacher" for purposes of section 3319.11 has received extensive judicial examination in the past, the definition of "teacher" is a relatively stable judicial concept today.[21]

The dispute over whether cross-certification is statutorily permissible arises from the requirement that the individual must be "qualified as to certification." This requirement refers to section 3319.08,[22] which states: "A continuing contract . . . shall be granted only to teachers holding professional, permanent, or life certificates."[23] Accordingly, an individual cannot become eligible to receive tenure until that individual possesses either a professional, permanent, or life certificate. The question which is not specifically addressed by any section of Title 33 is whether an in-

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[19] OHIO REV. CODE ANN. § 3319.11 (Page 1978). The statute also provides that an individual who has obtained tenure elsewhere is eligibile for tenure in the new school system after only two years. *Id.*

[20] *Id.* ¶ 3, set out at note 8 *supra.*

[21] For a discussion of who qualifies as a "teacher" for purposes of Ohio Revised Code section 3319.11, see notes 55-62, 78-87 *infra* and accompanying text.

[22] OHIO REV. CODE ANN. § 3319.08 (Page 1978), set out at note 1 *supra.*

[23] *Id.*

dividual who possesses multiple teaching certificates, of which at least one is a professional certificate and at least one is a provisional certificate, must possess the professional certificate *in the area in which he is employed*, or whether the requirement of being "qualified as to certification" can be satisfied by possessing the professional certificate in *any* teaching area and not necessarily in the area in which the individual is employed.

The acquisition of tenure is a time-consuming process. During this period many teachers are "promoted" within the educational hierarchy to the positions of guidance counselors, assistant principals, principals, supervisors, and superintendents. Other teachers change their areas of certification from one field to another. The question of whether a teacher who has been "promoted" or has changed fields of interest can utilize the professional certificate in his or her original teaching area to help satisfy the statutory requirements of tenure, even though he or she does not possess a professional certificate in the new area, becomes vitally important to the teacher seeking tenure. Ohio courts must answer this question of the validity of cross-certification in one of the following three ways: (1) the teacher is eligible for tenure in the new field; (2) the teacher is eligible for tenure in the school system, but not necessarily entitled to tenure in the new field; or (3) the teacher is not eligible for tenure at all unless he or she is re-employed in the original field for which a professional certificate is held or until a professional certificate is acquired for the new field. No Ohio court has held the first answer to be the correct one. The appellate courts, however, are currently divided as to which of the remaining two answers is proper.

IV. CASES REFUSING TO ALLOW CROSS-CERTIFICATION

As noted, one requirement which must be satisfied before tenure can be granted is that the individual be "qualified as to certification." Three appellate courts which have examined this requirement have interpreted it as requiring a professional, permanent, or life certificate *in the particular area* in which the individual is employed while seeking tenure and hence have denied cross-certification.

In *Majoewsky v. Indian Hill Exempted Village School District Board of Education*,[24] an individual held a professional elementary certificate

[24] No. C-74527 (Ohio 1st Dist. Ct. App. Sept. 8, 1975), *cert. denied*, No. 75-983 (Ohio Sup. Ct. Dec. 7, 1975). The First District Court of Appeals upheld its position of rejecting cross-certification in the subsequent decision of Voss v. Northwest Local Bd. of Educ., No. C-790168 (Ohio 1st Dist. Ct. App. July 13, 1979). In this decision a teacher was denied the right to cross-certify a professional teaching certificate in the areas of health education, physical education, and driver education with employment in occupational work adjustment for which only a provisional certificate was held. The decision was decided entirely on the prior *Majoewsky* decision, and once again no statutory interpretation was presented, nor any additional explanation or rationale presented.

but was employed as a guidance counselor (for which she held only a provisional pupil personnel certificate) when she became eligible for a continuing contract. Although the court determined that a guidance counselor is a "teacher" for purposes of section 3319.11,[25] it concluded that she was not qualified as to certification since her professional certificate was not in the area in which she was employed.[26] As a result, the court rejected the concept of cross-certification and refused to order the board of education to issue a continuing contract to the individual.

The *Majoewsky* decision is specious in that the court offered no statutory rationale as to why "qualified as to certification" implied that the certification must be in the field in which the individual is employed. Instead, the court merely rejected one rationale supporting cross-certification as expounded in *Haskins v. Union-Scioto Board of Education*.[27] The *Haskins* court rationalized that if cross-certification were denied, a superintendent could prevent any teacher with multiple certificates from obtaining tenure by assigning that teacher to serve in the area in which the teacher had no professional certificate.[28] In responding to this rationale, *Majoewsky* noted that a superintendent could prevent a teacher from obtaining tenure simply by failing to recommend the individual for re-employment and that *Haskins* had unjustifiably injected the likelihood of bad faith upon the part of superintendents. Although the *Majoewsky* court was completely justified in rejecting this rationale in support of cross-certification as expounded by *Haskins*, it offered no rebuttal of the more substantive rationales in support of cross-certification which were also expounded by the *Haskins* court. For example, *Haskins* examined in detail the legislative history of the requirements for certification as eventually enacted in section 3319.11.[29] *Haskins* further examined other pertinent sections of Title 33 which relate to tenure issues in instances in which an individual possesses multiple certificates. In sum, eight pages of well-reasoned and articulately presented statutory interpretation in support of cross-certification remained completely unrebutted by the *Majoewsky* court.[30] The attempt in *Majoewsky* to criticize the *Haskins* decision in support of cross-certification is therefore both incomplete and unconvincing; *Majoewsky* offered no statutory interpretation of its own in deciding the statutory question of cross-certification and failed to rebut a very persuasive statutory interpretation upholding cross-certification.

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[25] No. C-74527, slip op. at 6.

[26] *Id.* at 11.

[27] No. 36315 (Ohio C.P. Ross County, Nov. 2, 1973), *aff'd*, No. 595 (Ohio 4th Dist. Ct. App. July 20, 1974).

[28] *Id.*, slip op. at 22.

[29] *Id.* at 15.

[30] *See* No. C-74527, slip op. at 10.

