

VOLUME NO. 41

OPINION NO. 30

CONTRACTS - Employment contract between school district and superintendent;

EDUCATION - Authority of board of trustees and superintendent regarding employment contract;

SCHOOL BOARDS - Authority of board of trustees and superintendent regarding employment contract;

SCHOOL DISTRICTS - Authority of board of trustees and superintendent regarding employment contract;

MONTANA CODE ANNOTATED - Sections 20-4-401, 20-4-401(1), 20-4-401(3), 20-4-401(5), 20-4-402, 28-2-1701, 28-2-1702, 28-2-1711;

OPINIONS OF THE ATTORNEY GENERAL - 26 Op. Att'y Gen.
No. 15 (1955).

- HELD: 1. A board of trustees and a district superintendent may mutually terminate a three-year employment contract prior to the expiration of its term and enter into another three-year contract identical to the first except for date of expiration, without violating section 20-4-401, MCA.
2. Section 20-4-401, MCA, does not authorize a board of trustees and a district superintendent to enter into a rolling three-year employment contract.

21 October 1985

Patrick L. Paul
Cascade County Attorney
Cascade County Courthouse
Great Falls MT 59401

Dear Mr. Paul:

Your predecessor, J. Fred Bourdeau, requested my opinion on two questions concerning section 20-4-401, MCA, and its three-year limitation on the term of the employment contract between a school district board of trustees and a district superintendent.

In March 1984, the board of trustees (referred to as DISTRICT) and the district superintendent (referred to as SUPERINTENDENT) entered into an initial employment contract which contained the following provisions:

1. TERM

DISTRICT, in consideration of the promises herein contained of SUPERINTENDENT, hereby employs, and SUPERINTENDENT hereby accepts employment as Superintendent of Schools for a term commencing July 1, 1984, and ending June 30, 1987.

DISTRICT may by specific action and with the consent of the SUPERINTENDENT extend the

termination date of the existing contract to the full extent permitted by state law.

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12. RENEWAL OF EMPLOYMENT CONTRACT

If DISTRICT does not notify SUPERINTENDENT in writing before each January 1 that this Employment Contract will not be renewed, it shall be deemed that DISTRICT has renewed this Employment Contract for one (1) year extending from the termination date set forth in paragraph 1, above. SUPERINTENDENT shall, by certified mail to each member, remind the Board of the existence of this automatic renewal clause. Such notice shall be sent one month prior to the board meeting where renewal or nonrenewal is to be considered.

13. TERMINATION OF EMPLOYMENT CONTRACT

This employment contract may be terminated by:

A. Mutual agreement of the parties.

On February 11, 1985, the board and the superintendent terminated the contract by mutual agreement, effective June 30, 1985, and entered into a new contract for a term commencing July 1, 1985, and ending June 30, 1988, but otherwise containing the same provisions as the initial contract.

Mr. Bourdeau sought my opinion on the following questions:

1. Does the mutual termination of the initial contract at the end of the first year of a three-year term and execution of a second three-year contract, identical in all but date of expiration, violate the three-year limitation in section 20-4-401, MCA?
2. Does the "automatic" renewal for one year provided in paragraph 12 of the initial contract violate the three-year limitation in section 20-4-401, MCA?

Section 20-4-401(3), MCA, provides:

The written contract of employment of a district superintendent or a county high school principal shall be authorized by the proper resolution of the trustees of the district or the joint board of trustees and executed in duplicate by the chairman of the trustees or joint board of trustees and the clerks of the districts in the name of the districts and by the district superintendent or the county high school principal. Such contract shall be for a term of not more than 3 years, and after the second successive contract, the contract shall be deemed to be renewed for a further term of 1 year from year to year thereafter unless the trustees shall, by resolution passed by a majority vote of its membership, resolve to terminate the services of the district superintendent or the county high school principal at the expiration of his existing contract. The trustees shall take such termination action and notify the district superintendent or the county high school principal in writing of their intent to terminate his services at the expiration of his current contract not later than February 1 of the last year of such contract.

Regarding the first question, mutual termination of the contract is neither authorized nor forbidden by the express provisions of section 20-4-401(3), MCA; initially, then, it must be determined whether the parties to the contract have the implied authority to terminate the contract prior to the expiration of its term.

