

Opinion No. 66

SCHOOLS AND SCHOOL DISTRICTS; Principals, vacations —
SCHOOLS AND SCHOOL DISTRICTS; Contracts, vacations—
VACATIONS; Principal of County High School—CONSTI-
TUTIONAL LAW; Cash for unused vacation as gift of
public funds—ART. XII, Sec. 1, Montana Constitu-
tion—Section 59-1007, RCM, 1947—Sections 75-
2516, 75-4141 and 75-4231, RCM, 1947

- Held: 1. Under the contract employing a principal submitted for my consideration, the principal is not entitled to additional compensation for one month's vacation when he resigned his position after service for one year of his two-year contract.**
- 2. The principal of a high school is a "school teacher" within the meaning of Section 59-1007, RCM, 1947, and so is excluded from the provisions of Chapter 10 of Title 59, RCM, 1947.**

September 16, 1960

Mr. Anthony Keast
Missoula County Attorney
Missoula, Montana

Dear Mr. Keast:

You have requested my opinion concerning the payment of a claim for thirty days vacation to the principal of the county high school. You enclosed a copy of the contract employing the principal which was entered into May 15, 1959, and covers the period from July 1, 1959, to June 30, 1961. The contract provides in part "That the said school agrees to employ said PRINCIPAL to render professional services . . . for two (2) school years of not less than eleven months each year exclusive of school holidays." There is no specific provision in the contract for a vacation. You also state that a rule adopted by the Board of Trustees grants one month's vacation to the principal and assistant principals although there appears to be some question whether this rule was adopted prior to or after the date of the contract in question. While the contract of the principal was to run for a period of two years, the principal tendered his resignation at the end of the first year and the Board of Trustees accepted the same. The question you present is whether the principal is entitled, at the termination of his contract, to one month's compensation for vacation.

A principal of a county high school is employed by the Trustees under the provisions of Subsection 3 of Section 75-4231, RCM, 1947, as amended, which reads as follows:

"In the case of a county high school, to employ for a period of not exceeding two (2) years some person as principal of the county high school who shall possess the qualifications required of a district superintendent of schools and who shall have charge of the county high school and whose tenure shall be the same as that of a district superintendent, except that the term shall be two (2) years instead of three (3)."

The contract in question was entered into in compliance with and under the authority of this statute. The validity of the contract is not questioned, but an interpretation must be made as to whether a paid vacation should be granted to the principal in addition to the last

salary payment. There is no question that the principal enjoyed a vacation in the month of July, 1959, the first month of his employment under the present contract. It has been suggested in the correspondence you submitted that this vacation was an earned vacation under the previous contract of employment.

The contract entered into between the principal and the Board of Trustees covered the entire period of two years. It was the entire contract for the term. It is to be observed that the principal was to render services for "not less than eleven months each year." Thus it is apparent that what amounts to a thirty-day vacation was granted, but not so designated. The rule adopted by the Board of Trustees granting a one month vacation to the Principal, whether adopted prior to the date of the contract or subsequently, added nothing, as the principal was assured of one month's vacation in each year.

A public employee may waive his right to a vacation, as this right is a personal privilege. (*Matter of Croker v. Sturgis*, 175 N.Y. 158, 67 N.E. 307.) There is no question of a waiver here of a vacation under the current contract, as the principal took a vacation in the month of July, 1959. Having resigned effective June 30, 1960, he had no right to an additional vacation under his present contract.

To hold that the principal is entitled to pay for a vacation which he has not taken as a part of his compensation at the time of termination of the contract, would result in a gift of public funds for the additional month.

In the case of *State ex rel. Bonsall v. Case*, 172 Wash. 243, 19 Pac. (2d) 927, the court considered a statute which authorized a vacation during each year and observed that the statute contemplated that paid vacations may be granted to an employee only if he is an employee at the time the vacation was taken, and held that to authorize payment for a vacation to a person subsequent to the time that his service ended was contrary to law. The court said,

"If this could be done, it would in effect be the giving to the employee a gratuity or bonus in addition to his regular salary, of which he agreed to accept at the time his employment or service began."