Majoewsky also interpreted the Ohio Supreme Court decision of *Gandy v. Board of Education*[31] as implicitly rejecting the concept of cross-certification.[32] In *Gandy*, an individual held an eight-year professional teaching certificate and a four-year provisional pupil personnel certificate. The individual was employed as a guidance counselor for several years and, upon expiration of the four-year provisional pupil personnel certificate, was rehired as a teacher under the still valid eight-year professional teaching certificate. The individual then sought tenure pursuant to section 3319.11, having "taught" three of the last five years within the school system as a guidance counselor, holding a professional certificate in the teaching area in which he was unqualifiedly re-employed, and receiving no written notice from the board of education that the re-employment was a limited contract. Importantly, the issue of cross-certification was not before the court: the individual was seeking a continuing contract while possessing a professional certificate in teaching and upon being employed as a teacher in the field in which the professional certificate was held. The court held that since the individual possessed a professional teaching certificate, he was entitled to a continuing contract upon being rehired as a teacher. Unfortunately, the court articulated this holding in an ambiguous manner when it concluded: "He was thus, under the provisions of the first paragraph of Section 3319.11, Revised Code, 'eligible for continuing service status' in the school district *when reemployed in the field for which he had such professional certificate*."[33]

Many Ohio courts have closely examined this statement since this decision is the only Ohio Supreme Court decision which remotely touches the concept of cross-certification.[34] The *Majoewsky* court concluded that this statement implied that if the individual had not been reemployed in the field in which he had such professional certificate, then the individual would not have been entitled to a continuing contract.[35] The *Majoewsky* court stated: "*Gandy*, at least by implication, appears to reject the concept of cross-certification. As we read the syllabus, *Gandy* not only avoids support of cross-certification, but rather subscribes to

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[31] 26 Ohio St. 2d 115, 269 N.E.2d 605 (1971).

[32] No. C-74527, slip op. at 10 (Ohio 1st Dist. Ct. App. Sept. 8, 1975).

[33] 26 Ohio St. 2d at 118, 269 N.E.2d at 607 (emphasis added).

[34] *See* Tucker v. Northridge Local School Dist. Bd. of Educ., No. CA 2552, slip op. at 9 (Ohio 5th Dist. Ct. App. Mar. 29, 1979); Majoewsky v. Indian Hill Exempted Village School Dist. Bd. of Educ., No. C-74527, slip op. at 16 (Ohio 1st Dist. Ct. App. Sept. 8, 1975); Krolopp v. South Range Local School Dist. Bd. of Educ., 47 Ohio App. 2d 208, 210, 353 N.E.2d 642, 644 (7th Dist. 1974); Iverson v. Wooster City School Dist. Bd. of Educ., No. 1328, slip op. at 6 (Ohio 9th Dist. Ct. App. Dec. 12, 1973); Haskins v. Union-Scioto Local Bd. of Educ., No. 36315, slip op. at 24 (Ohio C.P. Ross County Nov. 2, 1973), *aff'd sub nom.* Union-Scioto Local Bd. of Educ. v. State *ex rel.* Haskins, No. 595 (Ohio 4th Dist. Ct. App. July 20, 1974).

[35] No. C-74527, slip op. at 10.

the logic that tenure requires a certification directly akin to a teacher's field of experience."[36]

The better view, however, is that the *Gandy* dictum merely addresses the fact situation peculiar to the case presented and that the court did not intend for this statement to extend to situations in which cross-certification was an issue. Since the question of cross-certification was not before the court, at best the phrase can be construed as dictum. The *Gandy* decision does not prohibit cross-certification and probably did not intend to address the problem even in dictum. Accordingly, *Majoewsky*'s reliance on *Gandy* was misplaced and inappropriate.

In sum, the *Majoewsky* decision rejecting cross-certification is deficient for the following three reasons: (1) it offers no statutory explanation as to why cross-certification should not be permitted; (2) it fails to rebut a well-researched legislative history of the Teacher Tenure Act which was adopted by another district appellate court in support of cross-certification; and (3) it inappropriately infers that the dictum of the Ohio Supreme Court *Gandy* decision rejects the concept of cross-certification.

Cross-certification was also prohibited in *Wieging v. Board of Education*.[37] Here an individual possessed a permanent certificate in typing and was employed as a typing teacher under a series of limited contracts. Although the individual would have been qualified to receive tenure upon being re-employed to teach typing, he voluntarily entered into a five year limited contract as a guidance counselor and principal. Thereafter the board of education elected not to re-employ him as either a teacher, guidance counselor, or principal. Although the individual possessed only a provisional pupil personnel certificate and a provisional high school principal certificate, he claimed entitlement to a continuing contract on the basis of his permanent certificate in typing. The court rejected this concept of cross-certification and held that the individual was not entitled to a continuing contract.[38] In so doing, the court con-

[36] *Id.*

[37] 55 Ohio App. 2d 110, 379 N.E.2d 605 (3d Dist. 1977).

[38] This court formulated the following strict rule:

> It is our conclusion that a teacher qualified as to certification and qualified as to length of service in the school district, shall be eligible to receive a continuing service contract to teach only in the area in which that teacher possesses a professional, permanent or life certificate and that when that teacher becomes voluntarily employed in a teaching field other than that in which he or she holds such a certificate, she or he waives entitlement to a continuing contract either until re-employed in the field for which such certificate is held or until so certified in the field in which he or she becomes voluntarily employed.

Id. at 114, 379 N.E.2d at 607-08. Such a rule can retard or even prevent an individual's mobility within a school system, much to the detriment of the school system and the individual. Further, such a rule can irreparably harm an individual who innocently fills a vacancy in the educational hierarchy, only to later find that valuable tenure rights have been forfeited as a result.

cluded that "qualified as to certification" is to be interpreted as meaning that the individual must be properly certified in the area in which he is employed at the time tenure is sought. The court's rationale for this conclusion was that:

> R.C. 3319.22, *et seq.*, prescribe the certification of teachers by certificates of various grades and various types. R.C. 3319.30 prohibits compensation to anyone "for the performance of duties as teacher * * * who has not obtained a certificate of qualification *for the position.*" (Emphasis added.) R.C. 3319.11 makes eligible for continuing service status those teachers qualified as to length of service in the school district who are also "qualified as to certification". R.C. 3319.08 prescribes that a continuing contract "which shall remain in effect until the teacher resigns, elects to retire, or is retired * * * or until it is terminated or suspended shall be granted only to teachers holding professional, permanent, or life certificates."[39]

Given the statutes it cited, it is extremely difficult to determine exactly how the *Wieging* court reached the conclusion that cross-certification is prohibited. The court did not logically connect the statutes. However, the court's "rationale" is subject to the interpretation which follows. First, section 3319.22[40] establishes two categories of certificates: grades and types. Grades of certificates consist of temporary certificates, one-year vocational certificates, provisional certificates, professional certificates, and permanent certificates. Types of certificates consist of kindergarten-primary, elementary, high school, special, elementary principal, high school principal, supervisor, superintendent, vocational, assistant superintendent, pupil-personnel, local superintendent, and educational administrative specialists. Second, section 3319.11 requires the individual to be "qualified as to certification." This refers to section 3319.08, which requires that an individual possess either a professional, permanent, or life certificate. Accordingly, since section 3319.22 establishes both grades of certificates and types of certificates, and since a particular grade of certificate is a prerequisite to obtaining tenure (namely, the grade of professional, permanent, or life), it follows by implication that the grade of certificate must be of the type of certificate under which the individual is employed. Accordingly, section 3319.11 requires that an individual possess a professional, permanent, or life certificate in the area in which he is employed.

