

Opinion No. 11**Schools and School Districts—
Married Teachers—Teachers’
Contracts—Teachers’
Tenure.**

HELD: 1. The trustees of a school district have the authority to employ any teacher they see fit and have a discretionary power in the employment of a married teacher providing the teacher does not have tenure rights.

2. School trustees do not have the authority to provide in a contract that a teacher must relinquish her position should she marry during the term of the contract.

3. No provisions may be included in teachers’ contracts discriminatory to married teachers.

4. School trustees do not have the power to employ married teachers on a day to day basis for the purpose of evading the teachers’ tenure law, nor do they have the power to employ single teachers in such a manner.

May 12, 1955.

Miss Mary M. Condon
State Superintendent of Public
Instruction
State Capitol Building
Helena, Montana

Dear Miss Condon:

You have submitted for my consideration the following questions:

1. May a school board in hiring teachers discriminate against

married teachers, all other qualifications being equal?

2. May a school board write a contract between the district and a teacher and include therein a provision that a teacher must relinquish her position should she marry during the term of the contract?
3. May a contract between a teacher and a school board contain any provisions discriminatory to married teachers?
4. May a school board, in order to evade the tenure law, hire married teachers or any other teachers on a day to day basis?

In answering your first question, it is necessary to consider subsection 2 of Section 75-1632, R.C.M., 1947, which grants the power to a board of trustees “to employ or discharge teachers, mechanics or laborers, and to order paid their wages.” This statute gives to the board of trustees the authority to employ any teacher who is qualified to teach; and in the exercise of this power the board may refuse to employ a married teacher, providing the teacher does not have tenure rights. The reason for this conclusion is that the trustees have an absolute discretion to employ initially those teachers who appear to be suitable for a teaching position. Whether the teacher is married might be considered by the trustees in tendering a contract.

Your second question is directed to the power of a board of trustees to include in a teacher’s contract a forfeiture provision which will terminate the teacher’s rights prior to the expiration of the contract. Section 75-2411, R.C.M., 1947, provides:

“In the case of the dismissal of any teacher before the expiration of any written contract entered into between such teacher and board of trustees for alleged immorality, unfitness, incompetence, or violation of rules, the teacher may appeal to the county superintendent; and if the superintendent decides that the removal was made without good cause, the teacher so removed must be re-

instated, and shall be entitled to compensation for the time lost during the pending of the appeal."

This statute was held, in *Kelsey vs. School District No. 25*, 84 Mont. 453, 276 Pac. 26, to be "a condition of the contract as effectively as if expressly written therein." It is obvious that marriage does not make a teacher either unfit or incompetent to teach.

In *Richards vs. District School Bd.*, 78 Or. 62, L.R.A. 1916C, 789, 153 Pac. 482, Ann. Cas. 1917D, 266, a school board attempted to enforce a rule providing that the marriage of a woman teacher automatically terminated her service. The reason advanced for the rule adopted by the board was that after marriage a woman might devote her time and attention to her home, to the neglect of her school work. In discussing the reasonableness of the rule, the court said:

"... It would be just as reasonable to adopt a rule that if a woman teacher joined a church it would work an automatic dismissal from the schools on an imagined assumption that the church might engross her time, thought, and attention, to the detriment of the schools; but such a regulation as the one supposed would not even have the semblance of reason. It must be conceded that quite a different case is presented where the act ruled against is inherently wrong. The act to which the instant rule relates does not involve a single element of wrong, but, on the contrary, marriage is not only protected by both the written and unwritten law, but it is also fostered by a sound public policy . . ."

Accordingly, it was held that the rule was unreasonable and that the marriage of a woman teacher was not a ground for dismissal under a statute providing that teachers might be dismissed only for good cause shown. See also: *Elwood vs. State ex rel. Griffin*, 203 Ind. 626, 180 N.E. 471, and *Jameson vs. Board of Education*, 74, W. Va. 389, 81 S.E. 1126.

In *State ex rel. Saxtorph vs. District Court*, Mont....., 275 Pac. (2d) 209, 11 St. Rep. 460, it was

held that the provisions of Section 74-2411, R.C.M., 1947, which provide for the dismissal of a teacher for alleged "immorality, unfitness, incompetence, or violation of rules" states the only grounds for the removal of teachers who have written contracts. In the *Richards* case cited above, it was held that a rule providing for the termination of a contract, if the teacher married, was not a reasonable rule. Such holding establishes the public policy that marriage is not a ground for dismissal. In *Abshire vs. School District No. 1*, 124 Mont. 244, 220 Pac. (2d) 1058, it was held that the Teachers' Retirement Act declared the public policy that the compulsory retirement age in Montana is seventy years and the trustees do not have authority to adopt a rule fixing retirement age at sixty-five. As the trustees of a school district do not have the power to adopt a rule contrary to public policy, it must be concluded in answer to your third question that there may be no discriminatory provisions in contracts with married teachers.

In your fourth question you ask if school trustees in order to evade the tenure law may hire married teachers or any other teachers on a day to day basis. Subsection 2 of Section 75-1632, R.C.M., 1947, makes it the duty of a school board to enter into written contracts with all teachers. Section 75-2401, R.C.M., 1947, establishes the public policy in this state that a teacher shall acquire tenure rights after having taught for three consecutive years in any school district in the state. In *McBride vs. School District No. 2*, 88 Mont. 110, 290 Pac. 252, it was held that the provisions of the tenure law "became a part of the contract of employment and were binding upon both the teacher and the board of trustees." In *Public School District vs. Holson*, 31 Ariz. 291, 252 Pac. 509, it was held that the trustees of a school district did not have the power to write into a contract a provision for dismissal at pleasure.

It is therefore my opinion:

1. The trustees of a school district have the authority to employ any teacher they see fit and have a discretionary

power in the employment of a married teacher providing the teacher does not have tenure rights.

2. School trustees do not have the authority to provide in a contract that a teacher must relinquish her position should she marry during the term of the contract.
3. No provisions may be included in teachers' contracts discriminatory to married teachers.
4. School trustees do not have the power to employ married teachers on a day to day basis for the purpose of evading the teachers' tenure law, nor do they have the power to employ single teachers in such a manner.

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