Here the principal agreed to a salary for each year and this was specific in amount. To allow compensation for an additional amount as vacation pay would not only violate the terms of the contract, but amount to a gift. Section One of Article XIII of the Montana Constitution prohibits the making of any donation to any individual. A similar conclusion was reached in the case of *Nolan v. State*, 44 NYS (2d) 328 (N.Y. Ct. of Claims 1943), in which the court rejected a state employee's claim for payment for an unused vacation, stating:

"A recovery here would be entirely inconsistent with the theory upon which vacation or leave of absence periods are

granted. Claimant was a civil service employee with a fixed salary which salary included pay for his vacation or leave of absence period. An award in this claim would have the practical effect of increasing his salary for the period in question, beyond the amount fixed by the state."

The question has been raised whether Chapter 10 of Title 59, RCM, 1947, which grants an annual vacation to each employee of the state or any county or city thereof, has application to the question here presented. Section 59-1007 provides:

"The term 'employee,' as used herein, does not refer to or include elected state, county, or city officials, or school teachers."

A principal must have a certificate qualifying him to teach in a high school as stated in Section 75-2516, RCM, 1947, as amended. Such a requirement leads to the conclusion that a principal is a teacher with administrative powers and duties. Section 75-4141, RCM, 1947, provides that the loss of a certificate precludes the principal from receiving further compensation.

In *McDevitt v. School Committee of City of Malden*, 298 Mass. 213, 10 N.E. (2d) 100 (1937), the Massachusetts Supreme Judicial Court stated that "a principal is merely a teacher who is entrusted with special duties of direction and management . . ." This definition is cited with approval in *Ortego v. Otero*, 48 N.M. 588, 154 Pac. (2) 252 (1944) which held that the word "teachers" covers those who are certified as qualified to teach and who are employed in school work. In support of this conclusion, the court in the *Ortego* Case noted that a school supervisor must be a certified teacher and stated:

"Thus appears an inclination toward giving the status of 'teacher' to the position of rural school supervisor. Why the requirements for certification as a teacher and other educational requirements including at least fifteen (15) hours training in class room supervision unless the supervisor is to teach through advice and counsel to teachers, and supervision of class room work? Such in practice is the function of rural school supervisors including class room instruction to the pupils when occasion requires."

The exclusion of teachers from the Vacation Act is justified for a practical reason. While teachers are employed on a yearly basis, their services are limited to a portion of the year. They are not required to be in attendance during the normal summer vacation. Thus, each teacher is insured of an annual absence from duty, which amounts to a vacation or period of rest. Assurance of a period of time that the principal in the instant case may be absent is specifically provided in contract as he was employed for a period of two years but only required to serve eleven months out of each year.

There is no authority by rule, contract, or statute for a principal to accumulate his vacation. A failure to take a vacation during the year waives the right to a vacation. To this effect, see *Housing Authority of City of El Paso v. Harper*, 241 SW (2d) 347 (Tex. Civ. App. 1951); 35 Am. Jur., *Master & Servant*, § 66, pp. 498-99; 56 C.J.S., *Master & Servant*, § 97-b, p. 527. See also *Matter of Croker v. Sturgis*, 175 N.Y. 158, 163, 67 N.E. 307, 309 (1903).

It is therefore my opinion that:

1. Under the contract employing a principal submitted for my consideration, the principal is not entitled to additional compensation for one month's vacation when he resigned his position after service for one year of his two-year contract.
2. The principal of a high school is a "school teacher" within the meaning of Section 59-1007, RCM, 1947, and so is excluded from the provisions of Chapter 10 of Title 59, RCM, 1947.

Very truly yours,
FORREST H. ANDERSON
Attorney General