

4027

1. TEACHERS IN PUBLIC SCHOOLS — “AT THE TIME OF THE PASSAGE OF THIS ACT” — JUNE 2, 1941, HOUSE BILL 121, 94 GENERAL ASSEMBLY — SECTION 7690-2 G. C.
2. WHERE CURRENT CONTRACT EXPIRES AUGUST 31, 1941, AT WHICH TIME FIVE CONSECUTIVE YEARS OF EMPLOYMENT COMPLETED, TEACHER SO QUALIFIED ENTITLED TO TENDER OF CONTINUING CONTRACT, SEPTEMBER 1, 1941.
3. TEACHER WHO QUALIFIES AS TO CERTIFICATE AND YEARS OF SERVICE MUST BE TENDERED CONTINUING CONTRACT, SEPTEMBER 1, 1941, BY BOARD OF EDUCATION IN DISTRICT WHERE TEACHER QUALIFIES, WITHOUT REGARD TO CONTRACT 1941-1942.
4. STATUS, MARRIED WOMEN TEACHERS.
5. ALL QUALIFIED TEACHERS IN DISTRICT MUST BE OFFERED CONTINUING CONTRACTS — PROCEDURE UNDER REGULATION TEACHERS MUST RETIRE UPON ATTAINMENT OF CERTAIN AGE.

SYLLABUS:

1. *The time of the passage of House Bill No. 121 of the 94th General Assembly, within the meaning of the expression "at the time of the passage of this act" as used in Section 7690-2, of the General Code of Ohio, was June 2, 1941.*

2. *A teacher whose current contract with a board of education expires on August 31, 1941, and who at that time will have completed five consecutive years of employment with said board, qualifies under the terms of Section 7690-2, General Code, as having completed five continuous years of employment at the time of the passage of the act wherein Section 7690-2, General Code was enacted, and if he qualifies otherwise as to certification as provided by law, is entitled to the tender of a continuing contract on September 1, 1941.*

3. *A teacher who qualifies as to certification and years of service in accordance with the proviso or exception contained in the third paragraph of Section 7690-2, General Code, effective on September 1, 1941 must be tendered a continuing contract on that date by the board of education in the district wherein he qualifies, regardless of whether or not the board had previously entered into a contract with him for services during the school year 1941-1942.*

4. *A women teacher who is qualified as to certification and years of service for continuing service status under the terms of the proviso or exception contained in the third paragraph of Section 7690-2, General Code, is entitled to the tender of a continuing contract on September 1, 1941, even though she be then married and there exists a rule of the board of education against the employment of married women teachers in the schools of its district.*

5. *Whether or not a board of education has a lawful regulation providing that teachers must retire upon the attainment of a certain age, all teachers in the district who qualify as to certification and years of service must be offered continuing contracts in accordance with the third paragraph of Section 7690-2, General Code, on or soon after September 1, 1941, even though some of such teachers will soon reach the age specified in the regulation. Under such circumstances the board can not re-*

quire the teacher to retire before the continuing contract is terminated in the manner provided by law, as fixed by the terms of Section 7690-1, General Code.

Columbus, Ohio, August 2, 1941

Hon. E. N. Dietrich, Director of Education,
Columbus, Ohio.

Dear Sir:

I have your recent communication requesting my opinion concerning several questions that will arise in connection with the recently enacted law relating to contracts with teachers in the public schools, as contained in House Bill No. 121 of the 94th General Assembly, when and after the act becomes effective on September 1, 1941. The questions submitted are as follows:

“Question 1. How shall the phrase ‘passage of this act’ be interpreted? Was the act passed the day it was signed by the Governor or not until ninety days after signing, allowing the statutory time for a referendum?”

Question 2. A teacher has a contract which does not expire until August 31, 1941. She meets all the certification requirements and has completed five or more years of employment. Must the board of education issue the teacher a continuing contract?

Question 3. A teacher has been employed by the board of education for the school year 1941-42. She has completed five years of service with the board and possesses a certificate required under H. B. 121. Must the board issue her a new continuing contract?

Question 4. A board of education has regulation forbidding the employment of married lady teachers. The teacher is entitled to a continuing contract. Can the board refuse such a contract because of the regulation forbidding married lady teachers?

Question 5. A board has a local regulation providing that teachers must retire at a certain age. A teacher is entitled to a continuing contract which would run beyond the set retirement age. Can the board compel the teacher to retire?”

The manifest purpose of the Legislature in the enactment of House Bill No. 121 was to insure to the educational interests of the State con-

tinuous employment of capable and competent teachers who prove or have proven their worth by satisfactory service over a probationary period and to provide against the loss of the services of such teachers at the whim or caprice of changing boards of education and without just and reasonable cause.

