

## Opinion No. 45-4813

November 1, 1945

**BY:** C. C. McCULLOH, Attorney General

**TO:** Mrs. Georgia L. Lusk Superintendent of Public Instruction Department of Education  
Santa Fe, New Mexico

{\*150} I have your letter of October 29, 1945 wherein you request an opinion on the following question:

"If a teacher is employed under contract by the County Board of Education, can he or she be removed during the life of the contract in order to open a vacancy for an ex-soldier who held the position before?"

Sec. 57-701 of the 1941 Comp., as amended by Chap. 24, Laws of 1945, provides, in part, as follows:

"Any person who, since July 1, 1940, has left or leaves a position, other than a temporary position, in the employ of any employer, to enter the armed forces of the United States, and who serves one (1) year or more and is honorably discharged, or is entitled to a certificate to the effect that he has satisfactorily completed his period of training and service of one (1) year (if enlisted man) or who terminates his or her service without dishonor (if an officer), and is still qualified to perform the duties of such position, and makes application for re-employment within ninety (90) days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one (1) year: \* \* \*"

(b) If such position was in the employ of the State of New Mexico, any political subdivision thereof, state institution, county {\*151} or municipality, such person shall be restored to such position or to a position of like seniority, status, and pay."

Upon a soldier complying with the provision of this act and being entitled to the return of his job, or a like position, it is the duty of the employing agency to forthwith return the person to his same job, or to a position of like seniority, status and pay.

If it is possible for the Board to give the person a similar position, as required by statute, when the former position is being occupied by a person under contract, it would be the duty of the Board to comply with its contract of employment with the present teacher as well as to furnish the former member of the Armed Services a job of like seniority, status and pay.

In the event, however, that there are no other positions open which the Board can give to the member of the Armed Forces, the question would arise concerning whether or not

the person employed in the former position of the veteran would have to be removed, even though they have a contract for a definite length of time.

It is a fundamental rule of law that contracts are entered into subject to all the provisions of existing statutes. Therefore, it would appear that when a teacher accepts a contract to teach a school, filling a temporary vacancy caused by the absence of a person in the Armed Forces, that the statutory provision would in effect become a part of the contract wherein it would be understood that upon the return of the veteran, if no other similar position is available, the contract would be terminated and the veteran would be entitled to reinstatement in his former position.

By HARRY L. BIGBEE,

Asst. Atty. General