

Opinion No. 57-03

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BY: OPINION OF FRED M. STANDLEY, Attorney General By; Harry E. Stowers, Jr., Assistant Attorney General

TO: TO: Mrs. Georgia L. Lusk, Superintendent of Public Instruction, Santa Fe, New Mexico

QUESTIONS

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1. Does a teacher with tenure and who suffers a disability have re-employment rights when the disability is ended?

CONCLUSION

Yes.

OPINION

ANALYSIS

In answering this question resort must be had to not only the legal but also the social and economic concepts that have resulted in states adopting "Teachers Tenure Act."

A "Teacher Tenure Act" is basically an act that provides that teachers on compliance with certain conditions, such as serving in specified capacities for specified probationary periods, acquire permanent tenure or the status of permanent employees, **subject to dismissal only for cause or in the manner provided by law.** 78 C.J.S. page 1010.

"Such statutes change the common law rights of boards of education to contract with teachers, by changing the system from one of tenure by the contract ending automatically at the expiration of the contract to one of permanent tenure." 78 C.J.S., page 1010.

The reason for such acts is set forth succinctly at 47 Am. Jur., Section 129, page 390:

"Enactment of teachers' tenure laws can be justified upon the theory that their purpose is to promote good order and the welfare of the state and school system by preventing the removal of capable and experienced teachers by political whims."

Having set forth what Teachers Tenure Acts are and the purpose for their existence the next question is what benefit are they to the teacher? Again it is pointed out at 78 C.J.S., page 1025:

"In other words, a teacher who has acquired tenure has a vested right to his or her position in the absence of some disqualification and may not be deprived of that right except by due process of law."

Our own Supreme Court in the case of McCormick vs. Board of Education, etc., 58 N.M. 648, has placed this right in a significant setting:

"The substantial benefits conferred upon a teacher by the Tenure Act **revolve around the security of** employment which is achieved by satisfactory performance of service. . ." (Emphasis supplied)

Thus our courts have recognized that the Tenure Act does give "security of employment" and that is what it is for.

The final determination then is, "does a disability incurred by a teacher deprive him of his rights to be re-hired when the period of disability ends?" When recourse is had to the statute covering disability, namely, Section 73-12-19, wording is noted:

"When any person is so retired he or she shall be entitled to receive **during the period of disability.** . ." (Emphasis supplied.)

Reading the above it must logically be concluded that the Legislature recognized that there would be periods of disability that would vary in duration, and then what would happen -- the teacher would return to duty.

Again with reference to the latest legislative expression, Section 73-12-13, N.M.S.A., 1953 Compilation, Pocket Supplement, wherein it provides;

"Notice of dismissal shall contain a statement of the cause or causes for dismissal upon which the governing board bases its decision to terminate the services of a teacher."

and further, keeping in mind that the dismissal under the Tenure Act is for any just or good cause in addition to certain contract conditions it becomes readily apparent that the Legislature intended that once a person acquired tenure he could not lose it in the absence of a good or just cause that inherent in the concept of tenure is the right of re-employment, within statutory provisions, once a disability has been removed.

This conclusion is further strengthened by the fact that the causes of dismissal set forth in the statute are exclusive and school boards cannot add thereto. See Knox County et al., vs. State ex rel Nighbert, (1940) 147 S.W. 2nd 100, wherein the court said in construing a Teachers Tenure Act, quoted Knoxville vs. State ex rel Hayword, 175 Tenn. 159, 168, 133 S.W. 2nd 465, 468:

"The court said; The Board of Education, nor the city, can set up as against the state a by-law that runs counter to a legislative enactment."

Also quoting the case of Thompson vs. Gibbs, 97 Tenn. 489, 37 S.W. 277, 278, 34 L.R.A. 548, the court points out:

"The right of dismissal, however, is limited to the causes of removal specified in the statute."

With reference to the question and the acts of the school board a careful reading of the statutes involved fails to disclose such a legislative grant to the local boards of education.

Thus, in conclusion when a teacher can be returned to active duty she is entitled to have a job if she had tenure prior to the disability and there is a vacancy for which she is qualified.

Further upon her return to active duty she would no longer be entitled to continued disability payments.

This supersedes and repeals all opinions on this matter and in conflict herewith.

We trust this fully answers your inquiry.