Assuming this to be a fair interpretation of the court's rationale, a rebuttal lies in the fact that only the *grade* of certification is related to the requirements of tenure as established by section 3319.11. The grade of certificate is related to tenure through section 3319.08. However,

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[39] *Id.* at 114, 379 N.E.2d at 607.

[40] OHIO REV. CODE ANN. § 3319.22 (Page 1978).

there is no statute in Title 33 which relates a particular *type* of certificate to tenure as established by section 3319.11. Legislators did not intend to make a particular type of certificate a prerequisite to obtaining tenure; therefore, the professional certificate need not relate to the area of employment, so long as the correct grade of certificate is held in *some* area. An individual is "qualified as to certification" for purposes of section 3319.11 when the individual possesses a professional, permanent, or life certificate in some area, though not necessarily in the field in which the individual is employed.

There is no support for the court's contention that section 3319.30[41] (which prohibits the compensation of anyone who has not obtained a certificate of qualification for the position held) requires the professional certificate mandated by section 3319.08 to be in the *position* in which the individual is employed. The obvious purpose of section 3319.30 is to insure that an individual possess at least a provisional or temporary certificate before being allowed to teach.[42] This does not imply, by any stretch of the imagination, that an individual certified in multiple fields can obtain tenure only in the field in which a professional, permanent, or life certificate is held.

Similarly, in *Tucker v. Northridge Local School District Board of Education*,[43] an individual possessing a professional certificate in biology was employed as a guidance counselor upon becoming eligible for tenure. The court rejected the concept of cross-certification and held that since the individual possessed only a provisional certificate in pupil personnel, the board of education was not required to renew his contract. In support of this conclusion a rationale was established similar to, but no more articulate than, that established by *Wieging*. The court reasoned: (1) section 3319.22 establishes different types of certificates;[44] (2) section 3319.30 prohibits compensation of any person who has not obtained a certificate of qualification for the position;[45] (3) section 3319.08 requires that a continuing contract shall be granted only to teachers holding professional, permanent, or life certificates;[46] and (4) section 3319.11 permits tenure only to those teachers "qualified as to certification."[47] Therefore, the court concluded, the professional certification must relate to the area of employment.[48] Again, the court has not sus-

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[41] *Id.* § 3319.30.

[42] OHIO ATT'Y GEN. OP. 57-1121 (1957) stated: "[T]he purpose of certification requirements is clearly to prevent the 'teaching of a school by an incompetent (or unqualified) person,' and not to abridge their contract rights. . . ."

[43] No. CA 2552 (Ohio 5th Dist. Ct. App. Mar. 29, 1979), appeal *filed*, No. 79-704 (Ohio Sup. Ct.).

[44] *Id.*, slip op. at 5.

[45] *Id.*

[46] *Id.* at 6.

[47] *Id.*

[48] *Id.* at 5.

tained the conclusion it has reached. If an individual possesses only one certificate, that certificate must relate to the area of employment or the individual will be prohibited from receiving compensation by section 3319.30. However, it cannot be concluded from the statutes cited by the court that when an individual possesses more than one certificate, the *professional* certificate must relate to the area in which the individual is employed.

Two common pleas decisions have also denied cross-certification. In *Lilly v. Green Board of Education*[49] the court assumed that the professional certificate must be held in the particular area in which the individual is employed.[50] Unfortunately, an independent statutory rationale supporting the court's assumption was not articulated; the court chose to follow the *Wieging* decision.[51] In *Woodrum v. Rolling Hills Local Board of Education*[52] the court denied cross-certification without conducting an examination of the relevant statutes.[53]

V. IN SUPPORT OF CROSS-CERTIFICATION

A. *Cases in Support of Cross-certification*

The following appellate courts have interpreted section 3319.11 as permitting the practice of cross-certification in the acquisition of tenure.

1. Guidance Counselors

As noted, section 3319.11 establishes "teacher" status as a prerequisite to obtaining tenure.[54] The majority of Ohio courts which have

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[49] No. CIV 77-218 (Ohio C.P. Scioto County Apr. 4, 1979). This case is to be appealed to the Ohio Fourth District Court of Appeals.

[50] *Id.*, slip op. at 4.

[51] The court stated:

> Also, the Court of Appeals for Putman County in 1977 in the case of [*Weiging*] held that "When one, who would be entitled to receive a continuing service contract as a teacher in an area where he holds a professional teaching certificate, voluntarily becomes employed in an area in which the certificate has no application, he waives entitlement to the continuing contract."

Id. at 5. Accordingly, this court decided to follow *Wieging* which may have been decided incorrectly. For a discussion of *Wieging*, see notes 37-39 *supra* and accompanying text.

[52] No. 30201 (Ohio C.P. Guernsey County June 8, 1977).

[53] The court stated:

> This Court holds that a Board of Education that grants a teacher enough contracts under a provisional certificate in the field in which the employee holds the provisional certificate but has not hired the teacher in the field which she has a professional certificate does not come within the provisions of Section 3319.11 and such employee is not qualified for or entitled to continuing contract status.

Id., slip op. at 4.

[54] *See* note 19 *supra*, and accompanying text.

considered the question of whether a guidance counselor is a "teacher" for continuing contract purposes have answered affirmatively.[55] Although guidance counselors are not eligible to receive tenure as such, their experiences as guidance counselors fall within the meaning of "teacher" for purposes of Ohio Revised Code section 3319.11 and can be utilized in satisfying the requirements for tenure in the school system.[56] The following cases have permitted cross-certification of a professional teaching certificate with experience obtained as a guidance counselor to fulfill the tenure requirements of section 3319.11.