Section 20-4-401(1), MCA, requires the board to "employ and appoint" the superintendent. Section 20-4-402, MCA, provides that the superintendent is the "executive officer of the trustees" and performs his duties "subject to the direction and control of the trustees." The board is also vested with the power of removal and discharge of the superintendent. See § 20-4-401(5), MCA; State ex rel. Howard v. Ireland, 114 Mont. 488, 138 P.2d 569 (1943). The Legislature has given the board extensive authority over employment decisions concerning the superintendent. The three-year term restriction

appears to be the only limitation on the contracting power of the board. See 26 Op. Att'y Gen. No. 15 (1955).

The general rules regulating the construction and operation of contracts ordinarily apply to contracts of employment of superintendents. See 78 C.J.S. Schools and School Districts § 192 (1952). Montana law allows executory contracts to be extinguished by rescission or cancellation upon consent of all the parties to the contract. See §§ 28-2-1701, 28-2-1702, 28-2-1711, MCA. In the absence of any restriction to the contrary, the board and the superintendent have the authority to effect a mutual termination of their employment contract prior to its expiration.

It follows that the board and the superintendent may then enter into another contract of employment, provided that its term is not more than three years. To hold otherwise would mean that the board could not reemploy a faithful and efficient superintendent on the same contractual basis used in hiring a new administrator. Such a procedure does not violate the three-year limitation imposed by section 20-4-401(3), MCA. See Hardison v. Beard, 430 S.W.2d 53 (Tex. App. 1968). This holding is consistent with the previous opinion of this office concerning subsection (3)'s predecessor statute [§ 75-4140, R.C.M. 1947] in which it was stated that "[t]he trustees, if they see fit, may grant a three-year contract to any district superintendent regardless of the number of previous terms he has served in the district." 26 Op. Att'y Gen. No. 15.

Regarding the second question, the "automatic" renewal provisions of paragraph 12 must be read together with the provisions of paragraph 1. If one assumes that the parties intended by paragraph 12 to extend the contract's termination date one additional year from June 30, 1987, if notice of nonrenewal was not given by January 1, 1985, the parties have entered into a rolling three-year agreement, the termination of which will not occur until three and one-half years after the notification deadline. The same pattern will be repeated in subsequent years if notice of nonrenewal is not given by January 1. See, e.g., Colman v. School Committee of Swansea, 378 N.E.2d 1016 (Mass. App. 1978).

School authorities may make employment contracts for such a term as may be permitted under the statutes, but they may not fix the term of employment in excess of the statutory limits of the term. See 78 C.J.S. Schools and School Districts § 185(b); Jay v. School District No. 1 of Cascade County, 24 Mont. 219, 61 P. 250 (1900). The question presented here is whether, by reason of paragraph 12, the contract's term of employment is "more than three years." I have concluded that it is.

Section 20-4-401(3), MCA, requires the written contract of employment of a district superintendent to be authorized by the proper resolution of the trustees and further provides that such contract shall be for a term of not more than three years. Paragraph 12 creates, in effect, a "term" in excess of three years by allowing the same contract to continue beyond three years.

The board of trustees may exercise only those powers conferred upon them by statute and such as are necessarily implied in the exercise of those expressly conferred; the statute granting the power must be regarded as both a grant and a limitation upon the powers of the board. McNair v. School District No. 1, 87 Mont. 423, 288 P. 188 (1930). Section 20-4-401, MCA, clearly requires the board to authorize, by resolution, a fixed-term contract of not more than three years' duration. The board may not bind itself, and future boards, to a contract with a term in excess of three years. With respect to the contract's term, the Legislature has limited the authority and defined the rights of the parties in such a complete way as to preclude any variation from the express provisions of the statute. Although the superintendent is granted, by this statute, the protection of a one-year continuing contract after completing his second successive contract without notice of nonrenewal, the board is not authorized to grant a rolling three-year employment contract which effectively extends the term of the contract beyond three years.

THEREFORE, IT IS MY OPINION:

1. A board of trustees and a district superintendent may mutually terminate a three-year employment contract prior to the expiration of its term and enter into another three-year contract identical to the first

except for date of expiration, without violating section 20-4-401, MCA.

2. Section 20-4-401, MCA, does not authorize a board of trustees and a district superintendent to enter into a rolling three-year employment contract.

Very truly yours,

MIKE GREELY
Attorney General