

VOLUME NO. 37

OPINION NO. 75

TEACHERS - American Indian Studies Act, applicability to tenured teachers; SCHOOL DISTRICTS - Trustees, American Indian Studies Act, applicability to tenured teachers; REVISED CODES OF MONTANA, 1947 - Sections 75-6001 - 6003, 75-6008, 75-6011, 75-6102 - 6105, 75-6121, 75-6129(2), 75-6130, 75-6131(1), 75-6132.

HELD: The provisions of the Indian Studies Act, sections 75-6121 through 75-6132, R.C.M. 1947, are applicable to tenured teachers.

11 October 1977

Georgia Ruth Rice
Superintendent of Public Instruction
Office of Public Instruction
State Capitol
Helena, Montana 59601

Dear Ms. Rice:

You have requested my opinion concerning the following questions:

Can boards of trustees for elementary and secondary public schools districts on, or located in the vicinity of Indian reservations, refuse to re-employ tenured teachers who have not satisfied the requirements for instruction in American Indian studies, as defined in section 75-6130, R.C.M. 1947?

Section 75-6131(1), R.C.M. 1947, the American Indian Studies Act, was effective on July 1, 1973, and provides:

By July 1, 1979, all boards of trustees for elementary and secondary public school districts on, or in public schools located in the vicinity of, Indian reservations where the enrollment of Indian children qualifies the school for federal funds for Indian education programs, shall employ only those certified personnel who have satisfied the requirements for instruction in American Indian studies as defined in section 2 (75-6130) of this act. (Emphasis added.)

The policy underlying this requirement is set out in section 75-6129:

It is the constitutionally declared policy of this state to recognize the distinct and unique cultural heritage of the American Indians and to be committed in its educational goals to the preservation of their cultural heritage. It is the intent of this act, predicated on the belief that school personnel should relate effectively with Indian students and parents, to provide means by which school personnel will gain an understanding of and appreciation for the American Indian people.

Section 75-6130 provides that the instruction in American Indian Studies required by section 75-6131 may be met in three different ways:

- (a) A formal course of study offered by a unit of higher education developed with the advice and assistance of Indian people;
- (b) in-service training developed by the superintendent of public instruction in cooperation with educators of Indian descent and made available to school districts; or
- (c) in-service training provided by a local board of trustees, which is developed and conducted in cooperation with local Indian people.

The answer to the question herein depends upon the answers to the following questions: First, did the Legislature intend that the requirements of section 75-6131 apply to tenured teachers; and second, if so, is that imposition constitutionally permissible?

Section 75-6103, the tenure act, provides:

[w]henever a teacher has been elected by the offer and acceptance of a contract for the fourth consecutive year of employment by a district in a position requiring teachers certification except as a district superintendent, the teacher shall be deemed to be re-elected from year to year thereafter as a tenure teacher at the same salary and in the same or a comparable position of employment as that provided by the last executed contract with such teacher, unless:

(1) the trustees resolve by a majority vote of their membership to terminate the services of the teacher in accordance with the provisions of section 75-6104; or

(2) the teacher will attain the age of sixty-five (65) years (Emphasis added.)

While the Indian Studies Act does not specifically mention tenured teachers, it broadly applies to "certified personnel" (section 75-6131). A school district may employ only certified teachers (section 75-6102), and therefore "certified personnel" in section 75-6131 refers to both tenured and nontenured teachers.

The Indian Studies Act permits school districts to employ only those personnel who have met the specified requirements (section 75-6131). The word "employ" generally signifies both initial and continued employment. Hinek v. Bowman Public School District, 232 N.W.2d 72, 74 (N.D. 1975). While the Tenure Act uses the term "re-elected" (section 75-6103), that term has been construed to mean re-employed. Stoneman v. Tonworth School District, 320 A.2d 657, 660 (N.H. 1974). Therefore, "employment" in the continuing sense in the Indian Studies Act and "re-elected" in the Tenure Act are essentially identical terms. If the Legislature had intended to limit the Indian Studies Act to the initial employment of a teacher, it could have done so. However, since the language of the Indian Studies Act is broad and comprehensive, it is plain that the Legislature intended it to apply to all certified teachers, whether tenured or not. It is interesting to note that House Bill 463, introduced in the Forty-fifth Legislature to "revise the requirements and procedures" of the Indian Studies Act was killed in committee. While that bill sought to revise the Act, it only did so in regard to extending the time limits within which compliance with the Act is required. It did not seek to limit the application of the Act as to

tenured teachers, and in fact proposed a subsection 3 to section 75-6131 which would have required compliance by July 1, 1984, by "all persons certified to teach in the public schools." Therefore, if the Legislature had intended to limit the application of the Indian Studies Act, such an intention would certainly have surfaced either in the original Act or in the amendments proposed in 1977.