To that end Section 7690-1, General Code was amended and supplemental Sections 7690-2 to 7690-8, inclusive of the General Code of Ohio were enacted. Under the terms of Amended Section 7690-1, General Code, as enacted in said House Bill No. 121, contracts with teachers are to be of two types: limited contracts and continuing contracts. Limited contracts are those which are made for definite terms as authorized by Sections 7702 and 7691 of the General Code of Ohio. A "continuing contract" as the term is defined in the statute is a contract "which shall remain in full force and effect until the teacher resigns, elects to retire, or is retired pursuant to Section 7896-34 of the General Code, or until it is terminated or suspended as provided in this act and shall be granted only to teachers holding professional, permanent or life certificates." "Continuing service status" of a teacher is defined in said Section 7690-1, General Code, as "employment under a continuing contract."

The pertinent part of Section 7690-2, General Code, is as follows:

"Teachers eligible for continuing service status in any school district shall be those teachers qualified as to certification who have taught for at least three years in the district, and those teachers who, having attained continuing contract status elsewhere, have served two years in the district, but the board of education, upon the superintendent's recommendation, may at the time of employment or at any time within such two-year period declare any of the latter teachers eligible.

Upon the recommendation of the superintendent of schools that a teacher eligible for continuing service status be re-employed, a continuing contract shall be entered into between a board of education and such teacher unless the board by a three-fourths vote of its full membership rejects the superintendent's recommendation. However, the superintendent may recommend re-employment of such teacher, if continuing service status has not previously been attained elsewhere, under a limited contract for not to exceed two years but upon subsequent re-employment only a continuing contract may be entered into.

Provided, however, that on or before September 1, 1941, a continuing contract shall be entered into by each board of

education with each teacher holding a professional, permanent or life certificate who, at the time of the passage of this act, is completing five or more consecutive years of employment by said board.”

Upon consideration of the first two paragraphs of Section 7690-2, General Code, when read in *pari materia* with Sections 7703 and 7691, General Code, which provide generally for the employment of teachers upon the nomination of the superintendent of schools, it will be observed that only in rare instances such as a subsequent employment after employment on a limited contract following a rejection of a superintendent's recommendation for continuing service status, is a board of education authorized to employ a teacher on a continuing contract unless he is recommended for such status by the superintendent.

An exception is made, however, in the third paragraph of said Section 7690-2, General Code, beginning with the word “provided,” as to the entering into of continuing contracts with teachers at the time of the inception of the contract system provided for by law. Under the clear and unambiguous terms of this exception or proviso a duty is imposed in mandatory language, upon employing boards of education to tender continuing contracts to all teachers in their local school systems who are qualified as to certification and who at the time of the passage of the act were completing five or more consecutive years of employment by the said board. The duty thereby imposed is not qualified by recommendation of the superintendent or anything else other than the certification and service of the teacher.

By the expression “at the time of the passage of this act” as it is used in the above mentioned proviso, is meant the time the act was signed by the Governor, which was June 2, 1941. The time of the passage of an act of the legislature and the time of its becoming a law are quite different. It is stated in Ruling Case Law, Volume 25, page 796:

“The taking effect of an act is a different thing from its passage or enactment. * * * In ordinary usage the passage of an act is well understood as that time when it is stamped with approval of the required vote of both houses in the constitutional manner signed by the presiding officer of each house and approved by the chief executive, or passed over his veto, or when it becomes a law by lapse of time.”

See also:

Foundry & Machine Company v. Power Company, 99 O.S., 429;

Lewis' Sutherland Statutory Construction, 2nd Edition, Section 172;

State v. Williams, 173 Ind. 414;

Cordiner v. Dear, et al. 55 Wash. 479;

Opinions Attorney General, Opinion 4025, August 1, 1941, page 627, addressed to the Prosecuting Attorney of Williams County.

It is a matter of common knowledge that for many years at least, school sessions have covered a period approximately from September 1st to the following May or June, and yearly contracts with teachers have universally been made to include this period. In most districts perhaps, such contracts in recent years have been made to correspond with the present school year, that is, from July 1st to June 31st of the following year. In some instances, however, contracts have been made to run from August 1st to July 31st, while in others contracts were made to cover a period from September 1st to the following August 31st. Prior to the change in the school year from September 1st to August 31st, to July 1st to June 30th of the following year by the amendment of Section 7689, General Code, in 1925, it was a very usual practice for school boards to make contracts with teachers to run from September 1st of one year, to August 31st of the following year, thus making them correspond to the then existing school year and in some districts that practice was continued after the change in the school year. The legislature no doubt had these facts in mind when considering the terms of said House Bill No. 121, and I believe the fair and reasonable construction that should be placed on the provisions of the statute relating to the completion of five or more years of consecutive service at the time of the passage of the act is to regard it as applying to all those teachers who completed the specified years of service at a time near to June 2, 1941, either before or after the end of the school year 1940-1941.

