

1957

Wilmith J. Rees v. Murray City Board of Education et al : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

WILMITH J. REES,
Plaintiff and Appellant,

vs.

MURRAY CITY BOARD OF ED-
UCATION, a corporate body, and
WENDELL C. DAY, EARL
HEALY, DAVID B. McCLEERY,
PAUL S. ROSE, LAWRENCE P.
PARRY, J. EASTON PARRATT
and VARIAN MORTENSON,

Defendants and Respondents.

Civil No. 8586

FILE
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BRIEF OF RESPONDENTS

PETER W. BILLINGS

Attorney for Respondents

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BRIEF OF RESPONDENTS

STATEMENT OF FACTS

Appellant in her brief states in a little over three pages how this case arose. She then goes on under four different sub-headings for an additional five pages with an argumentative statement of the case. As this is an appeal from a summary judgment, the factual issues should be reviewed in light of the principles applicable to such judgments. As Rule 56 of the Utah Rules of Civil Procedure was taken practically verbatim from the Federal Rules

of Civil Procedure, a recent statement of the Court of Appeals for the Tenth Circuit might be taken as a guide. In that case, *Killpack v. National Old Line Insurance Company*, 229 F2d 851, (CA 10, 1956) the Court said:

“Rule 56 of the Federal Rules of Civil Procedure, 28 U.S.C.A., authorized the entry of a summary judgment when it affirmatively appears from the pleadings, admissions, affidavits, depositions and exhibits on file that there is no genuine issue as to any material fact. Since this procedure was not designed as a substitute for the regular trial of cases, however, it should be invoked with due caution and all substantial doubts concerning the existence of a disputed material issue of fact should be resolved against the moving party after a careful scrutiny of the record.

“A review of the pleadings and supporting affidavits and exhibits in this case reveals the existence of several conflicts. A detailed discussion of the points of difference is not necessary, however, since in our opinion none involves an issue upon which the outcome of this litigation depends. The decision is here controlled by unchallenged documentary evidence.”

That same Court a few years earlier in *Broderrick Wood Products Co. v. United States*, 195 F2d 433, (CA 10, 1952), said:

“But if it affirmatively appears from the pleadings, admissions or depositions and affidavits, if any, that there is no genuine

issue as to any material fact upon which the outcome of the litigation depends, the case is appropriate for disposition by summary judgment and the court should enter such judgment."

As pointed out by Professor Moore in his *Federal Practice*, 2nd Ed., § 56.04, et seq., allegations in pleadings may be pierced by affidavits, depositions and other documentary evidence and summary judgment entered for the defendant. Professor Moore analogizes a summary judgment to a motion for a directed verdict, not to a demurrer as Appellant suggests. It is submitted that application of these principles is dispositive of the issues here. It is quite true that there are some conflicts in the respective affidavits but these conflicts are not material to the basic issues upon which the decision of the trial court was based. It is submitted these conflicts involve window-dressing items entwined around the essential undisputed facts in such a fashion as to provoke sympathies for a poor school teacher as against a hard-hearted school board.

What are these undisputed material facts?

(1) Beginning with the school year 1949-1950, Appellant was employed by the defendant Board of Education for a term of one year as a teacher in the Murray City High School. (R 6)

(2) Similar one year contracts were entered into between the Board and Appellant for the school

years 1950-1951, 1951-1952, 1952-1953 and 1953-1954. (R 7-10)

(3) Under date of March 29, 1954, the Murray Board of Education notified Appellant that it was not planning to enter into a contract with her for the school year 1954-1955. (R 39)

(4) On May 17, 1954, in response to request by her for a statement as to its reasons for not entering into a new contract, the Board advised her:

“The Board, at its regular meeting on May 13, 1954, directed me to notify you that its action concerning renewing your contract was taken because the Board felt that your outside interests and activities and your general attitude were unduly interfering with your duties as a teacher at the Murray High School”. (R 41)

In this same letter the Board offered to hold a special meeting on May 25, 1954, to hear her, but was advised by her counsel that he would not permit her to appear and the meeting was, therefore, canceled. (R 63)

(5) No further action has been taken by the Board in connection with the matter. On July 8, 1954, Appellant filed this action against the Board, the individual members thereof, the high school principal under whom she served and the Superintendent of the Murray City Schools, claiming on her first cause of action a breach of contract and on her

second cause of action, interference with contractual relations. (R 1-5)

Based on the pleadings, affidavits, documentary exhibits and the depositions on file, the Court granted the motion for summary judgment as to all of the defendants on the first cause of action and as to the Board of Education and its individual members on the second cause of action (R 70-73), leaving to be tried only the claim of interference with contractual relations as against the principal and the superintendent of schools. This appeal is from that Order.

