

SCHOOLS:
TEACHERS:

1. Under Section 168.126, RSMo 1969, a board of education need not give a probationary teacher ninety days notice prior to

April 15 of its intention not to rehire the teacher because of incompetency in order to lawfully refuse to renew that probationary teacher's contract for the next school year; 2. The time periods in Sections 168.116 and 168.126, RSMo 1969, should be computed on the basis of calendar days excluding the first day and including the last in accordance with Section 1.040, RSMo 1969.

OPINION NO. 18

March 28, 1972

Dr. Arthur L. Mallory
Commissioner of Education
State Department of Education
Jefferson State Office Building
Jefferson City, Missouri 65101



Dear Dr. Mallory:

This official opinion is issued in response to your request for a ruling on the following questions:

"1. Are school boards, except those of metropolitan districts, required to issue contracts for the ensuing year to probationary teachers employed by these boards if written statements setting forth alleged incompetencies are not furnished teachers ninety days prior to April fifteenth?

"2. If a school board is required to issue a contract for the ensuing year because a written notice setting forth the alleged incompetency is given the teacher less than ninety days prior to April fifteenth, may the Board of Education terminate such a contract if improvement satisfactory to the Board of Education has not been made within the ninety day period?

"3. Sections 168.116 and 168.126, RSMo, refer to the number of days' notice must be given teachers before certain actions can be taken by local school boards. How is this time to be computed? In calendar days or in school days? If school days, how should school holidays and days when school is dismissed for teachers meetings be handled?"

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Your first two questions require, initially, an interpretation of Section 168.126, RSMo 1969, of the Missouri Teacher Tenure Act.

"Probationary teachers, how terminated -- reemployed, how. -- 1. A board of education at a regular or special meeting may contract with and employ by a majority vote legally qualified probationary teacher for the school district. The contract shall be made by order of the board; shall specify the number of months school is to be taught and the wages per month to be paid; shall be signed by the probationary teacher and the president of the board and attested by the secretary of the board. The board shall not employ one of its members as a teacher; nor shall any person be employed as a teacher who is related within the fourth degree to any board member, either by consanguinity or affinity, where the vote of the board member is necessary to the selection of the person.

"2. If in the opinion of the board of education any probationary teacher has been doing unsatisfactory work, the board of education through its authorized administrative representative, shall provide the teacher with a written statement definitely setting forth his alleged incompetency and specifying the nature thereof, in order to furnish the teacher an opportunity to correct his fault and overcome his incompetency. If improvement satisfactory to the board of education has not been made within ninety days of the receipt of the notification, the board of education may terminate the employment of the probationary teacher immediately or at the end of the school year. Any motion to terminate the employment of a probationary teacher shall include only one person and must be approved by a majority of the members of the board of education. A tie vote thereon constitutes termination. On or before the fifteenth day of April but not before April first in each school year, the board of education shall notify a proba-

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tionary teacher who will not be retained by the school district of the termination of his employment.

"3. Any probationary teacher who is not notified of the termination of his employment shall be deemed to have been appointed for the next school year, under the terms of the contract for the preceeding year. A probationary teacher who is informed of reelection by written notice of tender of contract on or before the fifteenth day of April but not before April first shall within fifteen days thereafter present to the employing board of education a written acceptance or rejection of the employment tendered, and failure of such teachers to present the acceptance within such time constitutes a rejection of the board's offer. A contract between a probationary teacher and a board of education may be terminated or modified at any time by the mutual consent of the parties thereto."

We understand your first question to be whether the board of education of a school district other than a metropolitan district must advise a probationary teacher at least ninety days prior to April 15 of its intention not to offer the probationary teacher a contract for the ensuing school year. We understand and will assume, for the purposes of writing this opinion, that your request has nothing to do with the probationary teacher's contract for the current year, but that it relates only to whether that teacher will receive a contract for the next school year.

Under the Missouri Teacher Tenure Act there are two classifications of teachers -- permanent teachers and probationary teachers. See Section 168.104(4) (5). As the name would indicate, the Teacher Tenure Act grants to permanent teachers significant rights not granted to probationary teachers. The contractual arrangement between a permanent teacher and the employing school district is described as an indefinite contract. Section 168.104 (3) and Section 168.106. This contract continues in effect for an indefinite period subject only to those terminating events set forth in Section 168.106. The board of education of a school district can terminate the contract for cause only after a notice and hearing as provided in Section 168.114, Section 168.116 and Section 168.120. Unless one of the events described in Section 168.106 occurs, every permanent teacher has a contract which continues in effect from year to year without the necessity of specific action on the part of the board of education or on the part of the teacher. This protection afforded a permanent teacher is

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referred to as tenure and is obtained only after a teacher has been employed in the same school district for six successive years. See Section 168.104(4); Opinion No. 269 to Honorable Eric F. Fink, dated May 13, 1971, and Opinion No. 371 to Honorable James P. Mulvaney, dated October 2, 1970, copies of which are enclosed.

