Opinion No. 63-45

May 3, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

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

QUESTION

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1. In a hearing under Section 73-12-15, N.M.S.A., 1953 Compilation, may evidence be considered by the State Board of Education with regard to disability, incompetency, insubordination, or any other matter or matters, prior to the effective date of the then current contract, whether it be a signed contract, or a contract by operation of law for failure to give notice of reemployment of or dismissal on or before the closing day of the school year, as provided by Section 73-12-13, N.M.S.A., 1953 Compilation, or is the State Board of Education estopped from considering evidence on any happenings prior to the effective date of such contract or upon a disqualification that has not existed since the date of the new contract?

2. May a teacher's contract be terminated upon any ground based upon what happened prior to the effective date of such contract or upon a disqualification that has not existed since the date of the new contract?

CONCLUSIONS

1. See analysis.

2. See analysis.

OPINION

*{*92}* **ANALYSIS**

In your first question presented herein inquiry is made as to whether the State Board of Education may properly consider evidence presented to uphold the action of a local board of education in dismissing a teacher when subsequent to the time such evidence or facts became existent the local school board acted to accept such teacher for reemployment for another year and extended a new contract to such teacher.

Section 73-12-13, N.M.S.A, 1953 Compilation, permits a teacher who has been dismissed by a local board of education to file an appeal to the State Board of Education for review of the action of the local school board.

Under Section 73-12-13, supra, the method by which teachers are to be notified of the fact of their reemployment or dismissal is set out by statute. As stated in Attorney General's Opinion No. 62-129, dated October 15, 1962, a teacher may, under such statute, be reemployed either by express action of the local board extending a new contract for an additional year, or the teacher may be reemployed by operation of law based upon the failure of the local school board to serve written notice of dismissal within the time specified by statute.

Whichever means effected the reemployment of the teacher, however, is not determinative of the issue of whether upon a subsequent action by the local school board to dismiss such teacher, it may delve into and consider matters occurring prior to its action in reemploying the teacher. The answer to the question posed herein, we believe, must necessarily be founded upon the fact of whether or not the State Board of Education finds upon its review of the case any basis for upholding such appeal which occurred or existed after the local board renewed such teacher's contract, and whether or not the facts or evidence concerning the teacher and relied upon by the local board as the basis of its action dismissing the teacher, were known to the local school board at the time they acted or allowed the teacher's contract to be renewed for another year.

It is manifest that if adequate grounds existed upon which to predicate the dismissal of a teacher and such facts were unknown to the local board, then such board could properly, upon being apprised of these facts, move to dismiss the teacher upon such grounds and initiate proceedings for dismissal in the manner specified by law. The fact that the local Board of Education, before being aware of the existence of facts or evidence sufficient to sustain a dismissal, acted to renew a teacher's contract would not prevent the Board from subsequently taking appropriate action to dismiss such teacher upon being notified of such facts or evidence.

A different situation, however, arises where the local board of education was aware of such facts or evidence and acted to renew the contract of the teacher for an additional year, and the teacher relying upon such proffered contract *{*93}* undertook to perform or hold himself available to perform such contract. In such situation the action on the local board's part in renewing the teaching contract, dependent upon the facts of the particular case may give rise to a situation where the board in a suit on such contract may have waived such facts or estopped itself from later asserting such facts or evidence as the basis for sustaining an action for dismissal of the teacher. Waiver or estoppel, however, are not applicable where there was no knowledge of the facts or evidence relied upon. **Lance v. New Mexico Military Institute** (1962) 70 N.M. 158, 371 P. 2d 995; **Addison v. Tessier** (1957) 62 N.M. 120, 305 P. 2d 1067. It is generally recognized in most instances that estoppel does not lie against the state while acting in a governmental capacity, and unauthorized acts of a public body do not estop such public authority. **Ross v. Daniel** (1949) 53 N.M. 70, 201 P. 2d 993.

If, however, additional grounds become existent after the renewal of the teacher's contract which alone would sustain the dismissal of the teacher, or if a continued course of improper conduct exists, the cumulative effect of which is to constitute adequate

grounds for dismissal, we believe that the prior facts or evidence which occurred before the rehiring may properly be considered by the local school board in evaluating and reaching its final determination upon the question of whether the teacher should or should not be discharged.