Such other facts as are relevant to the material issues will be discussed in dealing with the issues raised in Appellant's brief.

STATEMENT OF POINTS

I. THE MURRAY CITY BOARD OF EDUCATION DID NOT BREACH ANY CONTRACT WITH MRS. REES.

A. Appellant was not discharged.

B. Appellant had no contractual right to re-employment.

C. The Murray Board of Education had no power to make an indefinite employment contract.

D. Any contract of the nature contended for by Appellant extending beyond the school term was illusory for want of mutuality of obligation.

E. No such contract as contended by Appellant existed.

II. APPELLANT HAS NO RIGHT TO A HEARING.

III. THE COURT BELOW DID NOT ERR IN DISMISSING THE SECOND CAUSE OF ACTION AS TO THE BOARD OF EDUCATION AND ITS INDIVIDUAL MEMBERS.

ARGUMENT

I. THE MURRAY CITY BOARD OF EDUCATION DID NOT BREACH ANY CONTRACT WITH MRS. REES.

A. Appellant was not discharged.

Appellant below and in her brief here has taken the position that she was discharged or dismissed. Such is not the case. All the defendant Board of Education did was to decide not to renew her one year contract and so notified her. She served out her time to the end of the school year and the Board has paid her the full salary therefor as prescribed by the written contract. The only contract between the parties has been fully performed by both. It is well settled that a failure to rehire or renew a teacher's contract does not constitute a discharge or dismissal. *Marion v. Board of Education*, 97 Cal. 606, 32 P 643 (1893); *State v. Wanamaker*, 281 P 2d 846, (Wash., 1955); *People ex rel. Fursman v. Chicago*, 278 Ill. 318, 116 NE 158, LRA 1917 E. 1069; 47 Am. Jur. 387, Schools, §125.

It is equally well established that no Board of Education can be forced to enter into a contract

with a teacher against the will of the majority of the Board. *State v. Wanamaker*, supra. The leading case on the power of a local school authority to determine for itself whether it will enter into or renew a contract of employment with a teacher is *People ex rel. Fursman v. Chicago*, supra. In that case an attack was made upon a rule of the Chicago Board of Education adopted by it just before the commencement of the school year 1915 to the effect that the Board would hire no teacher who was a member of a trade union or a federation or association of trade unions. The court upheld the validity of the rule stating:

“... A new contract must be made each year with such teachers as it desires to retain in its employ. No person has a right to demand that he or she shall be employed as a teacher. *The Board has the absolute right to decline to employ or to re-employ any applicant for any reason whatever or for no reason at all.* The Board is responsible for its action only to the people of the city, from whom, through the mayor, the members have received their appointments. It is no infringement upon the constitutional rights of anyone for the board to decline to employ him as a teacher in the schools, and it is immaterial whether the reason for the refusal to employ him is because the applicant is married or unmarried, is of fair complexion or dark, is or is not a member of a trades union, or whether no reason is given for such refusal. The board is not bound to give any reason

for its action. It is free to contract with whomsoever it chooses. Neither the Constitution nor the statute places any restriction upon this right of the board to contract, and no one has any grievance which the courts will recognize simply because the board of education refuses to contract with him or her. Questions of policy are solely for the determination of the board, and when they have once been determined by it the courts will not inquire into their propriety." (emphasis supplied)

In an earlier case on the same point, the Ohio court in *Frederick v. Owens* (1915) 35 Ohio C.C. 538, appeal denied, 116 NE 1085 stated:

"... Neither the superintendent nor any of his assistants nor any of the teachers have any vested right in the positions that they hold. The right to longer occupy those positions terminates at the end of the period for which the appointment has been made, and thereafter the right to continue therein depends upon the judgment of the superintendent and the board in so far as assistants and teachers are concerned, and of the board alone in so far as the superintendent is concerned. It was necessary that this power of selection — appointment and reappointment — should be vested somewhere and the legislature saw fit to vest it in the superintendent and in the board of education ..."