In *Krolopp v. South Range Local School District Board of Education*,[57] a teacher holding a professional elementary teaching certificate had received a continuing contract from a prior school system. This prior continuing contract made the teacher eligible for tenure in the new system after having served only two years.[58] The individual then served as a guidance counselor for five years under three separate limited contracts, possessing only a provisional pupil personnel certificate during this employment. Upon the expiration of the last limited contract, the board of education elected not to re-employ the individual as either a guidance counselor or as a teacher. The individual then sought and received the right to a continuing contract pursuant to section 3319.11. After determining that the individual was a "teacher" for purposes of section 3319.11, the court allowed cross-certification but qualified it as follows:

> [The] plaintiff is entitled to a continuing contract with [the board of education] *as a teacher* pursuant to R.C. 3319.11 because of plaintiff's professional elementary teaching certificate. This does not mean that plaintiff is entitled to a continued employ-

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[55] *See* Majoewsky v. Indian Hill Exempted Village School Dist. Bd. of Educ., No. C-74527 (Ohio 1st Dist. Ct. App. Sept. 8, 1975); Krolopp v. South Range Local School Dist. Bd. of Educ., 47 Ohio App. 2d 208, 353 N.E.2d 642 (7th Dist. 1974); Iverson v. Wooster City School Dist. Bd. of Educ., No. 1328 (Ohio 9th Dist. Ct. App. Dec. 12, 1973); State *ex rel.* Fox v. Board of Educ., 11 Ohio App. 2d 214, 229 N.E.2d 663 (2d Dist. 1966); Haskins v. Union-Scioto Local Bd. of Educ., No. 36315 (Ohio C.P. Ross County Nov. 2, 1973), *aff'd sub nom.* Union-Scioto Local Bd. of Educ. v. State *ex rel.* Haskins, No. 595 (Ohio 4th Dist. Ct. App. July 20, 1974); OHIO ATT'Y GEN. OP. 73-045 (1973).

[56] Guidance counselors are also certified as teachers. State Bd. Educ. Reg. EDb-3301-21-15 states:

> (B) Provisional certificate—The provisional school counselor's certificate will be issued to the holder of a master's degree with twenty-four semester hours (thirty-six quarter hours) of graduate work well distributed over the following areas: . . .
>
> (7) [A]nd with evidence of a standard teaching certificate valid for teaching in Ohio. . . .

[57] 47 Ohio App. 2d 208, 353 N.E.2d 642 (7th Dist. 1974).

[58] *See* OHIO REV. CODE ANN. § 3319.11 ¶ 1 (Page 1978), set out at note 8 *supra*.

> ment as a guidance counselor. R.C. 3319.01 provides that the superintendent of schools has the authority to assign plaintiff to a teaching position.[59]

Similarly, the Court of Appeals of Ross County also upheld the theory of cross-certification in *Union Scioto Local Board of Education v. Haskins*.[60] Here the individual held an eight-year professional certificate in the areas of health, physical education, slow learning, and remedial reading. She was employed for three years as a social studies teacher and held only temporary certification in this area during this period. After completing her third year of employment, at which time she was eligible to receive tenure in social studies, she was employed under a two-year limited contract as a guidance counselor, holding a provisional pupil personnel certificate. Upon the expiration of this two-year contract she was re-employed as a counselor under an additional one year limited contract. In response to her legal challenge, the court ordered the board of education to issue her a continuing contract since she had qualified for such pursuant to Ohio Revised Code section 3319.11, even though her professional certificate was not in the field in which she was employed. In so doing, the appellate court noted that a guidance counselor is a "teacher" by definition in section 3319.09(A),[61] and, therefore, an individual's experiences as a guidance counselor can be utilized in satisfying the requirements of tenure as established by section 3319.11.[62]

The Ashtabula County Court of Appeals also upheld the theory of cross-certification in *Rorabaugh v. Grand Valley Local School District Board of Education*.[63] Here, although the individual possessed a professional certificate in the fields of health and physical education, when she achieved eligibility for tenure she was employed as a guidance counselor, an area in which she possessed only a provisional certificate. The court felt that all the requirements for a continuing contract established by section 3319.11 had been satisfied. The court noted that section 3319.08 provides that "[a] continuing contract . . . shall be granted only to teachers holding professional . . . certificates"[64] and that this should not be interpreted as implying that a continuing contract shall be granted only to a teacher holding a professional certificate in

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[59] 47 Ohio App. 2d at 210-11, 353 N.E.2d at 644 (emphasis added).

[60] No. 595 (Ohio 4th Dist. Ct. App. July 20, 1974).

[61] OHIO REV. CODE ANN. § 3319.09(A) (Page 1978).

[62] Although the appellate decision was extremely brief, the common pleas decision, Haskins v. Union-Scioto Local Bd. of Educ., No. 36315 (Ohio C.P. Ross County, Nov. 2, 1973), provides an articulate and persuasive argument upholding the concept of cross-certification. It is the only decision examining the legislative history of Title 33.

[63] No. 933 (Ohio 11th Dist. Ct. App. June 26, 1978).

[64] OHIO REV. CODE ANN. § 3319.08 (Page 1978), set out at note 1 *supra*.

the area in which the individual is employed upon becoming eligible for tenure.[65] The court felt that since there is an ambiguity as to whether the certificate must be in the area of employment, this ambiguity should be construed in favor of the teacher.[66]

2. Teachers Who Change Teaching Areas

State ex rel. Peet v. Westerville City Board of Education[67] considers the question of whether teaching experience in one academic area is sufficient for tenure when combined with a professional certificate in a different teaching area. Although the individual possessed a professional certificate in social studies, he was teaching auto mechanics under a provisional certificate when he became eligible for tenure. In holding that the teacher could cross-certify, and was thereby entitled to tenure, the court noted that the board of education did not run any risk of having an unqualified teacher obtaining tenure since the state regulations and requirements of attaining a professional certificate assured that "the holder of a professional certificate in comprehensive social studies (or any other comprehensive field) is not a neophyte in that academic area."[68] Although the court did not discuss section 3319.01, it can be noted that this section allows the superintendent to assign the tenured teacher to teach in the area under which the professional certificate is held, thereby protecting the school system from being forced to continually re-employ a tenured teacher in an area in which only a provisional certificate is held.[69]

B. *Policies in Support of Cross-certification*

It has thus far been shown that Ohio courts are divided on the question of whether a teacher may utilize a professional certificate in an area in which the teacher is not employed to meet the statutory requirements of tenure as established by section 3319.11. Three courts have interpreted the phrase "qualified as to certification" as implying

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[65] No. 933, slip op. at 3.

[66] *Id.* In support of this contention the court refers to Thurston v. Board of Educ., 140 Ohio St. 512, 45 N.E.2d 604 (1942), which states:

> Recently, in the case of State ex rel. Bishop v. Board of Education of Mt. Orab Village School District., 139 Ohio St. 427, 40 N.E.2d 913, we had occasion to consider and apply certain parts of the "Ohio Teachers' Tenure Act" (Sections 7690-1 to 7690-8, General Code, 119 Ohio Laws 451), and upheld them as a valid exercise of legislative power. We further indicated that the act should be liberally construed in favor of those it was designed to benefit.