While the proviso or exception in the statute fixing the time when the duty to enter into continuing contracts in accordance with its terms arises, as "on or before September 1, 1941," the law does not become effective until September 1, 1941, and therefore the duty does not exist before that time. On September 1, 1941, however, when the law becomes effective, the duty becomes absolute and boards of education in the fulfillment of their duty as imposed by the statute must enter into contracts with teachers or at least tender contracts to teachers in accordance with

its terms, on that date or within a reasonable time thereafter. If the duty is not fulfilled precisely at that time it must be done to comply with the law, within a reasonable time thereafter. As time is not the essence of the matter, the provision of the statute is directory merely, and if the terms of the statute are not met precisely on the dates mentioned it must be done later, within a reasonable time. It is a familiar principle of law that a statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others is directory merely, unless the nature of the act to be performed or the phraseology of the statute or of other statutes relating to the same subject matter is such that the designation of time must be considered a limitation upon the power of the officer. That is not the case here. *State, ex rel. Smith v. Barnell*, 109 O.S. 246; *Layton v. Clements*, 7 O. A. 499; Crawford on Statutory Construction, Section 269.

The duty imposed upon boards of education by the terms of the proviso mentioned, to tender continuing contracts to teachers qualified as to certification and service as fixed by the statute is unqualified by any exception whatever other than certification and service. The fact that the board has a rule against marriage of women teachers does not excuse it from tendering continuing contracts to any such teachers otherwise qualified as provided by statute. If such teachers accept and a continuing contract is entered into and the rule of the board is not abrogated, a different question will arise when the question of terminating the contract is brought up, if it ever is. See in this connection my opinion No. 3998, rendered on July 18, 1941, and addressed to the Prosecuting Attorney of Jefferson County. It will be noted as pointed out in that opinion that, under the terms of Section 7690-6, General Code, before a contract with a teacher may be terminated cause must exist for such termination and the teacher notified and a hearing held. It of course, would require a majority vote of the board to sustain any charges that may be brought against a teacher and thereby terminate her contract. It is possible that there will be times, at least, that a majority of a board of education might not be in sympathy with a rule of the board forbidding married women teachers to teach in their schools, and a teacher's contract would therefore not be terminated on that account. Sometimes a rule of a board of education becomes practically obsolete by non-user and such a situation is at least conceivable in any case. It is rather difficult to understand how a married woman teacher could have become qualified as to years of service for continuing service status in the face of a rule against the employment of married women.

Inasmuch as the law itself fixes the manner of termination of contracts with teachers after those contracts are entered into, a rule of the board of education against the employing or continuing in employment of teachers after they attain the age of sixty-five years would have no force whatever. A rule of a board of education will not prevail over a definite provision of law. In other words, although boards of education are authorized by Section 4650, General Code, to make reasonable rules and regulations to govern the conduct of the schools and may lawfully adopt a policy that teachers may not be employed after they are sixty-five years old, they cannot lawfully make and enforce a rule that is contrary to law. Such a rule would have no force whatever with respect to the termination of continuing contracts. The law expressly provides that a "continuing contract" shall remain in full force and effect until the teacher elects to retire or is retired pursuant to Section 7896-34, of the General Code, "or until it is terminated or suspended as provided in this act." The law having provided for the time that a continuing contract shall remain in full force and effect so far as limitation of time is concerned, no rule of a board of education which provided otherwise with respect thereto would have any force or effect whatever. Such a rule may be made to apply to limited contracts.

I am therefore of the opinion in specific answer to the questions submitted.

1. The time of the passage of House Bill No. 121 of the 94th General Assembly, within the meaning of the expression, "at the time of the passage of this act" as used in Section 7690-2, of the General Code of Ohio, was June 2, 1941.

2. A teacher whose current contract with a board of education expires on August 31, 1941, and who at that time will have completed five consecutive years of employment with said board, qualifies under the terms of Section 7690-2, General Code, as having completed five continuous years of employment at the time of the passage of the act wherein Section 7690-2, General Code, was enacted, and if he qualifies otherwise as to certification as provided by the law, is entitled to the tender of a continuing contract on September 1, 1941.

3. A teacher who qualifies as to certification and years of service in accordance with the proviso or exception contained in the third paragraph of Section 7690-2, General Code, effective on September 1, 1941, must be

tendered a continuing contract on that date by the board of education in the district wherein he qualifies, regardless of whether or not the board had previously entered into a contract with him for services during the school year 1941-1942.

4. A woman teacher who is qualified as to certification and years of service for continuing service status under the terms of the proviso or exception contained in the third paragraph of Section 7690-2, General Code, is entitled to the tender of a continuing contract on September 1, 1941, even though she be then married and there exists a rule of the board of education against the employment of married women teachers in the schools of its district.

5. Whether or not a board of education has a lawful regulation providing that teachers must retire upon the attainment of a certain age, all teachers in the district who qualify as to certification and years of service must be offered continuing contracts in accordance with the third paragraph of Section 7690-2, General Code, on or soon after September 1, 1941, even though some of such teachers will soon reach the age specified in the regulation. Under such circumstances the board can not require the teacher to retire before the continuing contract is terminated in the manner provided by law, as fixed by the terms of Section 7690-1, General Code.

Respectfully,

THOMAS J. HERBERT,

Attorney General.