The same issue came before the Washington court a few years later and that court reached the same result, following and citing the Illinois and

Ohio cases and upholding a resolution of the Seattle School Board not to hire or rehire any teachers who were members of the American Federation of Teachers, *Seattle High School Chapter No. 200 of the American Federation of Teachers v. Sharples*, 159 Wash. 424, 293 P. 994, 72 ALR 1215. The Court said:

“ . . . The employment of teachers is a matter of treaty or voluntary contract. Both parties must consent and be mutually satisfied and agreed. On the part of each it is a matter of choice and discretion. However, though qualified, no teacher has the legal right to teach in the schools until the directors willingly enter into a contract for that purpose. . . ”

A Board of Education, having made its decision of policy not to rehire a teacher, a court cannot review such determination, *People ex rel. Fursman v. Chicago*, *supra*; *Gibson v. Mabry*, 145 Ala. 112, 40 So. 297. As was said by the Ohio court in *Fredrick v. Owens*, *supra*.

“The question here is, there being no showing that any teacher appointed is competent to perform the duties of the position, can the superintendent and the board of education be held to have abused their discretion in making selections, because they selected the ones they did instead of others who might have been chosen? It being true that neither the superintendent nor the board is required by law to state the reasons to anyone for the selections made, can the court enumerate cer-

tain reasons as insufficient and then command the superintendent and the board of education not to omit to appoint for those stated reasons, and then punish them for contempt if they do so? . . . It is difficult to conceive of anything that would be more certainly productive of confusion in practical application than the proposition that the courts may state to public officers the various grounds upon which they shall not determine against appointing an applicant for a position under the control of such officers. This doctrine extended to its logical result necessarily takes from the public officer very much of the authority given him by law to make the selections in question, and to that extent, and without the slightest warrant of law, passes this power over to the courts. We are very clearly of opinion that nothing exists in the statutes giving the courts any such power. We think it would be quite as justifiable for the courts to undertake to regulate all political appointments in the state by prescribing that different political affiliation should not furnish sufficient ground for denying appointments, and then proceed to punish the public officer who violated the order by denying appointments on political grounds. The members of the board of education are elected by the people. If the people make mistakes in their selection of men to fill these important positions, the ballot box, and not the courts, is the place to correct these errors."

This court has already recognized the principle that in the absence of some provision in the

contract of employment or some statutory restriction, an employer may discharge an employee at any time or for any cause without liability. *Karna Held v. American Linen Supply Company*, Utah, P 2d, decided February 8, 1957. This court in *Backman v. Bateman*, 1 Utah 2d 153, 263 P 2d 561, has applied this same principle to boards of education. Both the concurring opinion of Chief Justice Wolfe and the dissenting opinion of Justice McDonough in that case recognize that absent any legislative interdiction, a board of education might in its discretion refuse to employ or retain in employment any application or teacher for whatever reason its judgment might dictate. This court has also pointed out that a citizen outraged by a determination of policy by a board of education has no remedy in court, but has two alternatives:

“One is by petition to the board and the other is by election of new members.” *Beard v. Board of Education*, 81 Utah 51, 16 P 2d 900 at 912; *Allen v. Board of Education*, 120 Utah 556, 236 P 2d 756.