140 Ohio St. at 514, 45 N.E.2d at 605.

[67] No. 78CV-12-5895 (Ohio C.P. Franklin County June 7, 1979), *appeal docketed*, No. 79-AP-571 (Ohio 10th Dist. Ct. App. July 20, 1979).

[68] No. 78CV-12-5895, slip op. at 3.

[69] OHIO REV. CODE ANN. § 3319.01 (Page 1978), set out at text accompanying note 76 *infra*.

that a teacher must be certified in the area in which he or she is employed.[70] As has been demonstrated, these decisions are subject to severe criticism.[71] This note will now suggest additional rationales in support of the concept of cross-certification.

1. Tenure: In a Specific Position or in the School System?

One of the major ambiguities of Ohio Revised Code section 3319.11 is whether it establishes the requirements which must be satisfied to receive tenure in a *specific position* of employment or whether it establishes the requirements which must be satisfied to receive tenure in the *school system*, a question not specifically addressed by section 3319.11. When an individual is certified in only one teaching area, these two categories become one and no problem arises. The question is relevant when an individual possesses multiple certificates.

Proponents of the position that section 3319.11 grants tenure in a specific position will demand that all the requirements of section 3319.11 be satisfied for the particular area in which the individual is employed, including the requirement of possessing a professional, permanent, or life certificate, and will deny cross-certification. On the other hand, proponents of the position that section 3319.11 is designed to provide for tenure in the school system, rather than in a particular position, will not require that the professional certificate be held in the area in which the individual is employed since the individual is not seeking tenure for that particular position. Such proponents will allow the possession of a professional certificate in *any* area to satisfy the requirements of section 3319.11 and hence will allow cross-certification. Since the question of whether section 3319.11 provides for tenure within the school system or in a particular position is so related to the issue of cross-certification, it is not surprising to discover that once again Ohio courts are divided.

The only Ohio case which has allowed an individual in possession of multiple teaching certificates to obtain tenure in a specific position is *Beatley v. Indian Lake Local Board of Education*.[72] In this decision an individual possessed professional teaching certificates in both elementary education and secondary pupil personnel upon becoming eligible for tenure. After being employed as a high school guidance counselor for three years, the individual was issued a continuing contract. Subsequently, the board of education sought to assign the individual to an elementary teaching position but was ordered by the court to employ the individual in the specific position of guidance counselor. The court ignored the clear language of the employment contract whereby the in-

[70] Tucker v. Northridge Local School Dist. Bd. of Educ., No. CA 2552 (Ohio 5th Dist. Ct. App. Mar. 29, 1979); Wieging v. Board of Educ., 55 Ohio App. 2d 110, 379 N.E.2d 605 (3d Dist. 1977); Majoesky v. Indian Hill Exempted Village School Dist. Bd. of Educ., No. C-74527 (Ohio 1st Dist. Ct. App. Sept. 8, 1975).

[71] *See* notes 24, 37, 43 *supra* and accompanying text.

[72] No. 8-79-2 (Ohio 3d Dist. Ct. App. Nov. 16, 1979).

dividual agreed "*[To] teach* in the Public Schools of said District from the date of this Contract until she resigns, elects to retire, is retired pursuant to law, or until said Contract is terminated or suspended as provided by law."[73] Instead, the court reasoned that since the minutes of the board of education's resolution to issue the individual a continuing contract referred to employment as "High School Guidance"[74] and did not mention any alternate teaching field for which she was certified, the superintendent was precluded from reassigning the individual to another education area even though the individual possessed alternate certification. After an examination of several sections of Title 33, the court established the following rule: "[W]hen a teacher is re-employed on a continuing contract such continuing contract must have relation to the teaching field *contemplated by such employment* and to which the teacher holds proper certification, and the *contract has no relation to another field*, though proper certification exists, to which the employment does not relate."[75]

Although one can empathize with the individual teacher who in this case was asked to relinquish a position as a high school guidance counselor for the new and radically different position of elementary school teacher, the rule established by the court creates a dangerous precedent and leaves many unresolved questions. It virtually eliminates the power of the superintendent to assign teachers as provided for by section 3319.01: "The *superintendent* of a local, city, county, or exempted village school district shall be the executive officer for the board. Except as otherwise provided in this section for local school districts, he *shall direct and assign teachers* and other employees of the schools under his supervision."[76]

The *Beatley* decision severely limits the superintendent's clear statutory authority to assign teachers. If the continuing contract refers to only one professional certificate, the superintendent would be totally precluded from reassigning the individual to an alternate position for which certification is held. Further, if the individual's continuing contract is a form contract which is employed by many school districts, the superintendent may be forced to refer to the minutes of the board of education in determining to which, if any, alternate positions the individual may be assigned. Not only is such a requirement time-consuming, it may also prove unfruitful: for example, how is a superintendent to determine the perimeters of an individual's continuing contract when the contract is a form contract and the minutes of the board of education reveal no discussion of the individual's certification?

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[73] *Id.*, slip op. at 2 (emphasis added).

[74] *Id.* at 9.

[75] *Id.* at 10 (emphasis added).

[76] OHIO REV. CODE ANN. § 3319.01 (Page 1978) (emphasis added).

Similarly, how is the superintendent to resolve assignability of an employee when the board of education minutes reveal that several certificates were mentioned and yet a general continuing contract was issued to the individual "to teach in said school district"? Also unresolved by *Beatley* is the situation in which the teacher desires to be reassigned to an area in which another certificate is held, one different from the certificate mentioned in the continuing contract or in the board of education meeting. Must the board of education issue a new continuing contract before it can reassign the individual? If the board of education does not issue a new continuing contract and yet employees the individual in a position which was not referred to in the continuing contract, can the individual later force the board of education to re-employ him in his original area?

In sum, the only Ohio court which has interpreted section 3319.11 as providing for tenure in a specific position has established a dangerous precedent in contradiction of the statutory right of the superintendent to assign school employees as provided for by section 3319.01.

In opposition to *Beatley*, the conclusion that section 3319.11 was designed to allow for obtaining tenure in the school system, rather than in a particular position, has support in the wording of section 3319.11, in case law, and in other statutes.

The Teacher Tenure Act, Ohio Revised Code section 3319.11, does not provide on its face for obtaining tenure in a specific position within the school system. Instead, it provides: "Teachers eligible for continuing service status in *any school district* shall be those teachers qualified as to certification, who within the last five years have taught for at least three years *in the district*. . . ."[77] Thus the *Beatley* decision is contrary to the plain language of the statute.

