

Opinion No. 16.

Schools and School Districts—Contracts—Teacher's Tenure Act—Penalty.

Held: Penalty or forfeiture clauses in a teacher's contract with a school board are permissible, but insofar as such clauses conflict with the provisions of Section 1075, Revised Codes of Montana, 1935, the latter section will control the provisions of the contract.

February 13, 1945.

Mr. J. W. Lynch
County Attorney
Chouteau County
Fort Benton, Montana

Dear Mr. Lynch:

You have submitted a form contract used by one of the school districts in your county, and you ask my opinion concerning the following paragraphs:

"IT IS FURTHER UNDERSTOOD AND AGREED, that a teacher who is reappointed for another year, and who resigns within ten days of the time of his or her reappointment, will receive the final installments of his or her year's salary at the close of school in June, and the Board is hereby authorized to retain, in equal monthly installments during the school year, the total sum of \$50.00 as a guarantee to the said Board of the good faith of said teacher that he or she will report to and commence work as a teacher in said schools under the direction of the Board of Trustees on the.....day of September, 19..... If such teacher accepts the reappointment for the ensuing year and resigns after July 1st, the said \$50.00 so withheld shall be forfeited to the said School District No. One, and that said \$50.00 so withheld shall also be forfeited to the said School District No. One, should said teacher fail to report on the said.....day of September, 19..... Upon return of said teacher to resume.....duties under reappointment contract, the said payment of \$50.00 so withheld shall be paid to said teacher on the first Tuesday after the second Monday after the opening of the school term."

"IT IS FURTHER AGREED, by the parties to this contract, that if a teacher resigns his or her position (or be dismissed for cause) during the term of this contract for any reason other than an imperative one, he or she shall forfeit all installments withheld from the monthly payment made to the teacher, as in the paragraph next above provided, as a forfeit for such breach of contract. Ill health of the teacher or death in the immediate family shall be considered as imperative reasons. All other reasons shall be secondary unless the

party of the first part rules, before the resignation is accepted, that the reason given by the party of the second part for resignation is to be considered imperative, but no such ruling shall be considered a precedent."

The above quoted paragraphs provide for forfeitures which necessitate an examination of the law applicable.

In 12 Am. Jur. 115, the text states:

"The law permits a man to make a contract which will result in a forfeiture; and when it is clear from the terms of the contract that the parties have so agreed, a court of law, as well as a court of equity, will enforce the forfeiture . . . Forfeitures are, however, regarded with disfavor, and an interpretation which does not involve a forfeiture is favored."

It is apparent from reading the two paragraphs under consideration, a forfeiture is intended and the language used does not permit a construction that would not involve a forfeiture.

It might be urged there is a lack of mutuality in the first paragraph. In 13 C. J. 341, the text states:

"Where one party agrees to perform services and the other to accept and pay for them, the contract is mutual."

There is no lack of mutuality in the paragraph under consideration as the school board reappoints the teacher and the teacher may resign within ten days and avoid any forfeiture. However, if the teacher resigns after July 1st, and after having entered into a contract to teach, and for which services the school district is obligated to pay, the forfeiture is invoked and the teacher loses all claim to the \$50.00.

The provisions of Section 1075, Revised Codes of Montana, 1935, must be considered in the construction of the first paragraph.

Section 1075 provides that a teacher who has been elected for the third consecutive year shall be deemed re-elected from year to year thereafter unless the board of trustees gives notice of dismissal before the first day of May. Also the section provides the board may give notice of re-election at an earlier date than May 1st and after such notice of re-election, the teacher must, within twenty days, give notice

of acceptance, otherwise the failure to so notify shall be regarded as conclusive evidence of non-acceptance of the position.

Our Supreme Court, in *McBride vs. School District No. 2*, 88 Mont. 110, 290 Pac. 252, said:

"The provisions of Section 1075, as amended, became a part of the contract of employment and were binding upon both the teacher and the board of trustees . . . and the notice of dismissal therein provided for must be clear and explicit."

See also Opinion No. 364, Vol. 19, Report and Official Opinions of the Attorney General.

Insofar as the provisions of Section 1075 conflict with the first quoted paragraph, Section 1075 will control. However, Section 1075 is available to teachers who have taught for three consecutive years. In applying the provisions of Section 1075 to the contract, much will depend on the factual situation in each case. If a teacher who had taught for three consecutive years were appointed, and did not notify the board in writing of his acceptance within twenty days, the failure to notify shall be deemed as non-acceptance. It is not incumbent on the teacher to notify the board of his resignation and thus Section 1075 will control over the provisions of the contract in this regard.

It is my opinion penalty or forfeiture clauses in a teacher's contract with a school board are permissible, but insofar as such clauses conflict with the provisions of Section 1075, Revised Codes of Montana, 1935, the latter section will control the provisions of the contract.

Sincerely yours,
R. V. BOTTOMLY,
Attorney General