B. Appellant had no contractual right to re-employment.

To attempt to escape the inescapable conclusion that it does not constitute a breach of contract to fail to renew a contract, Appellant argues that there was an implied “tenure clause” in her contract of employment. Just what this tenure clause was sup-

posed to be is not clear. In the portion of her brief arguing that she had shown a “prima facie case” for tenure, (Appellant’s brief, pp. 12-18) it is indicated that the tenure she claims is that “there could be no unilateral discharge without a thorough investigation and hearing before the Board.” (Appellant’s brief, p. 14) The quotation from Appellant’s deposition of Dr. Clove, the former Superintendent of Murray Schools, appearing on page 15 of her brief, indicates the same thing. Appellant’s counsel, in questioning Dr. Clove as to what kind of tenure he had referred to put the same interpretation in his question:

“Q: In other words, before a teacher could be discharged, she would have to be discharged through some orderly dismissal procedure?” (Deposition of Dr. Clove, p. 15, line 15)

Inasmuch as Appellant was not discharged, the implied tenure clause thus derived by Appellant and her counsel, would not be applicable to her case even if it existed.

Since Appellant appears to be confused as to the meaning of “tenure”, it might be helpful to review briefly the tenure principle in the education field. Tenure generally takes one of two forms: (a) A proscription against dismissal of a teacher, i.e., that her employment be terminated before the end of the contract term, except for certain prescribed

grounds and after a hearing, and (b) The establishment of a right to be retained in employment indefinitely, subject only to removal for certain enumerated causes and in a prescribed manner. See 47 Am. Jur., Schools, § 127 et seq. Both of these types are normally created by statute. No statute creating either type of tenure is in effect in Utah, and, as this court pointed out in *Backman v. Bate-man*, supra, without such legislation mandate, a Board of Education in its discretion may refuse to hire or renew a contract for whatever reason its judgment might dictate.

It is submitted that under the undisputed facts of this case, there neither existed nor could exist any contractual limitation on the discretion of the Murray Board of Education.

C. The Murray Board of Education had no power to make an indefinite employment contract.

The Board of Education, being a creature of the legislature, has only such powers as are expressly conferred upon it and such implied powers as are necessary to execute and carry into effect its express powers. *Allen v. Board of Education*, 120 Utah 556, 236 P 2d 756; *Hansen v. Board of Education*, 101 Utah 15, 116 P 2d 936. There is nothing expressly in the statute stating the Board's powers, (53-6-20, U.C.A. 1953) with respect to the employment of teachers. Since the Board has the obligation

to maintain the schools, it would have implied authority to make necessary contracts for employment of teachers. There is nothing in that obligation, however, which would make it necessary that those contracts extend beyond the school term.

The only legislative provision with respect to the duration of a teacher's contract was not adopted by the Utah Legislature until the special session of December, 1953. That provision, (now 53-4-14, U.C.A., 1953), provides:

“Boards of education of local school districts may enter into written contracts for the employment of personnel for terms not to exceed five years, provided that nothing in the terms of such contracts shall restrict the power of such local boards to terminate such contracts for cause at any time.”

It is submitted that until that provision was adopted, the Board of Education had no authority to make a contract for more than the year to year basis practiced in Murray School District and in other school districts of the state, let alone the life-time and good behavior contract contended for by plaintiff.

The history of the 1953 Act amply demonstrates that it was intended as a grant of *new* power to the Boards of Education — not a limitation on existing implied powers of the Board.

The bill had its genesis in the report of the

sixty-man Utah Public School Survey Commission issued in February, 1953. On page 87 of that report the commission recommended as follows:

“14. *Necessary* legislation should be enacted to *permit* the local boards of education to adopt a policy of ‘continuing contracts’ extending beyond a single year.” (emphasis supplied)

At page 272 of that report appears a model bill drafted by the Commission to carry out its recommendations. That bill was approved and recommended to the Legislature by the Utah Legislative Council as originally drafted. The Governor, in his call of the Special Session, listed as among the items to be covered at such Special Session the following:

“11. Legislation to *permit employment* of school personnel upon a five-year tenure by contract and to provide certain standard terms for such contracts, placing certain limitations and restrictions on the boards and contracting personnel.”

The Governor, in his message to the Legislature at the opening of the Special Session stated, among other things:

“I recommend the adoption of legislation to *permit* school boards to enter into five-year contracts with employees, subject to termination for cause at any time . . .”

The Governor went on to suggest certain restrictions on activities of teachers, primarily di-

rected toward curtailing their political activities. (Message of Governor J. Bracken Lee, First Special Session of the 30th Legislature, December 1, 1953, p. xv of the Session Laws of 1953).