Evidence of previous conduct or the continued existence of factors which bear upon new evidence or facts presently under consideration may properly be weighed by a school board.

Since evidence of previous conduct or facts may be considered by a local board in arriving at its determination of whether or not to dismiss a teacher under a proper ground for dismissal, the state board of education may also consider this same evidence or facts in reviewing the case upon appeal and such matters may be necessary to a full understanding of the case.

Section 73-12-15, N.M.S.A., 1953 Compilation, provides that no teacher having a written contract shall be discharged except upon good cause and after hearing on written charges. This section also authorizes the teacher the right of appeal to the state board of education and the right to have her dismissal heard de novo by the state board. See Attorney General's Opinion No. 5966, dated June 8, 1954. As stated in **McCormick v. Board of Education of Hobbs Municipal School District No. 16** (1954) 58 N.M. 648, 274 P.2d 299, the state board may overrule the local board only upon a determination by it that the local board acted arbitrarily, unlawfully, unreasonably or capriciously. We believe the state board of education in considering evidence upon trial de novo of a dismissal by a local board should consider only that which was introduced at the hearing before the local school board, unless the hearing before the local board was not a completely fair hearing. See **Ferguson-Steere Motor Co. v. State Corporation Commission** (1957) 63 N.M. 137, 314 P.2d 894. In that case trial de novo was permitted from the corporation commission to the district court. Our Supreme Court held:

"It was not within the province of the trial court, nor is it within the province of this court, to consider any evidence other than that introduced at the hearing before *{*94}* the commission. The commission is an administrative body and the courts are limited in their review of the actions of such bodies. Harris v. State Corporation Commission, supra; Transcontinental Bus System, Inc., v. State Corporation Commission, 56 N.M. 158, 241 P. 2d 829. It is well settled in this state that it is not the province of the trial court to re-try a case brought before it on appeal from an administrative body or agency or to substitute its judgment for that of the agency, but the trial court is limited to a determination of whether the administrative agency's action was legal or reasonable."

The **Ferguson-Steere** case, supra, also enunciated the legal rule applicable to the admission of evidence in administrative proceedings. The Court stated:

"The Commission is an administrative agency and it is well established that the rules governing admissibility of evidence before administrative boards are frequently relaxed

for the purpose of expediting administrative procedure. . . . The rules relating to weight, applicability or materiality of evidence, however, are not thus limited. . . A number of states have enacted statutes governing the admissibility of evidence before such agencies, but New Mexico is not one of them. . . . Hearings before administrative bodies need not be conducted generally with the formality of a court hearing or trial, but the procedure before such bodies must be consistent with the essentials of a fair trial. . . . The order of the administrative agency must be based upon substantial evidence. . . This court has consistently held that the courts may not overrule the acts of administrative officers on matters committed to their discretion unless their actions are unlawful, unreasonable, arbitrary, capricious, or not supported by evidence, and that in reviewing the action of such bodies, the trial court is bound by the substantial evidence rule, that is, whether the findings of the administrative body are supported by substantial evidence. . . There must at least be such relevant evidence as a reasonable mind might accept as adequate to support the conclusion. . Mere uncorroborated hearsay or rumor does not constitute substantial evidence. . ."

Therefore, in answer to your first question, we hold that the state board may properly consider evidence relied upon or presented at the hearing of dismissal before the local board of education in order to determine whether the action of the local board was proper under the facts of the particular case.

The answer to your second question has, in part, been discussed in our consideration of your first question. As stated, supra, dismissal may be properly predicated upon facts which existed prior to the renewal of a contract if the existence of such facts come to light only after the renewal of the teacher's contract. If, however, the facts and evidence were known to the board at the time it acted to renew the teacher's contract, such conduct may, depending upon the particular facts of the case, constitute waiver or estoppel sufficient to make it inequitable for the local board to rely upon these facts alone to base its dismissal of the teacher and the state board of *{*95}* education upon review of the case on appeal de novo may so determine.

By: Thomas A. Donnelly

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