Opinion No. 57-160

July 9, 1957

BY: OPINION OF FRED M. STANDLEY, Attorney General Robert F. Pyatt, Assistant Attorney General

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

QUESTIONS

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1. Are Directors of Elementary Education, Directors of Guidance, Assistant Directors of Guidance, the Secretary of the Guidance Department, Directors of Research and Statistics, Business Managers, Art Directors of Elementary Grades, and Custodians covered under the Teacher Tenure Law when none of such positions involve teaching duties?

2. Are the above personnel, or any personnel in such categories, entitled to a hearing on the question of rehiring?

3. If so, what are the requirements of such a hearing.

4. Is a municipal board of education required to request further recommendations from its superintendent before making appointments, where the superintendent's original recommendations have been rejected by said board?

5. If the board does not request further recommendations from its superintendent, does it thereby violate any rules or regulations of the North Central Association of Secondary Schools?

6. What procedure should the board follow from this point, in the event of violation of either state law or North Central Association of Secondary Schools' regulations?

CONCLUSIONS

1. No.

2. No.

3. The answer is immaterial.

4. No.

5. See opinion.

6. See opinion.

OPINION

ANALYSIS

The answer to the first question depends upon what categories are accorded protection by the provisions of the so-called Teacher Tenure Law being found in §§ 73-12-13, N.M.S.A., 1953 Comp., 1955 Supp., 73-12-14 and 15, N.M.S.A., 1953 Comp., and 73-12-15.1, N.M.S.A., 1953 Comp., 1955 Supp.

The above § 73-12-13, among other things, requires that on or before the school year's closing day, the governing board of education shall serve a written notice of reemployment or dismissal upon ". . . each teacher by it then employed, certified as qualified to teach by the State Board of Education, . . .". The section then goes on by setting forth certain tenure requirements and the procedure to be held after notice, including hearing and appeals to the State Board. The question is whether or not the quoted language includes non-teaching personnel employed in administrative, directorial, business or custodial positions. The distinction was pointed out in Opinion of the Attorney General No. 4715, dated May 16, 1945, wherein it was held that if the duties of a school principal are solely of an administrative character and do not involve teaching in the class room then the principal would not be entitled to the benefits and protection accorded by the Teacher Tenure Law, but if, on the other hand, the duties of such principal also involve actual teaching in the class room, then such party would be entitled to the benefits of such law. Material attached to your requested opinion indicates that the personnel herein covered by this opinion do not engage in teaching duties, and therefore according to said Opinion of the Attorney General, would not be entitled to the benefits of the Teacher Tenure Law and are not covered by the same. It would follow that such personnel are not entitled to the hearing(s) set forth in § 73-12-13, supra.

Our conclusions are further buttressed by **Bourne v. board of Education of City of Roswell,** 46 N.M. 310, 128 P. 2d 733, in which it was held that a school nurse was not entitled to the benefits of the Teacher Tenure Law. The Court reasoned that while her duties doubtless included instruction to pupils in the principles necessary to the care of their health, and was thus in a sense a teacher, she was not a "teacher" as that term is used in the Teacher Tenure Law. To our way of thinking, a nurse who admittedly made some instruction in health to the pupils would have a stronger case than administrative personnel not rendering any instruction whatsoever.

It was held in **Ortega v. Otero,** 48 N.M. 588, 154 P. 2d 252, that a rural school supervisor, who also engaged in class room instruction as a teacher, was accorded the benefits of the Teacher Tenure Law. We do not deem this case contradictory to our conclusion herein, but instead feel that it is in accordance with the ruling in the above

cited Attorney General's opinion. Furthermore, it should be borne in mind that the Teacher Tenure Law read somewhat differently at the time of the Ortega decision than it now reads. We have set forth what we deem to be the most important language by quoting the same above. However, at the time of the Ortega case, the governing language read ". . . teacher **or other employee** certified as qualified to teach . . ." (emphasis supplied). If anything, the language at the present time is not as broad as it was at the time the Ortega decision was rendered. Therefore, both on its facts, (the fact that the supervisor also engaged in teaching) and upon the variation in statutory language, we believe that the Ortega decision is not controlling under the present circumstances.

A recent extension of the Teacher Tenure Law throws further light upon this question. In 1955, the Legislature, by Laws 1955, Chapter 39, § 1, the same being § 73-12-15.1, 1953 Comp., 1955 Supp., extended the provisions of the Teacher Tenure Law to all ". . . properly certified teachers in state institutions whose salaries are derived in whole or part from the State Public School Equalization Fund". Had the Legislature intended that the Teacher Tenure Law cover administrative personnel, it would have been so easy to have settled the matter once and for all by statute expressly extending such law to administrative personnel as was done to teachers in certain state institutions. Want of such statutory extension is, in our opinion, somewhat conspicuous in its absence.

Questions No. 1 and 2 are answered in the negative, which thus means that the third question does not require an answer.

We do not find anything in the statutes or decisions of this State requiring the board of education (local) to request further recommendations from its superintendent or other administrative officer before making appointments where the original recommendations have been rejected. We can therefore only conclude, that insofar as State law is concerned, the local board of education is not required to request further recommendations.

The fifth and sixth questions pertain to board procedure pursuant to or possibly in violation of regulations of the North Central Association of Secondary Schools. In all due respect to that body, we do not believe that it is a proper function of the Attorney General's Office to engage in an interpretation of said regulations, the North Central Association of Secondary Schools not being an agency of the State of New Mexico, other than to state what should be evident, that no nonpublic body could require a public body to act except in accordance with law.

A carbon copy hereof is enclosed for your convenience.