The bill, as originally drafted by the School Survey Commission and recommended by the Legislative Council was adopted by the Legislature without change and bore this title:

“AN ACT PROVIDING THAT BOARDS OF EDUCATION OF LOCAL SCHOOL DISTRICTS MAY ENTER INTO WRITTEN CONTRACTS FOR THE EMPLOYMENT OF PERSONNEL FOR TERMS OF NOT MORE THAN FIVE YEARS ON CONDITION THAT SUCH CONTRACTS SHALL NOT RESTRICT THE POWER OF LOCAL BOARDS TO TERMINATE SUCH CONTRACTS FOR CAUSE AT ANY TIME.”

It is significant that in discussing this proposed legislation, everyone concerned used the word “permit”. If the intent were to limit existing power the verb used would have been “restrict” or one with similar meaning. “Permit” clearly indicates a grant of new authority, not a limitation on existing power. It is also significant that the Sixty Man Commission used the adjective “necessary” to describe the proposed legislation. Certainly if school boards already had the power to make continuing contracts existing beyond a single school term, such

legislation would not be characterized as necessary.”

Clearly after this Act was passed, the Murray School Board could not have entered into a lifetime or good behavior contract of employment with Appellant as she apparently contends. Its power is specifically limited to five years by the 1953 Act. Yet, if a special grant of authority was “necessary” to “permit” school boards to enter into five year contracts, *a fortiori*, legislation would have been necessary to allow a board to make a “lifetime and good behavior” tenure contract before the 1953 Act. No such statute exists. Therefore, any such contract as Appellant claims is clearly ultra vires and void.

It is not contended as Appellant suggests that the members of a board of education may not bind their successors by employing a teacher for a period extending beyond the term of office of the board members. Such doctrine based on the historical distinction between governmental and proprietary activities (See *Jacobberger v. School District No. 1*, 256 P 652 Ore., 1927) is now generally recognized as too great a limitation on the effectiveness of a board’s operations in view of the staggered terms of board members. To meet the needs of an efficiently operated school system, the courts have modified this ancient doctrine to allow contracts for a reasonable period of time. (See annotations at 70 ALR 802 and 149 ALR 343) These cases in up-

holding contracts determined to be for a reasonable time have all dealt with contracts with definite terms. The contract Appellant claims has no such definite term. She claims a teacher having "professional tenure" is employed until the age of 65 unless removed for cause and after full inquiry and hearing.

It is submitted that such an indefinite contract is not necessary for the operation of the school system and is for an unreasonable length of time. In fact, the 1953 Act constitutes a legislative finding that up to five years is what is necessary and reasonable.

After the effective date of the 1953 Act — that is, February 18, 1954, the board could have made a five year contract with Appellant, but the Board, instead, on March 29, 1954, chose not to make any contract with Mrs. Rees.

D. Any contract of the nature contended for by Appellant extending beyond the school term was illusory for want of mutuality of obligation.

Appellant's claimed "permanent" contract after a three year probationary period was illusory for want of mutuality of obligation. Parenthetically, it should be noted that this is the non-Federal issue reserved by the Supreme Court in the case cited by Appellant. *State ex rel. Anderson v. Brand*, 303 U. S. 95.

Plaintiff here contends she was bound for one year. It is clear that is all the Board was bound. At the end of one year the Board elected not to renew her contract. This is a far different situation than that in the Wyoming case, *Tracy v. School District No. 22*, 243 P 2d 932, cited by Appellant. In that case the Board had terminated the teacher's employment during the school year, i.e., a discharge.

There was no obligation on the part of Appellant to teach beyond the one year term. There is nothing expressly or impliedly in the contract which bound her to teach beyond that specified time. Therefore, as to any obligation of the Board to hire her beyond the one year term, "it lacked the essential element of mutuality of obligation and was terminable at will by either party". *Price v. Western Loan and Savings Co.*, 35 Utah 379, 100 P. 677. The same rule is stated in 135 ALR 646 that where the employee furnishes no consideration additional to the services incident to his employment, the agreement amounts only to an indefinite hiring terminable at the will of either party. As pointed out in Corbin on Contracts, Section 96, such an agreement terminable at the will of either party is not an enforceable contract when made. All part performance by the employee does is to create a unilateral contract binding on the employer to pay the specified wages for the actual period of employment.

