

1957

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

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

UNIVERSITY UTAH

OCT 31 1957

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WILMITH J. REES,

Plaintiff and Appellant,

—vs.—

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

Defendants and Respondents.

Case No.
8586

BRIEF OF APPELLANT

A. W. SANDACK

*Attorney for Plaintiff and
Appellant*

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STATEMENT OF THE CASE

This is an appeal from a Summary Judgment Order by the Honorable A. H. Ellett, Judge of the Third Judicial District Court, in favor of all defendants and against plaintiff on her First Cause of Action, no cause for action, and in favor of all defendants except J. Easton Parratt and Varian Mortenson and against

plaintiff on her Second Cause of Action, no cause for action.

The entire record below was designated for this appeal.

The appellant, Wilmith J. Rees, was first employed in 1949 by the Murray City Board of Education as a teacher in Murray High School for the 1949-50 school year. Similar contracts were made for the school years 1950-51, 1951-52, 1952-53 and 1953-54, copies of which were filed with the Complaint (R. 6-10).

On March 29, 1954, without having any previous warning from the Board of Education, appellant received the following letter from Superintendent J. Easton Parratt (R. 39):

“Dear Mrs. Rees:

You, no doubt, are making plans for next year. Accordingly the Board of Education is of the opinion that it would be to your interest to know that the board is not planning on entering into a new contract with you for the school year 1954-55.

We are pleased to have had the opportunity of working and becoming acquainted with you during the past few years.

Very truly yours,

J. Easton Parratt
Superintendent & Clerk”

Historically, all teacher contracts by the Murray City Board of Education provided that each teacher will be

given "notice of *unsatisfactory* work on or before April 1 of the school year." (R. 6-10, paragraph 5 of each contract).

On April 8, 1954, after receiving this notice, Mrs. Rees requested a hearing before the Murray City Board of Education at its next meeting (R. 54). On May 13, 1954, after some postponements, appellant appeared at the Arlington School, Murray, Utah, at 7:30 o'clock P.M. with her counsel for the purpose of protesting the board's action and found the board had met between the hours of 7:00 o'clock P.M. and 7:25 o'clock P.M. that evening, and were not available at 7:30 o'clock P.M. for appellant's hearing. This was later claimed to be a misunderstanding by the board of education (R. 60). Aware that she was getting the run around and her efforts for reinstatement were futile, Mrs. Rees commenced this action on July 8, 1954, alleging the Murray City Board of Education's action was wrong, that the board should be enjoined from discharging her, and that the actions of the board in refusing to issue her a new contract for the next school year be declared null and void. Her Complaint also sought damages against the board members, superintendent and principal individually for malicious interference with appellant's contractual rights (R. 11). Defendants' Motion for Summary Judgment was heard June 11, 1956. No testimony was taken, but all of the pleadings, exhibits, affidavits and depositions of the parties were made of record.

Mrs. Rees's allegations of fact in her Complaint (R. 1-5) and her supporting Affidavits (R. 48-50), though

contradicted by Affidavits filed by the defendants must be accepted as true on a Motion for Summary Judgment.¹

Appellant sets forth the facts from this standpoint.

I. APPELLANT AT ALL TIMES RENDERED SATISFACTORY SERVICE AS A TEACHER.

Wilmoth Rees, a United States citizen and a resident of Salt Lake City, Utah, graduated from the University of Utah in 1949, and at all times held a professional certificate as provided by state law in order to qualify as a teacher in the public schools of Utah. She was employed as a home economics teacher and performed her responsibilities satisfactorily. With the consent and approval of the Murray City Board of Education, while so employed, she served as first Vice President and later as President of the Murray Education Association; was a member of the Utah State Home Economics Committee, Murray City High School Special Building Committee, Murray City Schools Survey Committee and Murray City Guidance Committee. Added to these activities, she performed other extra curricular duties for the Murray City High School, with the consent of the Board, in school fashion shows, commencement exercises, girls' league, Freshman Advisory and Report Card Committee activities.

