

Opinion No. 23

**Teachers Retirement Act—Compulsory Retirement—Reemployment
After Retirement.**

Held: Under the provisions of the Teachers Retirement System, a member is compelled to retire on the 1st day of September following his or her seventieth birthday.

May 13th, 1949.

Mr. R. W. Harper
Executive Secretary
Teachers Retirement System
Helena, Montana

Dear Mr. Harper:

You have presented the following factual situation for my opinion:

"S" a superintendent of schools, reaches the age of 70 years on July 9, 1949. The local Board of School Trustees desire to employ "S" for another year.

The questions presented by you are as follows:

- (1) Is the school district in error in re-employing "S"?
- (2) If they decide to re-employ him, what penalties could be invoked against the school district?
- (3) Are there any other duties to fall upon the Retirement Board in this particular case, other than notification of both the teacher and school district?
- (4) Should "S" be continued in employment, would he be required to continue payments to the System and would his salary for the last year be acknowledged in our records?

In answer to your first question, Section 6 of Chapter 87, Montana Session Laws of 1937, as amended by Section 2 of Chapter 137, Montana Session Laws of 1945, and Chapter 28, Montana Session Laws of 1949, must be considered. The amendment reads as follows:

"That from and after the passage and approval of this act, any member in service who has attained the age of seventy years, during any school year shall be retired by said Retirement Board on the first day of September following his or her seventieth birthday."

The provisions of this Section are mandatory in that the Board of Administration of the Teachers Retirement Act must retire a member when such member reaches the age of seventy years. The word "shall" is generally construed as mandatory in its ordinary and common use. See 50 Am. Jur., (Statutes) Section 28. It is also a well recognized principal of law that the word "shall" is construed as must when a public body is directed to do certain acts. See 25 R.C.L. Section 15, (Statutes), p. 769.

Furthermore it is my opinion that the clear import of Section 2, Chapter 137, *Supra.*, indicates that the Retirement Board must retire a

member of the System on September first following said member's seventieth birthday.

Assuming that a member is compelled to retire in light of the above statute and discussion, the next question is whether or not, under the hypothetical set of facts, "S" reached the age of seventy "during any school year."

Section 1061 of the Revised Codes of Montana, 1935, states that:

"The school year shall begin on the 1st day of July and end on the 30th day of June."

It is my opinion that "S" reached the age of seventy during the school year, namely July 9, 1949, consequently, he must retire on September 1, 1949, and the school district would be in error to employ "S" after September 1, 1949. See also Volume 22, Attorney General's Opinions 52, page 70, for a further discussion of Section 6, Chapter 87, Montana Session Laws of 1937, as amended by Section 2, Chapter 137, Montana Session Laws of 1945.

In answer to your second question, the act itself does not provide for any penalty for a failure to observe the provisions thereof. However, under Section 1015, Revised Codes of Montana, 1935, as amended by Chapter 103, Montana Session Laws of 1943, the duties of a trustee are prescribed as follows:

"Every school board unless otherwise specifically provided by law shall have power and it shall be its duty:

1. To prescribe and enforce rules not inconsistent with law. . . .

14. To require teachers to conform to the law."

Section 999, Revised Codes of Montana, 1935, prescribes the method for the removal of school trustees and is as follows:

"Any school trustee may be removed from office by a court of competent jurisdiction by law for removal of elective civil officers; provided, however, that upon charges being preferred and good cause shown, the board of county commissioners may suspend a trustee until such time as such charges can be heard in the court having jurisdiction thereof."

If the school trustees, or any member thereof, violates the provisions of the Retirement Act to the extent that such violation results in misconduct or malfeasance in office, then such trustees, or any one member, may be removed from office in the method prescribed by law.

In answer to your third question, Section 3, Chapter 87, Montana Session Laws of 1937, provides that it is the duty of the Retirement Board to assume responsibility for the general administration and proper operation of the retirement system.

In order to make effective the provisions of this act, it is my opinion that the Retirement Board has fulfilled its duty when both the school district and the teacher are notified in the manner provided for by law of any action taken by the Board.

Answering question number four, it is my opinion that if a member is lawfully compelled to retire under Section 6 of Chapter 87, Session Laws of 1937, as amended by Section 2 of Chapter 137, Session Laws of 1945, and such retirement is ignored by the school trustees, the retired member cannot be compelled to continue payments to the retirement system, nor can his salary, after he has been lawfully retired, be acknowledged in your records.

In passing, I wish to bring to your attention the fact that I am aware that there still exists in Montana a shortage of competent teachers in our public schools, and I am also aware that there are many employees of the system who are as competent after reaching seventy (70) years of age as many of the younger employees. However, the Legislature fixes the policy and enacts the laws under which the members of the Teachers Retirement System are to bound. Many of the provisions of the Retirement Act may seem to be unsound, especially in light of the economic conditions today, but, nevertheless, the Attorney General's Office must interpret the law as the Legislature has passed it.

Very truly yours,
ARNOLD H. OLSEN,
Attorney General.