

Opinion No. 62-129

October 15, 1962

BY: OPINION OF EARL E. HARTLEY, Attorney General Thomas A Donnelly, Assistant Attorney General

TO: Mr. Tom Wiley, Superintendent of Public Instruction Department of Education, Santa Fe, New Mexico

QUESTION

QUESTION

What is the effect of the failure to serve written notice of re - employment or dismissal on or before the closing day of school as required by Section 73-12-13, N.M.S.A., 1953 Compilation, as amended?

CONCLUSION

See analysis.

OPINION

ANALYSIS

A determination of the question presented above, requires an interpretation of Section 73-12-13, N.M.S.A., 1953 Compilation, as amended. This section provides in applicable part as follows:

"(a) On or before the closing day of each school year the governing board of education, hereinafter referred to as the governing board, of each school district in the state, whether rural, municipal or otherwise **shall serve written notice of re-employment or dismissal upon each teacher by it then employed, certified as qualified to teach by the state board of education**, hereinafter referred to as the state board of education. Written notice of placement shall also be given to such qualified teachers employed by county boards of education on or before the closing day of each school year.

(b) The notice of dismissal required under sub-section (a) of this section to a certified teacher who has taught in a particular county or other particular administrative school unit for three (3) consecutive years and holds a contract for the completion of a fourth consecutive year in a particular district shall specify a place and date for a hearing not less than five (5) days nor more than ten (10) days from the date of service of such notice at which time the teacher may appear. . . ." (emphasis supplied)

Statutes requiring the giving of notice of re-employment or dismissal are generally construed as mandatory, and in the absence of the giving of such notice re-employment is usually held to be effected. 78 C.J.S., "Schools and School Districts," Section 197, at page 1067, states the rule as follows:

"The giving of the statutory notice ordinarily is mandatory if automatic re-employment is to be avoided, irrespective of the actual knowledge by the teacher of the action of the school authorities in voting not to re-employ him for the ensuing year. Where the school authorities fail to give the required statutory notice, the teacher's employment ordinarily continues for the succeeding year on the same terms. In some jurisdictions on failure of the school authorities to give the required notice they are required by the statute to give the teacher a regular contract the same as though there had been an express re-employment. . . ." (emphasis supplied)

Cases recognizing the rule that a contract of employment for the succeeding year arises and exists by operation of law where notice of re-employment is not given, have been rendered in a number of jurisdictions: **Darby v. Biggs School Dist of Butte County, et al.**, 59 P. 2d 167, 15 Cal. App. 2d 218; **Blalock v. Ridgeway**, 92 Cal. App. 132, 267 P. 713; **Knickerbocker v. Redlands Highschool Dist.**, 122 P.2d 289, 49 Cal. App. 2d 722; **Day v. School Dist No. 21 of Granite County**, 38 P. 2d 595, 98 Mont. 207; **Brown v. Bd. of Ed. of Blount County**, 5 So. 2d 629, 242 Ala. 154; **Holcombe v. County Bd. of Ed. of Marion County, et al.**, Ala. Supp., 4 So. 2d 503; **Smith v. School Dist No 18, Pondera County**, 139 P. 2d 518, 115 Mont. 102; **Blood v. Spring Creek No. 12, Common School Dist.**, 105 N.W. 2d 545; **Tempe Union High School Dist. v. Hopkins**, 262 P. 2d 387, 76 Ariz. 228; **School Dist. No. 6, Pima Co., v. Barber**, 332 P. 2d 496, 85 Ariz. 95; **Brinkmann v. Common School Dist. No. 27, Gasconade Co.** 238 S.W. 2d 1, Aff'd Supp. 255 S.W. 2d 770; **State ex rel Joslin v. School Dist. No. 7, Jasper Co.** 302 S.W. 2d 497; **State ex rel Blair v. Gettinger**, 105 N.E. 2d 161, 230 Ind. 516; **Wilson v. Bd. of Ed. of Union Tree School Dist. No. 1, Town of Harrietstown**, 207 N.Y.S. 2d 355, 26 Misc. 2d 1075.

As originally enacted, Section 73 - 12 - 13, supra, specifically declared that failure to provide a teacher with such required notice was to be construed as a renewal of a teacher's employment for the ensuing year, unless the teacher gave written notice that he did not desire the contract to be renewed. This provision was deleted by the legislature in 1949, and the section was rewritten generally. The omission of this language, however, does not alter the effect of such statute.

This section has been interpreted by Attorney General's Opinion No. 4573, dated September 7, 1944, and by the State Supreme Court in **Freeman v. Medler**, 46 N.M. 383, 129 P. 2d 342. The Court in this case held that:

"As the act was in force on the last day of the term of school it was the duty of appellee Board on that day to have given appellant the required notice, in the absence of which he was employed for the ensuing year by operation of law."

A careful reading of Section 73-12-13, supra, and Section 73-12-15, relating to the discharge of contract teachers, leads us to the strong conclusion that the legislature although re-writing this section clearly intended and contemplated that the provision requiring notice of dismissal or re-employment to teachers be mandatory in effect. It is apparent that in accordance with the authorities cited above, school authorities are deemed to have consented to the re-employment of such teachers unless notice as prescribed by statute had been in fact presented. To construe such statute in any other light or meaning would in our opinion, rule meaningless the legislative safeguards patently intended to protect teachers and the school systems as well. In Section 73-12-15, supra, the legislature has provided elaborate legislative provisions regulating the discharge of contract teachers. This section and a teacher's rights could be negated if notice is not given and rehiring were held not to be effected.

The obvious purpose of the requirement of Section 73-12-13, supra, directing that notice of re-employment or dismissal be given "on or before the closing day of each school year" is to eliminate uncertainty and possible controversy regarding the status of the school and teachers. The section is designed to give time for hearing, or notice to enable a teacher to seek other employment. Section 73-12-13, supra, has application to both teachers having tenure rights, and non tenure teachers although the section as specified in subsection (g) thereof, gives no such protection to teachers holding substandard certificates or whose professional qualifications are below standards required by the governing boards.

The operative effect of a failure to give notice of dismissal or re-employment as required in Section 73 - 12 - 15, supra, is the automatic renewal of a teacher's current contract for the succeeding year, and as we view such statute, a formal acceptance by a teacher of such contract is required under the statute only when the school authority provides such notice, as is specified in Section 73-12-13 (e). See also Attorney General's Opinion No. 57-227, dated September 10, 1957.

Several important restrictions to the rule discussed above exist however. In addition to the statutory exceptions listed in Section 73-12-13 (g), supra, and Section 73-12-11, N.M.S.A., 1953 Compilation, relating to communicable diseases, the following exceptions are noted in 78 C.J.S., "Schools and School Districts," Section 197, at pages 1064-1065:

"The failure of the school authorities to give the statutory notice does not in all cases entitle the teacher to re-employment for the succeeding year, as where the teacher lacks capacity to hold the position, or where he waives service of the notice, or where the school is closed by the school authorities pursuant to statute and the contract provides that in the event the school is closed the contract shall be void.

The proceedings to preclude the re-employment of a teacher for the ensuing year by statutory notice are to be in accordance with the requirements of the statute. However, it has been held that the statutes should be liberally construed and that a substantial compliance with the statutes is sufficient. . . ."

Based upon the above authorities and our interpretation of Section 73-12-15, supra, we conclude that except where other factors are present, such as those listed herein, the giving of the statutory notice to public school teachers ordinarily is mandatory if automatic re - employment is to be avoided.