Therefore, quite aside from the power of the Board to make the type of contract apparently contended for by Appellant, no enforceable agreement was made beyond each year's term. As to the last of such annual contracts, both parties have performed in full and there is no liability for the Board's decision not to deal with Appellant further.

E. No such contract as contended by Appellant existed.

In Point I of her brief, Appellant claims the trial court erred in granting summary judgment on the grounds she had shown a prima facie case of tenure. It is submitted that the evidence which Appellant claims establishes such prima facie case indicates quite the contrary.

The contracts of employment themselves offer no evidence of tenure. Each contract is only for one year. There is nothing about the contract which would indicate a continuing relationship beyond one school year. Nothing is required of either party beyond the one year term prescribed. Each annual contract is an integration of the agreement between the Board and the teacher.

Each of the contracts for the first four years Appellant was hired (R 6, 7, 8 and 9) contain in paragraph 4 thereof a reference to "no *discharge* without a thorough investigation and hearing before the Board." But the contract for the 1953-54

school year (R 10), the last contract under which Appellant was hired, has no such provision. The paragraph 4 in the last contract provides, instead, that the teacher has a right to terminate the contract on ten days written notice. Such a provision does not indicate a contemplated lifetime relationship. Again, these paragraphs 4 of the earlier contracts refer only to discharge, and, as we have pointed out, Appellant was not discharged.

Each contract of employment provides in Paragraph 1 thereof that the teacher agrees to be subject to the rules and regulations of the Board. The only reference to tenure in the rules and regulations of the Murray Board of Education is that the “tenure of office of all employees shall be at the pleasure of the Board”. (R 19)

Appellant also relies for her prima facie case of tenure on the correspondence and deposition of Dr. James Clove, a former Superintendent of Murray Schools. Appellant refers to the statement in the letter of Dr. Clove to all teachers, dated April 21, 1949, (R 22): “The Board of Education has extended the probationary period of new teachers from one year to three years to obtain tenure”. In taking Dr. Clove’s deposition, Appellant attempted to expand that statement into a contractual relationship, but Dr. Clove both on direct and cross-examination made it clear that he was talking not

about "legal tenure", but about "professional tenure". (Deposition, pp. 7, 23, 24, and 27.) He also made it clear that the employment of a teacher in the Murray School District was on a year to year basis. (Deposition, p. 31.) Professional tenure in the mind of Dr. Clove so far as contract renewal was concerned, meant no more than the question of renewal of a teacher's contract after the probationary period was a matter for the Board of Education. It is merely a policy of indicating to teachers that so long as they were doing work satisfactory to the Board, they could expect to be rehired. The Board still remains the final word on whether or not the teacher will be offered a new contract.

In discussing the relationship of tenure to the "Recommended Procedure for Orderly Dismissal of Teachers for Incompetency and Other Causes", proposed by a group of educators in 1947-1948, both Dr. Clove, who was Superintendent at the time the matter was first presented, and J. Easton Parratt, the present Superintendent, are certain that no such procedure was ever adopted by the Murray Board of Education. (See Dr. Clove's deposition, pp. 25 and 28, and the deposition of Mr. Parratt, p. 50, and the affidavit of J. Easton Parratt. R 18) No record of such adoption appears in the Board's minutes. On the contrary, the affidavits of Board members and the depositions of the two superintendents

indicate that the Murray Board has treated each case on an *ad hoc* basis, and that no formal procedure was ever adopted. (See e.g., Clove deposition, p. 3, lines 24-30; Parratt deposition, p. 13, line 3)

In addition, the Manual on Teachers' Security prepared by the Utah Education Association in 1952 shows that the "Orderly Dismissal Procedure" was not adopted in the Murray District. (Manual, pp. 18-20)

But quite aside from the meaning of tenure as used in Dr. Clove's letter or as he believed tenure should be, (Clove deposition, p. 28) it is quite clear that no tenure policy applied to Appellant as she was and is a married woman. The tenure policy, whatever it was, was not applicable to Appellant as she did not fall within the class of teachers encompassed by the policy.

