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THE RIGHT OF TEACHERS EMPLOYED IN THE COLORADO PUBLIC SCHOOL SYSTEM TO NOTICE AND HEARING BEFORE DISMISSAL

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The problem of dismissal of teachers employed in the Colorado public schools has been recently brought to the public's attention by certain events reported in the local newspapers. Considerable public interest was created in the problem by the reasons given for the dismissals, and the manner in which the dismissals occurred. For this reason the problem has been studied, and this article written, with the idea of clarifying what actually took place, the constitutionality of the action of the school boards involved, and whether or not teachers are denied due process of law under the Colorado statutes concerning teacher dismissal.

Sometime during the year of 1953, the Governor of the State of Colorado received and passed on, through the Colorado Attorney General, to various local school boards, certain information concerning teachers employed by those school boards. The information so given contained charges of Communistic or subversive activity by the teachers named. The local school boards then either asked for the resignation of the teachers concerned or informed them that their contracts would not be renewed for the coming year, the action by the school boards apparently being based solely upon the information furnished by the Governor.

The exact number of teachers so dismissed is not known. Newspaper accounts listed the number as nine, but at the same time stated that the Governor's list contained more names. Also, unless the teachers concerned made known the situation, more teachers may have been dismissed without the school boards disclosing the fact.

Every teacher so far dismissed has been in a probationary status. One teacher having acquired tenure was accused, but the school board concerned held an informal hearing and quickly dropped the charges when it considered the statutory requirements for dismissing a teacher in a tenure status.

In none of the recent cases were the teachers dismissed during the school term, but in each instance were either informed that their contracts would not be renewed for the coming year or told that they could resign knowing that their contract would not be renewed in the future.

The center of the controversy in the recent dismissals was the secrecy of the source of the information furnished to the school boards by the Governor and the failure to give the teachers a chance to refute this information. The Governor steadfastly refused to reveal the source of this information but stated that it was from an authoritative governmental source. The Governor

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refused to answer directly whether or not the information was from the F.B.I., as did the F.B.I. itself, but did state that the information was not received by him from the McCarthy Committee or any other Senate investigating committee.

The school boards were not directed by the Governor to use the information furnished by him. In fact he stated, "Whenever I get any information that is authoritative and indicates a teacher has Communistic leanings, I pass that on to the school authorities. *The action is up to them*"; but apparently this information was the sole cause for the dismissals.

The teachers being dismissed were shown papers listing charges, but were not given the source of the information nor a chance to rebut the charges.

Everything in connection with the dismissal of the teachers in these cases was done at the local school board level; no action at the state level was taken. The State Board of Education moved to hold a hearing on whether or not these teachers' certificates and licenses to teach should be revoked, but stipulated in its motion that hearings would be held only if the teachers concerned requested a hearing, and then only if certain ground rules were followed.

The rules for the hearings prescribed by the State Board were:

- (1) All information shall state the sources from which it is obtained.
- (2) Information from any government agency shall be approved and certified by the agency.
- (3) The State Board would conduct the hearing on revocation with the local board and superintendent to be present.
- (4) Teachers would have the right to be represented by counsel.
- (4) All testimony would be under oath.
- (6) Certified copies of the record to be furnished to the government agency furnishing the information and to the school board in the local district.

The Governor stated that he was in accord with this decision but still refused to divulge the source of his information, and as a result the proposed hearing by the State Board was never held, and no action at the state level has as yet been taken.

The problem thus presented by the recent dismissals is whether or not a teacher is entitled to notice and hearing on the reasons for refusal by the school board to renew the teacher's contract for another year. However, in the interest of determining teachers' rights under Colorado law this article will not be limited to the specific question set out above, but will cover dismissal of teachers in general.

In pursuing this problem, the rights of teachers having ac-

quired tenure will first be considered and next the rights of those teachers classified as probationary teachers.

A teacher having acquired the status of being on tenure is defined by the Colorado statute¹ as:

Any teacher having served as a teacher in active service in the same first class school district, county or union high school district, or junior college, including the time before and after the passage of this subdivision, on a regular full time basis continuously and without interruption for three full years, and who shall thereafter, and subsequent to the effective date of this subdivision, be re-employed for the fourth year immediately succeeding in such first class district, county or union high school district, or junior college, shall, without further election, have stable and continuous tenure as a teacher in such school during efficiency and good behavior and continuous service.