The majority of cases which have considered the question of whether section 3319.11 establishes tenure in a school system or in a particular position have denied the granting of tenure in a particular position. In cases in which an administrator such as a principal, assistant superintendent, or superintendent have sought tenure in those specific areas, such tenure has been denied. In considering these cases, the courts had to first determine if such administrators were indeed "teachers" for purposes of section 3319.11, which begins: "*Teachers* eligible for continuing service status in any school district shall be those *teachers* qualified as to certification. . . ."[78] In Ohio a "teacher" is defined in terms of certification, rather than in terms of employment duties. Ohio Revised Code section 3319.09 states: "(A) "Teacher" means 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 education position for which the state board of education requires cer-

[77] *Id.* § 3319.11 (emphasis added), set out at note 8 *supra*.

[78] *Id.* (emphasis added).

tification. . . ."[79] Although this statutory definition of teacher would seem to unqualifiedly place guidance counselors, principals, and superintendents within the meaning of "teacher" as used in section 3319.11, such inclusion has been judicially qualified.

The Ohio Supreme Court has held that a superintendent does not have the status of a "teacher" within section 3319.11 insofar as the individual attempts to seek tenure in the specific position of superintendent. In *State ex rel. Saltsman v. Burton*[80] (*Saltsman I*), a superintendent possessed a permanent certificate entitling him to serve as a superintendent. After a series of employments as superintendent, during which time the individual would have been entitled to a continuing contract, the board of education elected not to rehire him. The individual then claimed a right to a continuing contract as a superintendent, which would in turn mandate his automatic re-employment. The court held that the individual was not entitled to tenure as a superintendent even though all of the requirements of section 3319.11 had been satisfied, basing its decision on the fact that other statutory provisions precluded a right to tenure for superintendents. The court reasoned that Ohio Revised Code section 3319.01[81] allowed the board of education to appoint a superintendent for a term not longer than five years.[82] The court also noted that the superintendent of a school district could recommend the re-employment of a "teacher" under section 3319.11.[83] Accordingly, if a superintendent were to be considered a "teacher" for tenure purposes, he could recommend himself for re-employment under a continuing contract. To permit such a result would be improvident, and the court felt that the statutes should be interpreted so as to avoid such a possibility.[84] The court also reasoned that one basic purpose of the Teacher Tenure Act was to prevent the termination of teachers resulting from changes in the personnel or political complexion of boards of education and concluded that a superintendent needs no such protection.[85] Finally, the court noted that the position of superintendent consisted entirely of executive and discretionary functions and entailed no actual "teaching."[86] A similar rationale was employed in *Frank v.*

[79] *Id.* § 3319.09.

[80] 154 Ohio St. 262, 95 N.E.2d 377 (1950). The Ohio Supreme Court upheld its decision of *Saltsman I* two years later in State *ex rel.* Saltsman v. Burton, 156 Ohio St. 537, 103 N.E.2d 740 (1952) (*Saltsman II*). In this case the same individual sought entitlement to a vacant position of elementary supervisor. The court denied such entitlement, stating: "[I]f teachers alone are entitled to continuing contracts, it is immaterial what administrative position the relator is seeking." *Id.* at 539, 103 N.E.2d at 741.

[81] The court cited G.C. 4842, recodified as Ohio Revised Code section 3319.01.

[82] 154 Ohio St. at 265, 95 N.E.2d at 378.

[83] The court cited G.C. 4842-8, recodified as Ohio Revised Code section 3319.11.

[84] 154 Ohio St. at 268, 95 N.E.2d at 380.

[85] *Id.* at 266-67, 95 N.E.2d at 379.

[86] *Id.*

Meigs County Board of Education,[87] which held that an assistant superintendent possessed no rights under the Teacher Tenure Act to obtain tenure in the particular position of assistant superintendent.

Similarly, an individual cannot utilize section 3319.11 to acquire tenure as a principal. In *Ross v. Board of Education*,[88] the Cuyahoga County Court of Appeals held that although the Teacher Tenure Act confers specified protections based on certification and experience, it does not provide for tenure as a principal.[89] Unlike the *Saltsman I* court, the *Ross* court cited no statutes which implied the preclusion of the right to tenure for principals. Instead, it excluded tenure rights for principals solely on the basis that the position consists of executive, administrative, and supervisory functions.[90] Since the individual's job description included only these functions, as opposed to teaching functions, the position was not one covered by the Teacher Tenure Act.[91]

In sum, superintendents and principals are not "teachers" for purposes of section 3319.11 when tenure is sought for the specific position of superintendent or principal, even though section 3319.11 addresses tenure rights of "teachers" and even though section 3319.09(A) defines principals and superintendents as teachers.

The question now arises as to whether superintendents and principals should be included within the meaning of "teacher" for purposes of section 3319.11 to enable them to qualify for tenure in the *school system*. Obviously, if the individual possessed tenure as a teacher prior to accepting the new position of superintendent or principal, that tenure is retained upon the subsequent refusal to re-employ the individual for the

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[87] 140 Ohio St. 381, 44 N.E.2d 455 (1942).

[88] 52 Ohio App. 2d 28, 367 N.E.2d 1209 (8th Dist. 1977).

[89] *Id.* at 30, 367 N.E.2d at 1211.

[90] *Id.* at 31, 367 N.E.2d at 1212.

[91] Although the result of *Ross* may be desirable, its rationale can be seriously questioned. Ohio Revised Code section 3319.09(A), *see* note 61 *supra*, clearly defines a principal as a teacher. Further, the argument that a principal is not really a "teacher" since the position encompasses no actual "teaching" is specious in light of the clear and unambiguous statutory definition of teacher in terms of certification rather than in terms of duties. Although *Saltsman I* stressed the non-teaching aspects of a superintendent, it is unclear exactly how much weight the court attributed to this argument. Further, if the purpose of the Teacher Tenure Act was correctly stated in *Saltsman I* as preventing termination of employment resulting from changes in the personnel or political complexion of boards of education, then principals, unlike superintendents who are themselves hiring authorities, should not be precluded from obtaining tenure since they would certainly need such protection.

Perhaps a more persuasive argument for the court's position is that no individual in a school system is entitled to tenure in a specific position since Ohio Revised Code section 3319.01 enables the superintendent to assign an individual to any position for which the individual is certified. *See* note 76 *supra* and accompanying text. Since a prerequisite for obtaining a principal's certificate is the

new position.[92] The more interesting situation arises when the individual did not possess tenure as a teacher prior to being employed in the position of superintendent or principal and subsequently alleges that the tenure requirements of section 3319.11 have been fulfilled through the administrative experiences.

In *Franks*[93] and *Saltsman I*,[94] the two cases which held that superintendents are not entitled to tenure in that position, tenure was not sought alternatively as a teacher. Similarly, in *Ross*,[95] which held that a principal is not entitled to receive tenure as a principal, the individual had acquired tenure as a teacher prior to accepting the position of principal and was entitled to retain the teacher tenure upon not being re-employed as a principal.