In February, 1950, the Board of Education adopted the following resolution:

"The question of the continued employment of married women teachers was debated by the board. The board agreed unanimously that married women after three years probation teaching, if rehired must agree that employment is on a year to year temporary basis without attaining tenure." (Exhibit "G" to the affidavit of J. Easton Parratt R 19)

The effect of this resolution was reported to all teachers by the letter of March 17, 1950 (Exhi-

bit "C" of the affidavit of Parratt R 24), and was incorporated in the contract transmitted by the letter of March 19, 1950, covering the 1950-1951 school year (Exhibit "B", Parratt affidavit R 23), and was referred to in item 6 of each contract for the ensuing years. It is clear that from this resolution and the announcement to the teachers that no tenure was implied in the contract offer which Mrs. Rees accepted in 1950 and in subsequent years, as she was a married woman. Therefore, plaintiff's argument of implied contract arising out of the professional tenure policy of the Board falls, as the offer was never made to her or to other married women. Her married status was not the reason for the Board's refusal to rehire her, but that is immaterial. The point is that the tenure policy had no application to persons in her class.

II. APPELLANT HAS NO RIGHT TO A HEARING.

Appellant further complains at pages 26-28 of her brief that the Board of Education did not give her the hearing to which she claims she was entitled. As support for her contention Appellant cites cases from states which have tenure and dismissal procedure by statute. Of course, since Utah has no such statute, these cases are inapplicable. In making her contention, Appellant also overlooks these facts:

- (1) She was not *discharged*. All the Board of

Education did was to decide not to renew her contract and so advised her.

(2) The provision referring to investigation and hearing in case of *discharge* contained in the contracts of employment had been eliminated in the contract in effect for the 1953-1954 school year. That is the contract which was in effect at the time and which governs the rights and obligations of the parties.

(3) The Board granted Appellant an opportunity to be heard. (R 41) Her counsel notified the Board (R 63) that he had advised her not to attend the special hearing called at her request. (R 41) By refusing to attend such hearing, she waived any rights to a hearing if any she had.

Since it is clear Appellant was not entitled to a hearing under her written contract, she claims on Page 27 of her Brief that the Board is estopped to deny the effect of Dr. Clove's letter of April, 1949, or that the Board ratified such letter. In the first place as we have shown, the Clove letter on "professional tenure" did not apply to married teachers such as Appellant. In the second place the Board cannot be estopped or be found to have ratified a contract beyond its authority. In the third place the facts show that the proposed "Dismissal Procedure" was never taken up before the Board. (Clove deposition, pp. 25-28; Parratt affidavit, R 18 and 19)

or that any hearing procedure was ever adopted by the Murray Board of Education. (Parry Affidavit, R 42-43; Day Affidavit, R 44-45) The record shows that in the handling of the discharge of teachers in Murray, each case was on an *ad hoc* basis. (Clove deposition, p. 16; Parry and Day Affidavits, R 42, 43, 44 and 45.) There can be no ratification of a procedure never considered by the Board or applied by it in practice.

III. THE COURT BELOW DID NOT ERR IN DISMISSING THE SECOND CAUSE OF ACTION AS TO THE BOARD OF EDUCATION AND ITS INDIVIDUAL MEMBERS.

As stated by Appellant at page 31 of her brief, the gist of her claim in her second cause of action is interference with contractual relations as outlined in Section 766 of the Restatement of Torts. That section describes as a tort the inducement of a third person either (a) not to perform a contract with another, or (b) not to enter into or continue a business relationship with another.

As has already been shown Appellant's only contract with the Board was to serve for the school term 1953-1954. This contract was fully performed by both parties. Therefore, Sub-section (a) of Section 766 is not applicable.

As stated, 766 refers to inducing a third person. In this case all the Board did was to advise Mrs.