Since the Indian Studies Act on its face applies to tenured teachers, the second inquiry is whether that application is constitutionally permissible. The crux of that inquiry depends upon whether the statutes governing teacher tenure create contractual rights in and of themselves in favor of tenured teachers. If so, the extent of those rights must be determined. The Legislature is then prohibited from enacting a statute in derogation of those rights by Article II, section 3, of the Montana Constitution, which prohibits the Legislature from enacting "any law impairing the obligation of contracts...."

Considerable litigation has arisen concerning the question of whether a contract is created by teacher tenure legislation, and United States Supreme Court decisions have reached both affirmative and negative conclusions. In Phelps v. Board of Education, 300 U.S. 319 (1937), the New Jersey tenure statute under consideration provided that after three years teaching no teacher could be dismissed or subjected to a salary reduction except for cause and after hearing. The Court held (300 U.S. at 322-23) that this did not amount to a legislative contract. The tenure act was "but a regulation of the conduct of the [school] board and not a term of a continuing contract indefinite in duration with the individual teacher." By contract, Anderson v. Brandt, 303 U.S. 95 (1938) involved a tenure act which provided for an "indefinite contract" after five years of teaching. The Court held (303 U.S. at 100) that a legislative enactment may contain provisions which as to individuals become contracts between them and the state or its subdivisions, and these contracts are subject to the constitutional prohibition against legislative impairment. The Anderson Court found the whole tenor of the act in question to be one of creating a contract. For example, the word "contract" appeared twenty-five times in its first four sections. The act assured affected teachers of a binding and enforceable contract against the school district, and repeal of the act could not affect any rights acquired thereunder.

Dodge v. Board of Education, 302 U.S. 74, 78-79 (1938), involved a change in an annuity statute. The court stated the following guidelines:

The parties agree that a state may enter into contracts with citizens, the obligation of which the legislature cannot impair by subsequent enactment. They agree that legislation which merely declares a state policy, and directs a subordinate body to carry it into effect, is subject to revision or repeal in the discretion of the legislature. The point of controversy is as to the category into which the Miller Law falls.

In determining whether a law tenders a contract to a citizen it is of first importance to examine the language of the statute. If it provides for the execution of a written contract on behalf of the state the case for an obligation binding upon the state is clear. Equally clear is the case where a statute confirms a settlement of disputed rights and defines its terms. On the other hand, an act merely fixing salaries of officers creates no contract in their favor and the compensation named may be altered at the will of the legislature. This is true also of an act fixing the term or tenure of a public officer or an employee of a state agency. The presumption is that such a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise. He who asserts the creation of a contract with the state in such a case has the burden of overcoming the presumption. If, upon a construction of the statute, it is found the payments are gratuities, involving no agreement of the parties, the grant of them creates no vested right. (Emphasis added.)

Generally, an enactment will not be construed to create private contractual rights which limit or extinguish the power of the government to completely control the subject matter of the enactment unless the intent to create a contract clearly appears. "An agreement requiring the surrender or suspension of legislative control will not be raised by mere implication." Taylor v. Board of Education, 89 P.2d 148, 152 (Cal. 1939).

The basic purpose of teacher tenure statutes is generally agreed upon:

The evident purpose of the Tenure of Instructors Act is to protect competent and worthy instructors and other members of the teaching profession against unjust dismissal of any kind--political, religious or personal, and secure for them teaching conditions which will encourage their growth in the full practice of their profession, unharried by constant pressure and fear, but it does not confer special privileges upon them to retain permanently their position or salary nor permit their interference with the control or efficient operation of the public school system; and, notwithstanding it grants tenure to those who have taught the requisite period, it nonetheless empowers Boards of Education to discharge them for just cause in an orderly manner by the procedures specified.

