

## **Opinion No. 60-143**

August 9, 1960

**BY:** OPINION of HILTON A. DICKSON, JR., Attorney General

**TO:** Mr. Harry Atchley Superintendent of Schools Encino Rural Independent School District Encino, New Mexico

### **QUESTION**

#### QUESTION

In view of the facts presented in the analysis, has a certain school teacher retained tenure rights with the Encino Rural Independent School District, so as to allow her to teach in such district during the 1960-61 school year?

#### CONCLUSION

Yes.

### **OPINION**

#### **{\*523} ANALYSIS**

A certain teacher taught in the schools under the control of the Encino Rural Independent School District for a sufficient number of years prior to the 1959-60 school year to acquire tenure rights with such district. She was refused a contract for the 1959-60 school year on the basis that she was then pregnant and would be required to take maternity leave for such year. She opposed taking such a leave and went before the State Board of Education requesting that she be allowed to teach. The State Board instructed the Encino Board to hold a formal hearing on the matter and this was done with the teacher present at the hearing. The hearing resulted in an affirmance of the previous position of the Encino Board and she was ordered to take such one-year maternity leave. She did not appeal the decision of the Encino Board to the State Board. She gave birth to a child early in the 1959-60 school year and shortly thereafter was employed as a teacher by another school system for the remainder of the school year. She taught in that system for the remainder of the 1959-60 school year. She now wishes to resume teaching in the Encino schools for the school year 1960-61. You question whether she may teach in the Encino schools for the 1960-61 school year and retain tenure rights heretofore acquired.

The teacher tenure law of the State of New Mexico is found at § 73-12-13 N.M.S.A., 1953 Compilation (P.S.). It provides generally that a teacher cannot be dismissed without a hearing before the local board of education after notice, if such teacher has taught for the same governing board of education for three consecutive years and holds

a contract for the completion of the fourth consecutive year. The teacher is allowed an appeal to the State Board of Education from an adverse ruling of the local board based upon the hearing and is allowed a further appeal from an adverse State Board ruling to the District Court, at which time a trial de novo is to be had on all matters of fact and law.

If the action of the Encino Board had amounted to a dismissal of the teacher, some question could arise as to the legality of its procedure in this case. However, we see no need to go into this question since a local board of education clearly has the power to require that a teacher take an involuntary maternity leave at least in cases where such teacher has knowledge of the board's maternity leave policy before entering into a contract to teach for the ensuing school year. **Board of School Directors v. Snyder**, 346 Pa. 103, 29 A. 2d 34; 78 C.J.S., Schools and School District, § 203. Therefore, our opinion is that the Encino Board legally required in this instance that the teacher take a one-year maternity leave of absence.

Since the Encino Board merely ordered the teacher to take an involuntary one-year leave of absence {*\*524*} it follows that the board left open to the teacher the right to return and teach in Encino after the year's leave of absence has elapsed. The teacher would have held a contract to teach but for the action of the board and in our opinion retained previously acquired tenure rights.

The question then is whether the teacher has waived or otherwise relinquished these rights by any action on her part subsequent to being granted a maternity leave. In our opinion, she has not. It has been held that the failure to request a leave of absence with full knowledge of local school board rules to the effect that such a failure amounts to an abandonment of tenure rights, constitutes a waiver of such rights. **State ex rel. Peters v. Sleeman, et al.**, 229 Wis. 252, 282 N.W. 19. However, the mere acceptance of a teaching position and performance of such teaching duties in another school district does not amount to such a waiver, **Engel v. Mathley**, 48 N.E. 2d 463 (Ind. App.).

In our opinion, the doctrine of the **Engel** case is applicable here, especially in view of the fact that the teacher did not want to take maternity leave, but was required by the board to do so.

By: Philip R. Ashby

Assistant Attorney General