Rees that it had decided not to enter into a contract with her for the succeeding school year. The Board members themselves are the ones charged by law with the responsibility of making such determination. The corporate entity of the Board could act only through its members. It is difficult to see how those members making a determination in their official capacity could be liable in their individual capacities for so determining, or inducing themselves to so determine. It is even more difficult to see how the school board, as a corporate entity which had no obligation to contract, could be liable for not entering into a contract. No third person was or could have been induced by the Board or its members, who were the very ones to do the contracting.

This is made clear by the court's refusal to dismiss as to the superintendent of schools and the principal of the high school. Neither of these individuals were to contract with Mrs. Rees. Therefore, if they, without privilege to do so, induced the Board and its members not to enter into a new contract for the 1954-1955 school year with Mrs. Rees, Section 766 of the Restatement might apply to them, but certainly not to the Board or its members. The individual members of the Board with respect to the decision not to re-employ Mrs. Rees could act only in their official capacity as members of the Board and not as individuals. To hold otherwise, would

tend to hinder elected board members from acting on their judgment for the interest of the Board of Education for fear of possible personal liability. Members of a board of education are performing a public service for an honorarium of \$100.00 per year. (Section 53-6-8, U.C.A., 1953) If they could be held liable for their acts as Board members exercising their collective judgment as a Board whether or not to re-employ a given teacher, the inducement to enter such public service would be negated. To impose liability in situations of this sort is against public policy.

Furthermore, Appellant claims that *all* the Board members conspired with each other to have the Board not re-employ Mrs. Rees. The claim as to "all" shows the absurdity of the situation. Even if one member or a conspiracy of a minority, by false representations, knowingly made to induce a majority to refuse to contract might incur liability for wrongfully so inducing the majority, how could *all*, who must make a decision, be liable for such decision. Such a policy would substitute the judgment of the court for the judgment of the Board as to whether or not to make a particular contract. Such is not the law in this State. *Beard v. Board of Education*, 81 Utah 51, 16 P 2d 900; *Allen v. Board of Education*, 120 Utah 556, 236 P 2d 756.

One other point should be made with respect

to the second cause of action. It sounds in tort and Appellant so characterizes it in her brief. Yet it is well settled in this jurisdiction that a board of education is an instrumentality of the state in the performance of a governmental function and consequently such board partakes of the State's sovereign immunity with respect to tort liability. *Bingham v. Board of Education of Ogden City*, 118 Utah 582, 223 P 2d 432; *Woodcock v. Board of Education*, 55 Utah 458, 187 P 181. As the Board members, in determining whether or not to employ Mrs. Rees, are acting in the scope of their authority for a governmental purpose such immunity from tort liability applies both to the Board of Education as a corporate entity and to its individual members. See the annotation at 160 ALR 7, 32; 47 Am. Jur., Schools, § 60; *Consolidated School District No. 1 v. Wright*, 261 P. 953, (Okla., 1927).

CONCLUSION

The protection of the professional relationship and employment security of teachers for which Appellant so eloquently argues can be achieved without the necessity of contractual tenure. Murray, like other school districts, had and continues to have a policy of renewing the annual contracts of teachers without regard to their politics, religion, nepotie re-

lationship or the availability of younger teachers at a lower salary. (Parry Affidavit, R 42; Day Affidavit, R 44; Parratt Affidavit, R 18; Clove Deposition, pp. 27-28) Such a policy is not a contractual obligation of indefinite duration, but is a policy to be applied in the discretion of the board in light of its duties and responsibilities. It is the position of the board here that it properly exercised its discretion and its policy in making its decision with respect to Mrs. Rees. It is further the position of the Board that whether its judgment was correct is not a question for which it is required to answer in court.

Whether Mrs. Rees was or was not a good teacher, whether or not the board was arbitrary in dealing with her, whether or not the Board's judgment was correct that her "outside activities and general attitude were unduly interfering with her duties as a teacher" are not the issues here. The sole issue is whether there was a binding contract between the Board of Education and Mrs. Rees, entitling her to re-employment for the school year 1954-1955 and for succeeding years until she reached the age of 65.

It is submitted that on the law and undisputed facts in this case no such binding contract existed.

For the foregoing reasons, the decision of the

lower court was correct and its judgment should be affirmed.

Respectfully submitted,

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