The only Ohio decision to date which considers whether a principal may cross-certify a professional teaching certificate with administrative experiences in order to acquire tenure in the *school system* is *Curry v. Grand Valley Local Board of Education*.[96] The individual had not received tenure in any school system prior to entering the Grand Valley school system, although she did possess a Permanent Elementary Principal Certificate and a Permanent Elementary Education Certificate. She was employed by Grand Valley as an elementary principal for three years under two separate limited contracts without having ever been employed as a teacher in the system. Upon the expiration of this last limited contract, the board of education elected not to re-employ her as either a teacher or a principal but failed to give her timely notice. Curry then sought judicial renewal of her employment pursuant to section 3319.11, and the court ordered the board of education to furnish Curry "a contract of employment"[97] but did not specify whether the contract was to be limited or continuing. Since the next school year had expired prior to the court's decision, the board of education paid Curry the

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possession of a teaching certificate, State Bd. Educ. Reg. EDb-3301-21-04 the superintendent retains the authority to assign the principal in a teaching position upon expiration of a contract.

[92] This situation is best illustrated in Ross v. Board of Educ., 52 Ohio App. 2d 28, 367 N.E.2d 1209 (8th Dist. 1977), where the court held that since the individual possessed teacher tenure prior to her appointment as a principal, she was entitled to a continuing contract as a teacher upon the subsequent failure to employ her as a principal. A similar rationale would also apply to superintendents, although no reported decision in Ohio addresses the matter.

[93] *See* note 87 *supra* and accompanying text.

[94] *See* note 80 *supra* and accompanying text.

[95] *See* note 88 *supra* and accompanying text.

[96] No. 887 (Ohio 11th Dist. Ct. App. Mar. 26, 1979). Upon appeal as a matter of right to the Ohio Supreme Court, the merits of cross-certification were not received since the discussion was limited to contempt charges. *See* filings in 61 Ohio St. 2d 314 (1980).

[97] No. 887, Journal entry, June 26, 1979.

amount she would have received under the court-ordered contract and then timely refused to give her a contract for the following year, believing itself to be in full compliance with the court order. In a subsequent suit Curry then sought and received the right to a continuing contract. However, the court did not specifically order the board of education to issue the individual a continuing contract as a principal. It stated in general terms: "We find, therefore, that the respondent Board of Education is in contempt of this Court's order of July 5, 1977, by failing to issue a continuing contract to the relator for the academic year 1976-1977 as a successor contract to the agreement which expired only July 31, 1976."[98] From this general order it can be assumed that the board of education retained the option of issuing the individual a continuing contract as a teacher or as a principal since the individual possessed a permanent certificate in both areas. At best the individual was entitled to tenure in the school system rather than in a particular position.

From these Ohio Supreme Court and appellate cases we can conclude that section 3319.11 has been judicially interpreted as allowing for obtaining tenure in a school system rather than in a particular position, at least in the special case of administrators.[99]

Finally, a reading of several other statutes yields the conclusion that section 3319.11 allows for obtaining tenure in the school system. Section 3319.01, which allows the superintendent to assign a teacher to any position in which the teacher is certified, also implies that tenure is granted in the school system.[100] Application of section 3319.01 is best illustrated in *State ex rel. Fox v. Board of Education*.[101] Here an individual possessing certificates in pupil personnel and teaching was unable to resist the superintendent's mandate that she return to the position of a classroom teacher from the position of guidance counselor, pursuant to the superintendent's power of assignment granted by section 3319.01.

Section 3319.17 has been noted as implying that tenure is not given for a specific position.[102] This section, which provides for teacher layoff procedures, states: "Teachers, whose continuing contracts are suspended, shall have the right of restoration to continuing service status in the order of seniority of service in the district if and when teaching positions become vacant or are created for which any of such teachers

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[98] *Id.* at 6.

[99] *See* note 55 *supra* and accompanying text. As has been noted, Krolopp v. South Range Local School Dist. Bd. of Educ., 47 Ohio App. 2d 208, 353 N.E.2d 642 (7th Dist. 1974) also allowed for tenure in the school system, rather than in the particular position of guidance counselor.

[100] OHIO REV. CODE ANN. § 3319.01 (Page 1978), set out at note 91 *supra*.

[101] 11 Ohio App. 2d 214, 229 N.E.2d 663 (2d Dist. 1966).

[102] Haskins v. Union-Scioto Local Bd. of Educ., No. 36315, slip op. at 21 (Ohio C.P. Ross County 1977), *aff'd sub nom.* Union-Scioto Local Bd. of Educ. v. State *ex rel.* Haskins, No. 595 (Ohio 4th Dist. Ct. App. July 20, 1974).

are *or become qualified.*"[103] This seems to imply that a laid-off teacher with tenure would be entitled to continue teaching in a school system in an open field even though that teacher possessed only a temporary or provisional certificate in that open field.

Since there is a very persuasive argument that section 3319.11 is designed to provide for tenure in the school system rather than in a particular position, it would be improvident to require that the professional certificate be held in the area in which the individual is employed because the individual is not seeking tenure for that particular position. Section 3319.11 is designed to allow the possession of a professional certificate in *any* area to satisfy its tenure requirements, preserving the ability to cross-certify.

2. Minimal Harm to the School System

Although an individual teacher may be seriously injured by construing any inherent statutory ambiguity against him or her by not allowing cross-certification, a school system would sustain comparatively little injury by allowing a teacher to obtain tenure by cross-certifying. This proposition is justified by section 3319.01 which allows the superintendent to assign a teacher to any position for which the teacher is certified.[104] Once cross-certification has been allowed, the superintendent can assign the teacher to the position in which a professional certificate is held. The school system is never forced to employ a teacher with tenure in an area in which the teacher possesses only a provisional certificate.[105] There is little argument to be made, therefore, in support of the

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[103] OHIO REV. CODE ANN. § 3319.17 (Page 1978) (emphasis added).

[104] *Id.* § 3319.01, set out in text accompanying note 76 *supra.*

[105] The logical counterargument to this is that an individual could possess a professional certificate in an area in which he or she is not employed and a provisional certificate in the area in which he or she is employed. After acquiring tenure, the individual can allow his or her professional certificate to expire, renew only his or her provisional certificate, and thereby force the superintendent to continually employ him or her in an area in which only a provisional certificate is held. This would violate Ohio Revised Code section 3319.01, which allows the superintendent to assign teachers. By allowing certain certificates to expire while renewing others, an individual could assign himself or herself to the position desired. This argument is specious for three reasons.