The intent of this statute has been declared by the Colorado Supreme Court to be to throw around a teacher having acquired such status, certain safeguards.² The safeguards referred to by the Court are now set out in the Colorado statutes³ and provide that:

Cancellation of an employment contract with a teacher on continuous tenure may be made for incompetency, neglect of duty, immorality, insubordination, justifiable decrease in the number of teacher positions, or other good and just cause. Provided, however, that the employing board or committee may cancel such employment or impose a mandatory retirement only upon the following procedure.

Then follow the mandatory requirements of the procedure to be followed by the school boards in dismissing teachers on tenure. The requirements are quite lengthy in the statute and in the interest of brevity the important parts of the requirements will be noted rather than the entire section of the statute. The pertinent parts are:

- (1) The person initiating a complaint against a teacher shall file a written notice of the charges with the secretary of the employing school board.
- (2) A copy of such notice shall be mailed, by registered mail, to the teacher concerned. This notice shall include a statement that if the teacher concerned desires a hearing on the charges made, a request for such hearing must be made to the secretary of the

¹ COLO. STAT. ANN., c. 146, § 239(8) (1935).

² Roe v. Hanington, 97 Colo. 113, 47 P. 2d 403.

³ COLO. STAT. ANN., c. 146, § 239 (12) (1935).

board within ten days of the mailing of such notice and statement. The teacher may elect either a public or private hearing. If no request for hearing is made, the hearing will be deemed waived.

- (3) If a hearing is requested, the employing board shall fix a date for hearing, said date to be within thirty (30) days after request is made. Notice setting forth the time and place of the hearing shall be mailed, by registered mail, to the teacher concerned, at least ten (10) days before the date of the hearing.
- (4) The teacher shall have the right to appear, in person, with or without counsel, to present witnesses, to be heard, and to cross-examine. All testimony shall be under oath.

The requirements of the statute above set forth thus limit the power of the local school boards to dismiss teachers having acquired a tenure status. This is a direct limitation upon the general powers granted local school boards under the Colorado statutes⁴ which provide in part, "Every school board, unless otherwise especially provided by law, shall have power and it shall be their duty: First—to employ or discharge teachers . . ."

The courts have consistently required a strict compliance by the school boards with the requirements for dismissal set out in the above statute. The sentiment of the courts on the subject of teacher dismissal was well stated in *School District No. 1 v. Parker*⁵ where it was said, "A contract to teach in the public schools differs from the ordinary contract in that the public has an interest in it, and in not having it capriciously interfered with by either party."

The first case in which the tenure law appeared and formed the basis for the decision by the Court was *Roe v. Hanington*.⁶ In the *Roe* case the plaintiff, who had been dismissed summarily for incompetence, sought and obtained a writ of mandamus ordering her re-instatement as a teacher. The Court stated:

Our previous decisions relating to the power of a school board thus summarily and without notice to dismiss a teacher, if now followed, make this action of the school board void and of no effect, unless justification therefor, as claimed by the school board, is to be found in the proviso of Section 8445, C. L. 1921.⁷

The proviso referred to by the court permitted summary dis-

⁴ COLO. STAT. ANN., c. 146, § 89 (1935).

⁵ 82 Colo. 385, 260 P. 521.

⁶ 97 Colo. 113, 47 P. 2d 403. The teacher tenure provisions were written into the law in 1921, and remain substantially the same today.

⁷ Sec. 8445, C. L. 1921, is now included in COLO. STAT. ANN., c. 146, § 239 (12) (1935), with the proviso referred to by the court having been repealed by COLO. LAWS, p. 562, Sec. 11 (1953).

missal of a teacher upon two-thirds vote of the school board. The Court held, however, that this proviso was ineffective when the entire section of the statute in which it appears was considered, and found the plaintiff entitled to notice and hearing before dismissal, the court saying, "By no stretch of construction as we conceive, may it be said that the proviso makes nugatory the requirements that charges shall be filed and the teacher have the required notice."