1. *Furton v. City of Menasha*, C.C.A. 7 1945; 149 F. 2d 945; Cert. denied, 327 U.S. 771. On defendant's Motion for Summary Judgment, court must accept allegation of Complaint as true. Facts must be accepted as true though contradicted by affidavit filed by defendants.

Mrs. Rees alleged in her Affidavit (R. 49) that at no time did her superintendent, principal or anyone else ever give her notice of unsatisfactory work, and she further denied specifically each and every implication raised by counter affidavits filed by defendants Exhibits I, J, K, L (R. 35-38) wherein the Board of Education attempted to suggest that she was not performing satisfactorily.

The trial judge at the hearing on Motion for Summary Judgment, aware that just cause for dismissing Mrs. Rees was lacking, requested that counsel for the board concede for the purpose of that hearing that, "Mrs. Rees was discharged because she played around with the Teachers' Union." Mrs. Rees's allegation that she "rendered satisfactory and successful service to said Murray City High School and Murray City Board of Education" (R. 3) must be taken in a light most favorable to her.

II. INDUCEMENTS HELD OUT TO MRS. REES TO BECOME A TEACHER.

Mrs. Rees's Affidavit (R. 49) alleged that it was her understanding when employed by Dr. James Clove, then Superintendent of the Murray City Board of Education, that there was, in effect, a tenure policy for its teachers which was as set forth in defendants' Exhibits A and B (R. 22, 23), and in her Exhibit 1 (R. 51), and that upon rendering three years satisfactory status as a teacher she would acquire by contractual right with the Murray City Board of Education the tenure right to hold her

job, together with a right to an orderly dismissal procedure if the board attempted either to discharge her or not to renew her contracts. Dr. Clove's deposition admits Mrs. Rees's understanding and reliance of the policy, explaining Exhibit A & B (R. 22, 23) to conform to the Board of Education's tenure policy. (See Clove Deposition, p. 6 commencing at line 15 and extending through line 23 of p. 8.)

III. APPELLANT'S RIGHTS AS A TENURE TEACHER.

Mrs. Rees filed with her Motion in opposition, the Affidavit of Herrick S. Roth, Vice President of the American Federation of Teachers, setting forth definitions of the terms Dr. Clove's employment letter raised. "Probation period" and "tenure" have the following meaning (R. 59):

"The word 'tenure' when applied to the employment of a teacher indicates that the teacher will be employed from the date of achieving tenure, continuously from year to year, until such time as the teacher reaches the retirement age for the school district."

"The term does not imply that the teacher shall never be subject to dismissal once he has attained the status of tenure. Tenure does provide for an orderly procedure for determining whether or not a dismissal of a teacher who has attained the status of tenure is warranted by the board of education."

**** that a hearing should be had after notice given to the teacher concerning grounds for removal or non-renewal of the contract. ****

"The burden of proof of dismissal or non-renewal rests with those who bring the charge."

Mrs. Rees denied that the term "Probation period" or "Tenure" had the meaning alleged to be given those terms by Messrs. Parratt, Day and Parry in their affidavits supporting their motion. Mrs. Rees further alleged that following her three year probation period she acquired tenure, and that this policy was a long standing policy of the Murray City Board of Education; that such a policy had been recognized during her employment regarding the non-renewal of another tenure teacher (a Mr. Tremayne).

Mrs. Rees also denied that the tenure policy was not applicable to married teachers and alleged that the action by the board was not predicated on the ground that she was replaced for a single female teacher or that the married women's rule had any materiality or relevancy to the matter.

IV. DEFENDANTS' ARBITRARY ACTIONS.

Notwithstanding Mrs. Rees's beter than average record of service to her high school and community from 1949, Murray Board of Education, acting upon Superintendent Parratt's and Principal Mortenson's recommendation, filed its dismissal notice two days before the final date allowed by the contract, without giving any reason for their action, and refusing Mrs. Rees the orderly hearing required by ordinary justice (R. 60). Mrs. Rees continued to request reinstatement by the Murray City Board throughout, continues to hold a good

standing teacher's certificate and continues to this date to be without employment as a teacher, although she has applied to the Salt Lake City Board, Jordan Board and the Granite School Board, an alarming commentary in itself when viewed in connection with the admitted critical shortage of competent teachers in this state.