On the other hand, as the name would denote, probationary teachers do not have indefinite contracts and, under the Missouri Teacher Tenure Act, are subject to less contractual protection than is a permanent teacher. The probationary period gives the administration of the school district an opportunity to determine whether a teacher is qualified for permanent status in that district. In Orr v. Trinter, 444 F.2d 128 (6th Cir., 1971), the Court stated that, "the very reason for the probationary period is to give the board a chance to evaluate the teacher without making a commitment to rehire him." Although this decision was based on the Ohio Teacher Tenure Act, we believe that a complete reading of the Missouri Teacher Tenure Act indicates that the Missouri Legislature also intended that a probationary teacher be, as the name would denote, on probation for five successive years of teaching in a school district.

Turning, now, to Section 168.126, subsection 2 of this section pertains to two distinct situations: (a) termination of a probationary teacher's current contract because of unsatisfactory work and (b) renewal of a probationary teacher's contract for the next school year. As this office has previously pointed out in Opinion No. 178, dated July 19, 1971 (a copy of which is enclosed herewith), a probationary teacher's current contract may be terminated for unsatisfactory work only after a written statement is delivered to the teacher setting forth each and every area of incompetency in which the board desires improvement in sufficient detail to permit the teacher an opportunity to correct the alleged faults within ninety days. This notice requirement gives the teacher who is under contract, yet on probation, the opportunity to avoid being peremptorily dismissed for incompetency. Peremptory termination for incompetency during the contract period could have serious repercussions on a teacher's future career. Also, finding a new job during a school year could be most difficult.

When the question is not termination of a current contract, but whether a teacher will receive a contract for the next school year, the legislature provided probationary teachers with a different kind of protection. Notice must be given prior to April 15 of the board's intention not to rehire or else the teacher is automatically rehired. We find no language in subsection 2 of Section 168.126 tying the last sentence in with the first two sentences of that subsection. We believe the first two sentences clearly relate to termination of a current contract during or at the end of a school year. For instance, the third sentence states:

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". . . If improvement satisfactory to the board of education has not been made within ninety days of the receipt of the notification, the board of education may terminate the employment of the probationary teacher immediately or at the end of the school year. . . ."

No reasonable interpretation of this sentence makes it applicable to whether a teacher will be rehired for the next school year. The only argument which can be made that the ninety day notice provision applies to contract renewal as well as termination during the term of the contract is that the last sentence of subsection 2, pertaining to rehiring, is included in the same subsection dealing with termination during the term of the contract. We agree that the cause of clarity would have been greatly served by placing the last sentence of subsection 2 in subsection 3 of this section. However, the complete absence of any reference to rehiring in the first sentences of subsection 2 pertaining to the ninety day notice convinces us that the legislature did not intend to restrict the board of education in its hiring plans for the next year by requiring that ninety days notice be given prior to April 15 if a teacher is not going to be rehired due to incompetency.¹

Any other interpretation of the ninety day notice provision would raise practical problems. Assuming arguendo that the ninety day notice provision applied to rehiring as well as termination, suppose the probationary teacher's incompetency first exhibited itself in late February. If the ninety day notice were given immediately, it would be less than ninety days until April 15. The board would have to offer the teacher a contract for the next year even though he was under a ninety day notice. Suppose, further, the teacher failed to correct the fault and was terminated the end of May. This situation would then exist -- probationary teacher's current contract terminated but by operation

Footnote

1. It should be noted that the ninety day notice provision applies only to termination due to incompetency. Therefore, even if the ninety day provision did apply to rehiring, it would apply only to probationary teachers not rehired due to incompetency. However, no statute requires a school board to give a teacher an explanation of why he is not being rehired. If the ninety day notice provision were applicable to rehiring, a teacher who was not rehired and did not receive a ninety day notice might contend that incompetency was the real reason. In this way, the ninety day notice provision could lead to an increase in teacher-board strife and litigation.

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of law the teacher would have a contract for the next school year. We do not believe the legislature intended for such an absurd result to be a possibility.

That fewer safeguards are provided probationary teachers when the question is whether they will be rehired, than are provided when the question is termination of current contract rights represents a reasonable legislative policy. Certainly, the decision by a school board not to rehire a teacher casts less grave or no reflection on a teacher than the decision to terminate a contract during its term. A provision giving a probationary teacher less rights when the question is whether the teacher will be rehired than when the question is whether the current contract will be terminated, is found in teacher tenure acts in other states. See Lunderville v. Emery Unified School District, 68 Cal.Rptr. 768 (1968 Ct.Apps.).