The Colorado Supreme Court next considered the problem of teacher dismissal in *School District No. 13 v. Mort*,⁸ decided in 1947. The plaintiff in that case was not in a tenure status, but was employed as a teacher, under an emergency certificate, for the school year 1944-45. A few weeks after the commencement of the school term the plaintiff was informed that within five days a hearing would be held to determine the plaintiff's competency to teach. No written charges were filed with the board or given the teacher. The Court not having the benefit of the explicit provisions regarding dismissal of teachers in a tenure status, but deciding only on the basis of the general requirement that a teacher may be dismissed only for good cause shown,⁹ said, "In a hearing before the board of directors of a school district on charges preferred against a teacher, considerable latitude should be allowed in procedure, but this affords no excuse for a failure of the board to reasonably comply with the provisions of the statute on the subject." The Court awarded damages for the balance due under the plaintiff's contract, holding that the interpretation of good cause shown, required specific accusation, notice, evidence concerning the charge presented before the board in its official capacity and an opportunity for the teacher to refute the charges.

The decisions in these cases well support the conclusion that unless there is rigid adherence to the statutory provisions for dismissal of teachers having acquired tenure, there will be a denial of the teachers' rights afforded by the statute; and teachers whose rights are so denied will be entitled either to re-instatement or damages for the balance of her contract period.

Summary dismissal of teachers having acquired a tenure status is impossible under the statutory provisions and court decisions cited, and it appears certain that a deviation from the provisions of Sec. 239 (12) will be sufficient grounds for court reversal of any local school board action so deviating.

The problem of dismissal of teachers in a probationary status will next be considered. This problem will be separated into two parts; first, where the teacher is told that her contract will not be renewed for the succeeding year, and, second, where the teacher is summarily dismissed during the school term.

The Colorado statutes do not specifically define the term probationary teacher, but it may be stated that a probationary teacher

⁸ 115 Colo. 571, 176 P. 2d 984.

⁹ COLO. STAT. ANN., c. 146, § 219 (1935).

is one regularly employed in the public schools not meeting the statutory requirements for tenure as set out above. Such a teacher is employed by contract, on a yearly basis,¹⁰ the contract being made anew each year by the teacher and the employing school board.

The problem of dismissal of probationary teachers by refusal to renew these contracts is essentially one of contract law, with one exception; that exception being a restriction, of minor importance here, imposed upon the school board by statute.¹¹ With the exception mentioned, ordinary contract law is applicable, and the solution to the problem is relatively simple. It is a long standing principal of American law that no one may be forced to enter into a contract against his will. Corpus Juris Secundum states,¹² "The liberty to contract as guaranteed by the various constitutions, includes the right of the parties to incorporate into their contracts, otherwise valid, such terms as may be mutually satisfactory to them . . . and the right to decline to enter into a contract." This proposition has been accepted by the courts and was well stated by the California Court of Appeals¹³ when it said, "There is no constitutional power in any person or group of persons to compel another to execute a contract against his will."

This principle is equally applicable to both the government or its agencies, and private persons. Thus, the school board, having the right to enter into a contract only with the persons it chooses, need not define its reasons for not entering into a contract. Corpus Juris Secundum further states,¹⁴ "One may refuse to enter into contract relations with another regardless of his motive for so refusing."

Applying these principles to the problem at hand, it may well be said that the local school board is under no obligation to renew the contract of a probationary teacher for a further period; and in so refusing to renew the contract, need not state its reasons therefor. The Colorado Supreme Court spoke directly on this point in a recent case, *School District No. 1 v. Thompson*.¹⁵ In that case the Court said, "She (plaintiff) had started teaching for the Englewood School District in September, 1947, and had merely the one year contract ending September 1948, which the board was under no obligation to renew." Thus we may conclude that a probationary teacher has had none of his constitutional rights violated when the school board refuses to renew his contract for the ensuing year, the school board being limited in this instance only by its own discretion and the proviso of Section 239 (13) mentioned above.

¹⁰ COLO. STAT. ANN., c. 146, § 89 (1935).

¹¹ COLO. STAT. ANN., c. 146 § 239 (13) (1935), which provides that unless probationary teachers are given notice before April 15th that their contracts will not be renewed, they will be deemed to be re-employed for the succeeding year.

¹² 16 C.J.S. 616.

¹³ *McKay v. Retail Automobile Salesmen's Local No. 1067*, 89 P. 2d 426.

¹⁴ 17 C. J. S. 359.

¹⁵ 121 Colo. 275, 214 P. 2d 1020.