V. STATUTES.

School laws of Utah are silent regarding teacher tenure. Section 53-6-20, *Utah Code Annotated*, 1953, broadly provides:

"Every board of education shall have power and authority *** to construct and erect school buildings and to furnish the same *** and may do all things needful for the maintenance, prosperity and success of the schools and the promotion of education; and may adopt by-laws and rules for its own procedure, and make and enforce all needful rules and regulations for the control and management of the public schools of the district."

Chapter 29, *Laws of Utah*, 1953, First Special Session, p. 70, 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."

This law was approved December 9, 1953, and became effective February 18, 1954.

Attention is also directed to Utah State Teachers' Retirement Fund created by Chapter 20, *Utah Code Annotated*, 1953.

STATEMENT OF POINTS

POINT I.

THE COURT BELOW ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BECAUSE GENUINE ISSUES OF MATERIAL FACT EXISTED TO BE FULLY TRIED ON THE FIRST CAUSE OF ACTION.

A. Plaintiff's Allegation that She was a Tenure Teacher and had Acquired the Contractual Benefits of Tenure was a Material Fact in Controversy.

POINT II.

THE COURT BELOW ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BECAUSE DEFENDANTS WERE NOT ENTITLED TO PREVAIL AS A MATTER OF LAW ON THE FIRST CAUSE OF ACTION.

A. In Establishing Tenure for its Teachers under Contract of Employment, Murray City School Board was not Acting *Ultra Vires*.

B. Murray City School Board failed to Act in Accordance with its own Rules Regarding Orderly Dismissal of a Tenure Teacher.

C. The Contract Covering the School Year 1953-54 was not Lacking in Mutuality.

D. The Married Teacher Rule did not Bar Appellant from Benefits of Tenure Program.

POINT III.

THE COURT BELOW ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BY HOLDING THAT MEMBERS OF THE BOARD OF EDUCATION COULD NOT INDIVIDUALLY BE LIABLE FOR TORTIOUS AND WILLFUL INTERFERENCE WITH APPELLANT'S CONTRACTUAL RIGHT ON THE SECOND CAUSE OF ACTION.

ARGUMENT

POINT I.

THE COURT BELOW ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BECAUSE GENUINE ISSUES OF MATERIAL FACT EXISTED TO BE FULLY TRIED ON THE FIRST CAUSE OF ACTION.

A. Plaintiff's Allegation that She was a Tenure Teacher and had Acquired the Contractual Benefits of Tenure was a Material Fact in Controversy.

Like a general demurrer under former rules of pleading, the Motion for Summary Judgment cuts at the heart of appellant's claim. Like a general demurrer, the Motion for Summary Judgment concedes the facts alleged to be true. Summary Judgment is not a substitute for trial. It only determines whether there are issues to be tried. *Barron and Holtzolf*, Federal Practice and Procedure, Vol. 3, p. 61.

The complaint, supporting affidavits and deposi-

tions of Dr. Clove raise genuine and material issues of fact, and the Court below should have accepted these allegations as true although contradicted by affidavits filed by defendants. Mrs. Rees alleged the existence of a tenure policy and an orderly dismissal procedure. The contracts and documents which created this right accompanied her complaint.

Commencing with the first contract (R. 6) and running through each of the renewals except Exhibit E (R. 10), paragraph 4 of each contract provided:

“This contract may be cancelled by mutual agreement, and by the Board of Education for immorality, incompetence, insubordination, and mental or physical incapacity. It is agreed that there shall be no discharge *without a thorough investigation and a hearing before the board.*”

As far as can be determined, this had been the standard procedure in the Murray City School Board for some years prior to 1949.