Therefore, we conclude that under Section 168.126, the board of education of a Missouri school district (other than a metropolitan school district) need not give a probationary teacher ninety days notice of its intention not to rehire due to incompetency but must, in accordance with subsection 2 of Section 168.126, advise the probationary teacher between April 1 and April 15 of its intention not to rehire. If the probationary teacher is not so notified, he shall be deemed to have been appointed for the next school year under the terms of the contract for the preceding year. See subsection 3 of Section 168.126.

Even though we have concluded that the Missouri Legislature does not require that notice be given prior to a decision not to renew a probationary teacher's contract because of incompetency, consideration should be given to whether the Due Process Clause of the Fourteenth Amendment to the United States Constitution requires that a probationary teacher receive notice and an opportunity to be heard before a school board decides not to renew the teacher's contract for the next year. Under certain circumstances, courts in other jurisdictions have held that a probationary teacher must receive a notice stating why his contract is not being renewed and an opportunity to appear before the board before his contract can lawfully not be renewed. See, for instance, Shirck v. Thomas, 447 F.2d 1025 (7th Cir., 1971).

However, the Eighth Circuit Court of Appeals has taken a different position. In Freeman v. Gould Special School District of Lincoln County, Arkansas, 405 F.2d 1153 (8th Cir., 1969), six teachers sought to have the Court compel the defendant school district to renew their annual teaching contracts. In May, 1967, plaintiffs received notice that their contracts would not be renewed for the next year. The notification was in accordance with an Arkansas statute which provided for automatic renewal of teacher's contracts unless notice to the contrary was given within a prescribed time.

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Plaintiffs argued that the Due Process Clause was violated unless the board could show good cause for not renewing their contracts. The Court rejected this substantive due process argument as follows:

"Almost all of the cases cited in support of plaintiffs' position are concerned with either racial discrimination or an invasion of a constitutionally protected right or privilege by way of a statute or regulation. We agree that the teachers are protected under the Equal Protection Clause from discrimination on account of race or religion or in their assertion of constitutionally protected rights, but no case cited by plaintiffs has gone so far as to say that all actions of any governmental board or agency in employment cases must accord the individual due process under the Fourteenth Amendment so as to provide tenure and a right to retain the position, except for cause. And 'for cause' presupposes a right to hearing, notice, and appeal. Many government employees are under civil service and some under tenure. Absent these security provisions a public employee has no right to continued public employment, except insofar as he may not be dismissed or failed to be rehired for impermissible constitutional reasons, such as race, religion, or the assertion of rights guaranteed by law or the Constitution." Id. at 1159. (Emphasis supplied.)

* * *

". . . On the basis of this holding, plaintiffs then project that the Board must accord due process, both substantive and procedural, in all of its operative procedures. If this were so, we would have little need of tenure or merit laws as there could only be, as argued by the plaintiffs, a discharge for cause, with the school board carrying the burden of showing that the discharge was for a permissible reason. We do not believe this to be the law, as there are many public employees who are separated from their employment by a purely arbitrary decision, upon a change of administration or even a change of factual control where the appoint-

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ments are not protected by civil service or some type of tenure, statutory or contractual." Id. at 1160.

Plaintiffs in the Freeman case, although granted a hearing by the board, argued that they had been denied procedural due process because they were not permitted an opportunity to cross-examine their primary accuser. The Court rejected this argument, also:

"When a particular statutory procedure is set up for the dismissal of a teacher it must be followed, but absent statutory procedures the Board may adopt its own method. . . ." Id. at 1160.

* * *

". . . Absent statutory or contractual requirements, persons discharged for inefficiency, incompetency, or insubordination have no constitutional right to a hearing with rights of cross-examination and confrontation of witnesses." Id. at 1161.

For further authority that a school board in Missouri, even when terminating a teacher's current contract, is not required to provide any of the safeguards of procedural due process except those provided in the applicable statutes, see Brooks v. School District of the City of Moberly, 267 F.2d 733 (8th Cir., 1959); Wilson v. Pleasant Hill School District, No. 18501-4 (Western District of Missouri, March 1, 1971), and Judge Wangelin's Order of November 30, 1971, in Beauregard v. Board of Education of the Hazelwood School District, No. 71 C 337(4) (Eastern District of Missouri). Based on the foregoing decisions, we believe that the interpretation of federal law governing Missouri, at this time, is in accord with the decision of the Sixth Circuit Court of Appeals in Orr v. Trinter, 444 F.2d 128 (6th Cir., 1971).² Plaintiff, a

Footnote

2. Several cases are currently pending before the United States Supreme Court which raise issues pertaining to the rights of probationary teachers. See Perry v. Sindermann, No. 70-36; State College Board of Regents v. Roth, No. 71-162, argued on January 18, 1972; and Thomas v. Shirck, No. 71-819. Should the Supreme Court adopt a rule contrary to the position of the Eighth Circuit Court of Appeals, the conclusion of this opinion would undoubtedly need to be altered.

