Opinion No. 46-4874

March 8, 1946

BY: C. C. McCULLOH, Attorney General

TO: State Board of Education State of New Mexico Santa Fe, New Mexico

Re: Alberta S. Allen v. Carlsbad Municipal School Board.

OPINION

*{*201}* You have handed to me the file on the above matter and asked my opinion as to whether Mrs. Allen has been discharged contrary to the provisions of the teacher tenure act. From the file it appears that Mrs. Allen had become qualified for permanent tenure sometime prior to January 1, 1945. On January 2, 1945, she received a letter from Mr. Murphy, the Superintendent of Schools, stating that in accordance with the policy of the board of education not to employ married women as regular teachers, that her status in the future would be on an emergency basis. On March 21, 1945, the municipal board sent Mrs. Allen a notice which will be discussed more fully hereafter. On the same date Mrs. Allen replied. On July 15, 1945, another letter was sent to Mrs. Allen, the gist of which was that Mr. Murphy could not tell her what, if any, employment would be offered her. This letter and the letter of August 20, 1945, telling her that they would not need to press her into service, could have no bearing on the case as they were written subsequent to the closing date of the school.

Mrs. Allen has not been reemployed and has demanded a hearing from the municipal board on one or more occasions which demands have been rejected. In view of the foregoing, which I assume to be the correct facts in the case, it appears that Mrs. Allen's tenure was not severed in the manner required by Chapter 60 of the Laws of 1943, the tenure act then in force, since the provision that notice to a teacher who had acquired tenure of the *{*202}* board's desire to discontinue the services must "specify a place and date not less than 5 days or more than 10 days from the date of mailing such notice, at which time such teacher may, at his discretion, appear before the board for a hearing."

It is further very doubtful whether the various letters sent Mrs. Allen would amount to the notice of termination of services required by the tenure law. Thus, unless Mrs. Allen has waived her rights to permanent tenure, she was entitled to re-employment during the school year 1945-46.

I know of no reason why a teacher having acquired tenure could not waive such rights. A waiver is defined as "a voluntary and intentional relinquishment or abandonment of a known existing right." 67 C.J. 289.

To constitute a waiver, the action must be voluntary:

"The action is in no sense voluntary where a party cannot decline to take except at the peril of liberty or property and what one does in a dilemma forced upon him by the default of the other party cannot be counted upon as a waiver." 66 C. J. 298.

To constitute a waiver, the action must be based upon knowledge of the facts and existence of the rights:

"No one can be said to have waived that which he did not know * * * or to have waived a right, benefit or advantage where he acted under a misapprehension of the facts, especially where he had been put off his guard or mislead by the conduct of the other party." 67 C. J. 301.

The waiver must have been intentional:

"Waiver is mainly a question of intention which lies in the foundation of the doctrine * * *. To constitute a waiver, there must be an intention to relinquish a known right." 67 C.J. 302.

Further, the action relied upon must be unequivocal:

"Waiver must be manifested in some unequivocal manner by some distinct act, by some positive act or positive inaction inconsistent with the right in question. Thus, mere inadvertent speech is not a waiver. A mere withholding of the enforcement of the right to payment is not a waiver of anything, nor does a waiver arise from forebearance for a reasonable time." 67 C.J. 306.

"The acts, conduct or circumstances relied upon should make out a clear case of waiver. It will not be implied from slight circumstances, but must be evidenced by acts or conduct, by an unequivocal and decisive act, clearly proved; It will be implied only from an unequivocal and decisive act of the party, clearly showing his purpose to waive the right in question." 67 C.J. 309.

Turning now to the correspondence relied upon as amounting to a waiver, it is noted, first, that the letter of January 2, 1945, has no great importance except insofar as it tends to show knowledge upon the part of Mrs. Allen. The letter of March 21 to Mrs. Allen stated that the board took the action referred to in Items I, D, 1, 2, II, A, C, D, and F on the attached memorandum. The items mentioned as they appear on the memorandum are as follows:

"I. All teachers

D. Approved for employment (as emergency substitutes not eligible to tenure) between now and the opening of school next fall

1. If they meet all requirements of 'regularly qualified' teachers as heretofore established by the board of education (and outlined in II, E below), or

2. If the present shortage of 'Regularly qualified' teachers continues.

*{*203}* "II. Re-election is subject to

A. Acceptance in writing by May 1, 1945.

C. The salary provided by the Eddy County uniform single salary schedule (and such amendments and interpretations as have been or may be made of it),

D. Assignment of the teachers to such grade, subject, or special duty and location within the district as the teacher may be qualified to accept and as may be to the best interests of the students, and

F. The special conditions (if any) as follows:"

I, D. you will note, has reference only to persons not eligible to tenure. D, 1 makes an exception in the event the teacher becomes qualified.

It is difficult to say how this language could apply to Mrs. Allen as she was qualified at all times. The only other item checked that could be of importance is II, D. However, it appears that the right to assign the teacher is not absolute but is based on the qualifications of the teacher and the interests of the students.

Mrs. Allen's reply is as follows:

"Carlsbad, New Mexico

March 21, 1945

"Superintendent of Schools

Carlsbad City Schools

Carlsbad, New Mexico

Dear Sir:

This acknowledges receipt of your letter and attached memorandum of March 21, regarding the election of teachers, and I **(accept),** (reject) said action subject to the terms set forth therein.

The only requirements of regularly qualified teachers as outlined in II, E, which I do not

meet (if any) are ___

I do want employment for the year 1945-46 please.

Respectfully yours,

Mrs. Alberta J. S. Allen

(Signed) ___ Signature of Teacher."

The entire letter is a mimeographed form sent out by the superintendent except for the signature and the portion which I have underlined. It would be hard to say that this reply constituted an unequivocal, intentional relinquishment of any right. While Mrs. Allen struck out the word "reject" so that the mimeographed form read "I accept said action subject to the terms set forth therein." She added her own words, "I do want employment for the year 1945-46 please."

This would appear to be an expression of desire, not for some possible or special employment, but for employment for the entire school year.

In view of the foregoing, it is my opinion that upon the record as presented to me Mrs. Allen cannot be deemed to have waived her right to re-employment, as a waiver is primarily a matter of knowledge and intention. A hearing might disclose other facts tending to establish a waiver or the lack of one.

By ROBERT W. WARD,

Asst. Atty. General