Million v. Board of Education, 310 P.2d 917, 921 (Kan. 1957). Tenure has been described as a "substantial, valuable and beneficial right, which cannot be taken away except for good cause...." Saxtroph v. District Court, 128 Mont. 353, 361 (1954). Tenure protects teachers from being fired for political, partisan or capricious reasons. Graham v. Board of Education, 305 N.E.2d 310, 313 (Ill. 1973).

The question of whether the Montana teacher tenure statutes create contractual rights in and of themselves has not been directly decided. The most illuminating case is Eastman v. School District No. 1, 120 Mont. 63 (1947), which basically involved the extent of notice that must be given to refuse to re-employ a tenured teacher. The majority discussed the relationship among the teacher, the school board, and the tenure act as follows (120 Mont. at 68):

The so-called teachers' tenure act which is operative after the third consecutive year of a teacher's employment does not do away with the necessity of having a contract as required by section 75-6102. The only effect of said section 75-6103 is to renew the teacher's existing contract for another year by operation of law, after her election for the third consecutive year unless the notice specified in said section is given. Therefore, whether a teacher is the holder of a written contract for her first year's service or whether her contract has been extended by operation of law under section 75-6103, the situation is the same. The teacher is still employed

under a contract, a teacher cannot be employed, he cannot perform services as a teacher, he cannot draw pay from the school district without a contract. Accordingly,...a person's right to teach in the public schools of Montana is created by contract, rests upon contract and ceases upon expiration of the contract.... (Emphasis original.)

The year-to-year nature of the tenure right was explained in the concurring opinion (120 Mont. at 74-75):

The statute is not open to the construction that the teacher, after serving three consecutive years, is placed upon a continuing, permanent tenure contract. Rather the statute permits and authorizes the school board to re-employ the teacher for another year in one of three methods, or to decline to re-employ her.

* * *

Obviously under the statute a teacher who has taught for three consecutive years obtains only the rights provided for by statute. Those rights are simply that he shall be automatically considered an applicant for the position from year to year and if the board does not affirmatively re-elect him before a stated time or give notice that it refuses to re-employ him, then his re-election is automatic.

In other words the effect of the statute is to place such a teacher in exactly the same position as a new applicant for the position, with the added feature of re-employment automatically if no action be taken by the board before May 1st. The board is confronted each year, not with the problem of whether it will discharge a teacher who has served three consecutive years or more but whether it will re-employ him.

The subsequent decision in Saxtroph v. District Court, supra, also primarily involved a sufficiency of notice question, but was decided after the tenure statute construed in Eastman had been amended to provide for notice and hearing upon the termination of tenured teacher services. Thus, while Saxtroph indicated that it overruled anything inconsistent in Eastman, the discussion of the nature of tenure in the latter case should not be affected. Saxtroph overrules Eastman only as to the notice required to terminate tenured teacher services.

More recently, in Stephens v. City of Billings, 148 Mont. 372 (1966), the dispute involved a seniority ordinance for firemen. In determining that the ordinance created no contract between the city and the firemen, the Court quoted extensively from the ALR annotation on teacher tenure (147 ALR 293) to the effect that in absence of language expressing an intent to confer contractual rights, recognition of permanent status does not create contractual rights immune from legislative encroachment.

As previously noted, section 75-6103 provides that if a teacher has been "elected" by offer and acceptance of a contract from the district for four consecutive years, then he or she is "deemed to be re-elected from year to year." This right is subject to numerous qualifications. The district trustees may notify all tenured teachers of their re-election by April 1 of each year, and the tenured teacher must accept the "conditions of" this offer within 20 days, or a conclusive presumption of nonacceptance arises (section 75-6105). If the trustees do not provide this written notice of re-election, a tenured teacher is deemed re-elected by virtue of section 75-6103. Alternatively, the trustees can resolve to terminate the services of a tenured teacher by following the notice, hearing and appeal procedures of section 75-6104.

A district may only employ certified teachers, and only under a written contract (section 75-6102). Therefore, a tenured teacher must maintain certification pursuant to section 75-6001 through 75-6011, or the district may not employ him. The Board of Education has adopted detailed policies on certification pursuant to sections 75-6002 and 75-6003, requiring, inter alia, continuing education credits for all Class Two certified teachers. Certificates are valid for five years (section 75-6008), but may not be issued to any person who has not complied with these certification requirements (section 75-6003).