The next problem, that of dismissing probationary teachers during the school term, will again be considered in the light of statutory provisions, and court decisions regarding the question.

The Colorado statute applicable to the summary dismissal of probationary teachers¹⁶ provides in part, "No teacher shall be dismissed without good cause shown." This provision of the statute is not limited to teachers having acquired tenure, but is applicable to all teachers employed in the Colorado public schools. The provision has long been in the statutes, being first enacted in the Session Laws of 1887,¹⁷ and has been interpreted by the courts in a number of decisions.

The Supreme Court first construed this statute in deciding the case of *School District No. 1 v. Shuck*.¹⁸ The Court in that case stated, "The discharge of a teacher during the term of his employment can only be upon good cause shown, after a specific charge and opportunity to be heard thereon before the school board."

The next case¹⁹ to place the problem of summary dismissal of teachers before the Court, followed the rule of the *Shuck* case, and held; "In an action by a discharged school teacher for salary, the record being entirely devoid of specific accusations, notice, opportunity of the teacher to be heard, or evidence placed before the school board in its official capacity, she was discharged without cause shown."

*School District No. 1 v. Parker*²⁰ again followed the same line of reasoning. In that case the plaintiff, a teacher, upon reporting for work after the school term had begun was informed that she had been dismissed. In an action for breach of contract, the plaintiff prevailed. The court holding that a person under contract to teach in the public schools of Colorado may not be dismissed without good cause shown, which includes specific charges, notice, and hearing. The court stated, "However much a teacher may offend, she can be dismissed only in the manner provided by law," the Court saying in effect that dismissal can occur only after notice and hearing is had.

The most recent case on the dismissal of probationary teachers is *School District No. 1 v. Thompson*.²¹ In this case the Court upheld the rulings of the earlier cases regarding the necessity, under Section 219, of granting a hearing on the reasons for dismissal, but also held that the mandatory requirements of the statute regarding dismissal of teachers in a tenure status did not necessarily apply to hearings under Section 219. In the *Thompson* case the plaintiff, a probationary teacher, was dismissed after a hearing by the school board, at which the testimony was not under

¹⁶ COLO. STAT. ANN., c. 146, § 219 (1935)

¹⁷ COLO. LAWS, § 26, p. 396 (1887).

¹⁸ 49 Colo. 526, 113 P. 511.

¹⁹ School Dist. No. 25 v. Youberg, 77 Colo. 202, 235 P. 351.

²⁰ 82 Colo. 385, 260 P. 521.

²¹ 121 Colo. 275, 214 P. 2d 1020.

oath. The Court cited with approval the earlier *Shuck, Youberg* and *Parker* cases cited above, but held that the formal requirements set forth in the tenure act are not applicable to a proceeding under Section 219. Under the "good cause shown" clause of the statute, a school board may adopt whatever procedure it desires, so long as the teacher concerned is afforded the constitutional requirements of notice and hearing.

It has thus been shown that by a number of decisions, even though a probationary teacher may not enjoy the mandatory requirements of the hearing for dismissal of a teacher having acquired tenure, nevertheless such probationary teacher may not be summarily dismissed without notice of the charges made against him and a fair hearing before an impartial board.

During the recent teacher "firings" it was claimed that the teachers involved were being denied their constitutional rights. However, as an examination of the facts and law has shown, the action by the school boards was within the law and did not deprive the teachers of any of their constitutional rights. In each instance the school board refused to renew a contract, which right the school board had. The teachers did not lose their licenses to teach or right to work, but merely were not re-hired by one particular school board. The manner in which the information concerning the teachers was given to the school boards and the way in which the school boards acted upon that information may be neither socially nor morally desirable, and, in fact, was most repugnant to ones own personal sense of justice. Nevertheless, the teachers were not deprived of any property without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

Generally teachers' rights are well protected under the Colorado Statutes. A teacher having acquired tenure may be dismissed only after notice and hearing in strict conformance with the statutory requirements, and a probationary teacher may only be dismissed for good cause shown which, by judicial construction, means only after notice and hearing is given. Thus the constitutional requirement of notice and hearing, as a part of the due process of law clause, is satisfied. The only instance in which notice and hearing is not given is when a probationary teacher's contract is not renewed and, as it has been shown, this is an instance when notice and hearing, and the due process of law clause of the constitution are not applicable or required.

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