Each contract provided:

“5. That you will be given notice of unsatisfactory work on or before April 1 of the school year.”

The contract for the year 1953-54 carried a slightly different provision:

“4. It is agreed and understood that each person performing services hereunder may terminate his service relationship at any time upon his giving written notice of such intention and the effective date thereof to the Board at least ten days prior to the proposed effective date of termi-

nation. Such notice may be mailed or delivered to the Superintendent.”

The reason for this language requires explanation. At the commencement of the 1953-54 school year in September, there was considerable agitation for improving teachers' salaries throughout the state. Boards of education were unable to offer teachers adequate contracts, and throughout the state many teachers and their associations refused to sign these contracts in time for the new school year. This resulted in the call of a special legislative session December 1, 1953, entirely devoted to the solution of this problem. In order to show good faith, Boards of Education throughout the state drafted this language which, in effect, said to a teacher, if we cannot get a satisfactory adjustment from the state legislature, you may resign on ten day's notice.

In this context, it is submitted that paragraph 4 of the agreement of 1953-54 did not alter the previous basic conditions that there could be no unilateral discharge without a thorough investigation and hearing before the board. It is urged these conditions became part of the 1953-54 contract, as effectively as if expressly written therein for those teachers who had passed their probationary period.

Dr. James Clove, former superintendent of the board, hired Mrs. Rees. His forthright deposition admits that his hiring letter of April 21, 1949, (R. 22) and the document entitled the Orderly Dismissal of Teachers, Exhibit D (R. 25-27), was standard operating procedure in the Murray City School Board. Nowhere in the affi-

davit or the depositions of the present board or their officers is there evidence that the policy under Dr. Clove had been changed, altered or rescinded. This indicates that the policy was acceptable and continued in effect. (See *Appeal of Black*, 287 P. 2d 96, 101. Contract cannot be annulled by succeeding board members.)

What is the meaning of this language if not to grant tenure to Mrs. Rees? "The Board of Education has extended the probationary period of new teachers from one year to three years to obtain tenure." This phrase is again recited in the letter of April 19, 1950, Exhibit B (R. 23), which accompanied the second contract Mrs. Rees received from the board. Examine Dr. Clove's deposition (P. 15, line 9 through page 17, line 14):

"Q. So that when you wrote this letter that we have referred to earlier, advising teachers that their probationary period would be extended from one to three years to obtain tenure, you were meaning the kind of tenure—not legal tenure—that came as an incident of this three-page document?

A. That's right.

Q. In other words, before a teacher could be discharged she would have to be discharged through some orderly dismissal procedure?

A. As far as I was concerned, that was true.

Q. And was that policy followed in any example during your term?

A. Yes.

Q. In what cases?

A. Well, only one case that I ever dismissed a

teacher was a teacher by the name of Tremayne, and we followed it there.

Q. Just exactly what was the procedure you followed in Mr. Tremayne's case? I don't care to know the issues or the merits of it.

A. I wrote him a letter that he would not be re-employed; that in our opinion he was not a capable teacher. That was his first year, and there was still no need for taking it before the board, according to this professional procedure. However, he requested it and it was granted.

Q. And you went through the whole formal procedure?

A. True.

Q. Gave him a hearing?

A. That's true.

Q. And you presented the Board's position and he presented his position?

A. That's true.

Q. And at the end of that, a decision was —

A. It was unfavorable to the teacher. The Board backed up our judgment.

Q. I see. Now, was there any other case of a dismissal of a teacher during your term?

A. No, no dismissal. A dozen teachers, however, resigned at my suggestion during those years. It was my policy that when a teacher was not doing what I considered good work to tell the teacher in a conference that I thought it was for the best interests of the teacher and the district that they try something else, go

to another district, and that the best procedure for the teacher would be to write a letter stating that they didn't, that they were resigning, didn't want to come back next year, and that I'd write them a letter accepting their resignation. That put it all on record as a resignation and no dismissal.