The fact that tenure is not a complete, automatic and perpetual right is evident from the preceding discussion of the statutory provisions. Tenure, for example, does not insure the re-election of a teacher if doing so would violate the state's statutory nepotism provisions. State v. School District No. 13, 116 Mont. 294, 298-99 (1944).

A situation similar to the one under consideration arose in Campbell v. Aldrich, 79 P.2d 251 (Ore. 1938), where the existing tenure law was amended to provide for mandatory

retirement at age 65. Proceeding upon a statute similar to Montana's, the court found no contractual right to exist, by virtue of the statute, between the state and the teachers. The statute vested the teachers with a statutory status embodying certain procedural safeguards, but the court was unable to find any indication that the Legislature intended to surrender its control over the subject of teacher tenure by enacting effectively irrevocable statutes.

Tenure is an essentially contingent right which gives a teacher year-to-year employment unless terminated according to the statutory procedure. It has been held in Montana that the provisions of the tenure statutes become part of the contract for employment between the district and the teacher by operation of the law. McBride v. School District No. 2, 88 Mont. 110, 115 (1930); Kelsey v. School District No. 25, 84 Mont. 453, 458 (1929). If the statutes themselves had created a contract in favor of the teachers, there would be no reason for implying the statutes into the actual contract with the district. It is clear that any contract which exists vis a vis a tenured teacher is the one with the district, and not one with the state by virtue of the existence of the tenure statutes.

The Legislature has retained and, in the case of the Indian Studies Act, has exercised its prerogative to alter the conditions of tenure. This is not to say that the Legislature could repeal the tenure statutes and thereby destroy the rights of those teachers who had acquired tenure. Local #8 v. City of Great Falls, Montana Supreme Court, No. 13616, decided August 1977. As the Court said in Campbell v. Aldrich, *supra*, 78 P.2d at 261:

In our opinion, the sovereign power vested in the Legislature to enact laws for the betterment of common schools is one which cannot be bartered away. The exercise of such power at one time does not mean that future Legislatures may not, in the light of experience, declare a different policy. If such is not the law, there is no hope for progress, and future legislators, in determining educational policies concerning the tenure of teachers, must follow in trodden paths.

The legislative policy of the Indian Studies Act is clear, and applies to all teachers.

Even assuming *arguendo* that teachers enjoy contractual rights by virtue of the teacher tenure statutes, a majority of the presently tenured teachers would still be subject to the Indian Studies Act requirements. The Act became effective July 1, 1973, and therefore any teacher becoming tenured after that date took tenure with notice of the Act and is clearly subject to its provisions. This would be true regardless of whether or not contractual rights exist.

Any tenure contractual rights that may exist are subject to the certification policies of the Board of Public Education. Section 75-6002. Further, all teachers under the Class Two Standard certificate are presently subject to continuing education requirements for the five-year renewal of their certificates. Thus, these teachers, even though tenured, are on notice that they have continuing education requirements, and the imposition of the Indian Studies Act requirements does not add or change their contractual rights as a legal matter. There is nothing in the certification statutes, section 75-6001, *et seq.*, to indicate that the Legislature intended that the certification policies could never be changed once they were adopted. To the contrary, the purpose of the certification policy is to establish and maintain professional standards. Section 75-6001. Thus, the Board has the power to change the certification policies as necessary to maintain professional standards without impairing any tenured teacher's rights. If such a power exists in the Board, it certainly exists in the Legislature.

The Indian Studies Act provides a six-year period (July 1, 1973 until July 1, 1979) to comply with its requirements. Every teacher certified on July 1, 1973, would have to be re-certified at some time during that period, and would complete the continuing education requirements with knowledge of the Act. If those requirements have not been met then the Legislature has clearly prohibited the school district from rehiring any non-complying teacher.

Affected teachers still have until July 1, 1979, to comply with the requirements of the Indian Studies Act. Compliance with the Act is presently difficult in some areas of the state. If in-service training programs as described in section 75-6130(2) are expeditiously established around the state, then all affected teachers will have reasonable opportunity to comply with the law.

THEREFORE, IT IS MY OPINION:

The provisions of the Indian Studies Act, section 75-6121 through 75-6132, R.C.M. 1947, are applicable to tenured teachers.

Very truly yours,

MIKE GREELY
Attorney General