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probationary teacher without tenure, had received notice that his contract would not be renewed for the next year. Plaintiff argued that the failure to give reasons for non-renewal of his contract and a hearing at which he could challenge the reasons violated his rights under the Due Process Clause. The Court rejected this argument stating as follows:

"First, the Fourteenth Amendment only protects against the State depriving one of life, liberty, or property without due process of law. 'It has been held repeatedly and consistently that Government employ is not "property." * * * We are unable to perceive how it could be held to be "liberty." Certainly it is not "life."' Bailey v. Richardson, 182 F.2d 46 (D.C.Cir.), aff'd by an equally divided Court, 341 U.S. 918, 71 S.Ct. 669, 95 L.Ed. 1352.

"Second, in the unique situation of a probationary school teacher, the failure to give reasons for the refusal to rehire is not arbitrary and capricious action on the part of the Board since the very reason for the probationary period is to give the Board a chance to evaluate the teacher without making a commitment to rehire him. A non-tenured teacher's interest in knowing the reasons for the non-renewal of his contract and in confronting the Board on those reasons is not sufficient to outweigh the interest of the Board in free and independent action with respect to the employment of probationary teachers. The Board is not a legal tribunal. It is an employer, and when it decides to hire or not to hire a particular teacher, it is acting 'as proprietor, to manage the internal operation' of the public schools. Cafeteria and Restaurant Workers, Local No. 473 v. McElroy, supra, 367 U.S. at 896, 81 S.Ct. at 1749. . . ."

* * *

"On the other hand, if the reason, either as stated by the Board or as suspected by the teacher, for the refusal to rehire the teacher is constitutionally impermissible the teacher can state a claim for which relief can be granted under 42 U.S.C. Sec-

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tion 1983. We cannot agree that the refusal to rehire plaintiff without giving reasons is itself a violation of either substantive or procedural due process. We hold that the failure to give a reason for the refusal to rehire, or to grant a hearing in connection therewith, standing alone, is not constitutionally impermissible conduct on the part of the Board of Education."

* * *

"In conclusion we emphasize that an essential feature of State teacher tenure laws is to require a teacher to serve a probationary period before attaining the rights of tenure. State statutes prescribe the rights of tenured teachers to written charges, public hearings and judicial review. The determination as to whether the quality of services of a particular teacher entitles him to continued employment beyond the probationary period, thereby qualifying him for tenure status, or whether his contract of employment should not be renewed prior to attainment of tenure status, is the prerogative of the employer, the Board of Education. In the present case Orr seeks to persuade this court to render a decision which would confer certain tenure privileges upon non-tenured teachers -- in effect to amend the Ohio statute by judicial decree. This we decline to do." Id. at 134-135. (Emphasis supplied.)

In view of our conclusion with regard to your first question, that it is not necessary to give notice to a probationary teacher prior to the notice of refusal to renew the teacher's contract for the next school year, it is not necessary to answer your second question.

Your third question inquires about whether the time periods set forth in Sections 168.116 and 168.126 are to be computed on the basis of calendar days or school days.

We find no provision in the Missouri Teacher Tenure Act setting forth the method by which the time shall be measured. Therefore, we believe that the general Missouri statute governing the computation of time would apply. Section 1.040, RSMo 1969, states as follows:

"Computation of time. -- The time within which an act is to be done shall be com-

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puted by excluding the first day and including the last. If the last day is Sunday it shall be excluded."

CONCLUSION

Therefore, it is the conclusion of this office that:

1. Under Section 168.126, RSMo 1969, a board of education need not give a probationary teacher ninety days notice prior to April 15 of its intention not to rehire the teacher because of incompetency in order to lawfully refuse to renew that probationary teacher's contract for the next school year;

2. The time periods in Sections 168.116 and 168.126, RSMo 1969, should be computed on the basis of calendar days excluding the first day and including the last in accordance with Section 1.040, RSMo 1969.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, D. Brook Bartlett.

Very truly yours,



JOHN C. DANFORTH
Attorney General

Enclosure:

Opinion No. 269, Fink, 5-13-71
Opinion No. 371, Mulvaney, 10-2-70
Opinion No. 178, Vaughan, 7-19-71