First, such a practice contradicts the very idea of tenure since a similar situation could exist without cross-certification; an individual could acquire tenure under a professional certificate, become certified in a new field, and allow his certificate in the original teaching field to expire. Such a practice, if allowed, would bring the Teacher Tenure Act, section 3319.11 which allows the superintendent to assign teachers, into direct conflict with section 3319.01.

Second, a rebuttal to this argument lies in the fact that the board of education may possess adequate grounds for the firing of an individual who would refuse to renew his professional certificate pursuant to Ohio Revised Code section 3319.16, which states: "The contract of a teacher may not be terminated except for gross inefficiency or immorality; for wilful and persistent violations of reasonable

proposition that tenure should not be granted to an individual simply because the individual possesses only a provisional certificate in the area in which he or she is employed upon becoming eligible for tenure.

3. Public Policy

Public policy supports the proposition that cross-certification should be permitted. Allowing tenure in the school system, rather than in a particular field, promotes mobility within the system. This mobility is needed to fill the positions of guidance counselors, principals, supervisors, and superintendents. It is undesirable to require an individual to remain in one position until tenure is received before employment in another position can be sought. It is also undesirable to allow a teacher to lose his statutory right to tenure simply because he has filled a vacancy in the educational hierarchy.

The question of cross-certification can be avoided by the board of education through timely notice as required by section 3319.11 in instances in which the board of education wishes to terminate the employment of a marginal teacher. The board of education can also avoid the

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regulations of the board of education; or for *other good and just cause*." OHIO REV. CODE ANN. § 3319.16 (Page 1978) (emphasis added).

Whether a teacher's refusal to renew a teaching certificate constitutes "just cause" for termination of employment is unanswered in Ohio. In Dorian v. Euclid Bd. of Educ., No. 37708 (Ohio 8th Dist. Ct. App. Mar. 3, 1978), an individual possessed certification in psychology and French upon receiving a continuing contract. The individual was employed as a psychologist for several years and did not renew her French teaching certificate upon its expiration. Subsequently, the board of education sought to re-employ the individual as a teacher because a declining school enrollment resulted in a need for fewer psychologists. The individual refused to renew her French teaching certificate upon the board's request and further refused to return to a teaching capacity. The appellate court held that the individual had a right under the continuing contract to be reinstated as a school psychologist with full back pay since the board of education had not taken any action to terminate the individual's continuing contract pursuant to Ohio Revised Code section 3319.16. In so holding the court stated: "We express no opinion as to whether or not her failure to file an application for certification constituted just cause for dismissal pursuant to R.C. 3319.16." *Id.*, slip op. at 6, n.1. This court at least hinted that an individual's refusal to renew a teaching certificate may constitute grounds for dismissal pursuant to section 3319.16. *Dorian* is to be appealed to the Ohio Supreme Court.

Third, there is reason to believe that the board of education could itself renew the individual's certificate without first receiving the individual's request or permission. As to the renewal of professional certificates, section 3319.25 states: "*The state board of education may* convert any provisional certificate or *renewal* thereof into a *professional certificate* of like type valid for eight years, provided the applicant has met the standards of preparation, experience, and teaching success set by the board for the conversion applied for." OHIO REV. CODE ANN. § 3319.25 (Page 1978) (emphasis added). Interestingly, the renewal of a professional certificate does not require that the individual must request such renewal. A similar argument is not required for an individual possessing a permanent certificate since such needs no renewal.

problem of cross-certification through an extensive evaluation of a teacher's abilities during the individual's first three years of employment. It would be beneficial to the individual and the school system if the board of education could agree on whether the individual is of benefit to the school system and should be retained. This should be done even with individuals who are not eligible for tenure. This practice will then eliminate situations in which a marginal teacher is employed for ten years under a series of limited contracts, obtains a professional certificate after the tenth year of employment, and becomes eligible for tenure; at this point the board of education is forced to either terminate the individual's employment or issue a continuing contract. It can be argued that no individual should be placed in a position of non-reemployment after ten years of service; the board of education should make a determination as to the individual's merits prior to this occasion. In sum, since the board of education possesses all that is needed to avoid problems of cross-certification issues in the courts, it is improvident to thereafter uphold the board of education which has, through its own negligence and ineffective policies, promoted the very situation which can result in irreparable harm to the individual teacher.

VI. CONCLUSION

During the last few decades, many teachers have lost their valuable tenure rights, and others have retained theirs only after extensive litigation, because the concept of cross-certification is not specifically addressed by Title 33. Although the Teacher Tenure Act does not prohibit cross-certification, some appellate courts have concluded that tenure is only to be acquired in a specific position within the school system, and not in the system itself, and have accordingly held that tenure should not be acquired by an individual who does not possess a professional certificate in the area of employment even though that individual does possess the requisite certification in another area. Not only do these cases contradict the purpose of tenure and the need for mobility within a school system, they also contradict many of the sections of Title 33 and introduce a requirement into section 3319.11 which was never specifically stated. The rationale used in these cases is both inarticulate and dubious. Unfortunately, on three occasions the Ohio Supreme Court has denied certiorari to decisions which have considered the concept of cross-certification.[106]

Both the proponents and opponents of cross-certification must conclude that the statutes are vague and ambiguous and have left many unresolved questions. Accordingly, the appellate courts of Ohio are hopelessly in conflict. It is obvious that legislative clarity is direly needed. Both the individual teacher and the board of education are enti-

[106] *See* notes 24, 37, 43 *supra.*

tled to a statutory framework which resolves the many ambiguities which presently exist in Title 33. We can but hope that the Ohio Legislature will soon clarify the ambiguities in this area. Since no section of Title 33 prohibits the practice of cross-certification, few modifications need be made to correct this particular ambiguity. The easiest method to eliminate future judicial uncertainty would be to specifically define cross-certification in Ohio Revised Code section 3319.11 and address its validity.

Alternately, key phrases of section 3319.11 can be clarified so as to unquestionably allow for the concept of cross-certification. A suggested modification is:

> Teachers eligible for continuing service status in a school system shall be those teachers *who possess either a professional, permanent, or life certificate*, and who within the last five years, *have served* for at least three years in the district, *though not necessarily in the area* in *which their professional, permanent, or life certificate is held*, and those teachers who, having attained continuing contract status elsewhere, *though not necessarily in the area in which they are employed*, have served two years in the district, but the board of education, upon the recommendation of the superintendent of schools, may at the time of employment or at any time within such two-year period, declare any of the latter teachers eligible.[107]

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[107] OHIO REV. CODE ANN. § 3319.11 (Page 1978) (proposed changes and additions emphasized).