Q. So that in those instances no—

A. It was officially resignation.

Q. Resignation rather than dismissal.

A. That's true.

Q. But even in those cases where this resignation procedure was involved, you had some discussions prior to the resignation letter advising the teacher of her unsatisfactory conduct?

A. That's right.

Q. Did the Murray Board of Education know about the Tremayne incident?

A. Yes.

Q. Did they support the action you took on it?

A. Yes, sir.

Q. Did they permit you to go through the procedure you used?

A. Yes, sir."

"Recommended Procedure for the Orderly Dismissal of Teachers" was the policy and practice used during Dr. Clove's term as superintendent. See Clove Deposition, p. 18, line 12 through 18.

In addition to that, Exhibit H adopted by the Murray City School Board in 1946 (R. 32, 33) attached to the salary schedule (R. 34), provided:

"V. Teachers Demerits

1. Teachers whose work is rated by the Principal and Superintendents as being below the standard expected in Murray City Schools may be denied their annual increment.
2. If the quality of work is rated below average for a two-year consecutive period, the teacher shall not be given a contract of re-employment in the Murray City Schools. Such teachers will be given a notice before April 1st if their work is below average and that they are not entitled to their annual raises."

For the purpose of meeting her burden at the Summary Judgment hearing, Mrs. Rees certainly established a *prima facie* case for tenure, and having acquired the incidence of that contractual relationship established genuine and material issues of fact that should have been fully tried, not disposed of simply because defendants' affidavits contradicted these facts.

It is, of course, conceded that if defendants were entitled to prevail as a matter of law, the Court below did not err. This proposition will now be examined.

POINT II.

THE COURT BELOW ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BECAUSE DEFENDANTS WERE NOT ENTITLED TO PREVAIL AS A MATTER OF LAW ON THE FIRST CAUSE OF ACTION.

A. In Establishing Tenure for its Teachers under

Contract of Employment, Murray City School Board was not Acting *Ultra Vires*.

It is common knowledge since World War II, this state has faced a serious teacher shortage primarily because of inability to pay teachers adequate wages and permit conditions comparable to those offered by other industries in other states. Tenure for teachers is based upon the public policy of protecting the educational interest of the state and not upon the policy of granting special privileges to teachers as a class or as individuals. Consequently, tenure should be strictly construed against the boards and liberally construed to affect the high purpose of this public policy.

So, to meet this competition, Utah School Boards attempted to better teachers' conditions within the public interest. Tenure had been under consideration for many years, when in November, 1947, as an outgrowth of the resolutions made at a leadership convention at Cedar City, there was appointed a joint committee representing the State School Board Association and the Utah Education Association which studied the problems and submitted its approved recommendations September 13, 1947. This constituted the recommended orderly dismissal procedure for teachers which was adopted by about three-fourths of our school districts in this state. See *The Administration of Public Education* by Dr. John T. Wahlquist, published by the Ronald Press Company, New York, Chapter 7, p. 241:

“Many states and school systems have worked out procedures to be followed in the dismissal of

teachers. In Utah, for instance, the State School Board Association and the Utah Education Association have cooperated in working out a procedure which has been adopted by about three-fourths of the school districts in the state. The procedure defines the grounds for dismissal, provides that written notice of intended dismissal be given to the teacher, and stipulates that the teacher may request a hearing before the board of education before final decision on the dismissal is made.

“Even though the problems discussed above are influenced in large measure by state legislation and state board of education rulings, local superintendents and principals can do much to make this area of personnel administration more effective. Regardless of tenure status, administrators, by their actions and programs, can give teachers a feeling of security. Adequate supervision, particularly during the probationary period, can be provided. Board policies on retirement ages, the teaching of controversial issues, and dismissal procedures can be fair and liberal.”

Dr. Clove's deposition clearly establishes that the Murray Board, by implication at least, adopted a similar orderly dismissal procedure and held out this tenure program as an inducement to Mrs. Rees to accept employment in its public school.

