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TEACHERS POSITIONS IN PUBLIC SCHOOLS—NO VESTED RIGHTS FOR ANY TIME AFTER EXPIRATION OF PERIOD COVERING APPOINTMENTS—BOARD OF EDUCATION HAS AUTHORITY TO RESOLVE NOT TO APPOINT OR REAPPOINT TEACHER SIXTY-FIVE YEARS OF AGE—STATUS OF EXISTING, UNEXPIRED CONTRACT.

*SYLLABUS:*

1. *Teachers have no vested rights in positions held by them in public schools for any time after the expiration of the period for which their appointments were made.*

2. *A board of education has authority to adopt a resolution providing, in effect, that the board of education will not appoint or reappoint any teacher who has attained the age of sixty-five (65) years.*

3. *Such a resolution adopted by the board of education does not affect any teacher that has attained the age of sixty-five years and has an existing unexpired contract entered into by and between the board of education and the teacher prior to the adoption of such a resolution.*

COLUMBUS, OHIO, August 19, 1938.

HON. E. N. DIETRICH, *Director of Education, Columbus, Ohio.*

DEAR SIR: This will acknowledge receipt of your recent communication which reads as follows:

“A board of education adopts a resolution the effect of which makes the retirement of teachers compulsory at the age of sixty-five. I should like an opinion whether such a resolution, in view of the vested rights created by the section of the General Code herein quoted, is not tantamount to the impairment of the obligation of a contract and therefore void.

‘Any teacher, except a new entrant with less than five years of service, who has attained sixty years of age may retire, if a member, by filing with the retirement board an application for retirement. The filing of such application shall retire such member as of the end of the school year then current. At the end of the school year in which they become members the retirement board shall retire all teachers who were over seventy years of age at the time they became members and shall retire all other members at the end of the school year in which the age of seventy is attained, provided in each case the consent of the employer is secured.’

Thanking you for your opinion on this question,”

Your communication states that the resolution is to the effect that it makes compulsory the "retirement of teachers at the age of sixty-five." A board of education would have no authority to make compulsory the retirement of a teacher at any age. It may, as I assume was done in this case, adopt a rule and regulation to the effect that it will not appoint or reappoint a teacher who has attained the age of sixty-five years. This would not prevent a teacher being employed or appointed by any other board of education. Therefore, it will be assumed in the writing of this opinion that the resolution adopted by the board of education was to the effect that it will not appoint or reappoint any teacher in its school district that has attained the age of sixty-five years.

Your letter sets forth verbatim the provisions of Section 7896-34, General Code. From a reading of this section it is evident that a teacher who has attained the age of sixty years and has five or more years of service may retire on his or her own application; that the State Teachers' Retirement Board must retire all teachers who have attained the age of seventy years, provided such retirement board secures the consent of the board of education; and that there is nothing in the language employed in said section which can be construed or interpreted as giving a teacher a vested right to teach until said teacher attains seventy years of age.

By virtue of the provisions of Section 7705, General Code, the board of education of a village or rural school district may not employ a teacher for a term longer than three years.

Section 7691, General Code, provides that no person may be appointed as a teacher in a city school district for a term longer than four years or shorter than one year, except to fill an unexpired term; and that in making appointments, teachers in the actual employ of the board shall be considered before new teachers are chosen in their stead. This restriction as to considering teachers in the actual employ of the board is only mandatory in its requirement that such teachers be considered first, and does not impose an obligation upon the board to appoint such teachers after having given them consideration.

Sections 7705 and 7691, General Code, are the only statutory provisions relating to the appointment and employment of teachers. There is nothing in either section that can be interpreted as giving a teacher a vested right in his position. The right to hold such position terminates at the conclusion of the period for which the appointment was made, and the right to continue thereafter depends upon the judgment of the board of education.

I assume from your letter that the resolution adopted by the board of education which in effect made compulsory in that particular school district the retirement of teachers who have attained the age of sixty-

five years exempted teachers that had attained sixty-five years but still held an unexpired contract entered into in accordance with the provisions of Sections 7691 or 7705 supra, by and between the teacher and the board of education prior to the adoption of the resolution. It is elementary that this resolution of the board of education can not interfere with existing contracts. This principle of law was well stated in the case of *State ex rel., vs. Creamer*, 85 O. S., 349, which case related to establishing the validity of the first workmen's compensation act. Judge Johnson, in delivering the opinion of the court said at Page 405:

“As to the suggestion that this statute impairs the obligation of contracts, it is sufficient to say that it can of course, not affect the contracts in existence and unexpired at the time it is put into operation by the employer.”

The case of *J. M. H. Frederick vs. John G. Owens*, 25 O. C. C. (N. S.), 581, is the outstanding case in Ohio, wherein there is thoroughly discussed the proposition that a teacher has no vested right in his position for any time after the expiration of the period of appointment. This case was decided by the Court of Appeals for Cuyahoga County, and the petition in error was dismissed by the Supreme Court of Ohio in 95 O. S., 407. The facts in that case were that the Grade Club was considering affiliating with a labor organization and the board of education adopted a resolution which, in effect, provided that no teacher might be appointed or reappointed who became affiliated with a labor organization. The court held in the first, second and seventh branches of the syllabus, as follows:

“1. The management of the public schools of a city is vested in the superintendent and board of education, and their decision as to the policy to be pursued in the employment of teachers will not be interfered with by the courts in the absence of a showing of fraud or abuse of discretion.

“2. In the appointment of teachers the superintendent and board of education are authorized to employ whomsoever they will from among those having the necessary certificates and giving preference to teachers whose terms are expiring. Such freedom of contract is guaranteed by the Constitution, and where the board adopts a resolution providing, among other things, that no applicant for position of teacher in the public schools will be given appointment who is affiliated with a labor

organization the discretion so exercised is within the authority vested in the board.

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"7. Teachers have no vested rights in positions held by them in the public schools, and their rights terminate at the end of the period for which they were employed."

In the body of the opinion at Page 591, the Court said:

"By the law of Ohio it was the duty of Frederick, the superintendent of schools, to appoint the teachers subject to approval by the board of education. The law prescribes the qualifications of teachers and provides that teachers already in the schools shall be given preference in the matter of appointment as against persons who have not been appointed to teach. Aside from these conditions imposed, the statute makes no attempt to control or regulate the discretion of the superintendent and of the board of education in the selection of teachers the whole subject being committed to their sound discretion.

"We have nothing to do in this case with the question of the dismissal of teachers during the term of their employment, as none were dismissed. Neither the superintendent nor any of his assistants nor any of the teachers have any vested rights in the position that they hold. The right to longer occupy these positions terminates at the end of the period for which the appointment has been made, and thereafter the right to continue therein depends upon the judgment of the superintendent and the board in so far as assistants and teachers are concerned, and of the board alone in so far as the superintendent is concerned. It was necessary that this power of selection, appointment and re-appointment, should be vested somewhere, and the Legislature saw fit to vest it in the superintendent and in the board of education."

Applying the principles of law enunciated in the case of *Frederick vs. Owens, supra*, it is my opinion, in specific answer to your question that a board of education is authorized to adopt a resolution to the effect that it will not appoint or reappoint any teacher who has attained the age of sixty-five years.

Respectfully,

HERBERT S. DUFFY,

*Attorney General.*