The school board injected into the relationship between Mrs. Rees and itself her unexpressed right for tenure by an implied contract that on the contingency her relationship continued satisfactorily for at least three years, then she was considered a permanent teacher.

Should it be urged in the year 1956 the power of a school board “to maintain its schools,” Section 53-6-20,

Utah Code Annotated, 1953, limits the implied powers of a board to adopt such a relationship between itself and its teachers?

See *Allen v. Board of Education*, 236 P. 2d 75:

“The Board of Education, being a creature of the legislature, has *** such implied powers as are necessary to execute and carry into execution its implied powers.”

This Court in *Backman v. Bateman*, 263 P. 2d 561, struck down an act of the legislature because it infringed upon a vested tenure right to retirement by a high school principal.

Defendants’ counsel cited in the court below, *Utah Code Annotated*, 1953, which provides:

“Boards of Education may appoint all other *officers* that in their judgment may be necessary to fully carry out the provisions of this title for the protection and improvement of school property and for the promotion of the interests of the schools *may remove them at pleasure* and may require any *such officer* to give a bond to the board in such sum as it may prescribe.”

Arguing this provision gives the school board unlimited authority to remove any teacher at its pleasure. This section applies only to officers of the board and not to employees. The position of a teacher in the public school is not a public office but an employment by contract between the teacher and the school corporation. The relationship is contractual. This section may not be applied against teachers; only against officers of the board.

See *School District No. 311 v. Wanamaker*, (Wash.) 281 P. 2d 846.

It was also urged below that *Laws of Utah*, 1953, First Special Session, Chapter 29, now cited as Section 53-4-14, *Utah Code Annotated*, 1953, constitutes a limitation against the Board. This section provides:

“Boards of Education, or 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.*”

This is not inconsistent with our case. The 1953 act, appellant contends, was not intended as a limitation on the existing and implied powers of the board. The legislature was certainly aware that since 1948, nearly three-fourths of Utah school districts had adopted a tenure program and an orderly dismissal procedure. Neither the message of the Governor, recommendations of the legislative counsel, nor debates in the legislature are helpful in determining whether or not this act was determined as a grant of new power or limitation of existing and implied powers of the board. We contend that since many schools in Utah had adopted tenure procedures previous to 1953, the boards exercised the power to so contract, and the above statutory provision was not a limitation on their power, but merely an authority to enter into written contracts for a term of five years.

This is not inconsistent with the established practice

of re-employing a teacher on a year-to-year basis if she performs satisfactorily.

This Court's attention is further called to the underlined portion of the statute which provides:

"To terminate such contracts for cause at any time."

Here again our legislature recognizes that just cause must appear even if a contract for five years may be terminated. Certainly, the principles of justice and fair play require some hearing after notice given to the party sought to be terminated, dismissed or non-renewed. Our legislature thus requires a hearing before "just cause for termination" is proven to exist.

Even in the absence of teacher tenure statutes, the Supreme Court of Wyoming holds:

"The majority of the Courts seem to hold that in the absence of a contract permitting removal at pleasure, principles of justice require that a hearing should be given to the party sought to be removed and we shall assume for the purpose of this case that in order to make the decision of the school board of any effect a hearing upon notice was necessary." (See *Tracy v. School District No. 5*, 243 P. 2d 932.)

In *Baird*, 298 Pac. 313, that Court held:

"According to the Durst case, removal of a teacher may be only for cause, and we may assume, as heretofore stated, that it should be only upon notice and hearing."

Mrs. Rees was not charged with any unsatisfactory

conduct nor was she allowed any of the fundamental elements necessary for a fair hearing.

Furthermore, since appellant's rights arose out of a contract with the Murray Board as the outgrowth of existing and implied powers and not statutory grants, it is urged that her right of tenure is not capable of being dissolved by an act of the legislature even if this Court construes *Laws of Utah*, 1953, Chapter 29, First Special Session, as the only power of the board. A case in point has been decided by the Supreme Court of the United States in favor of a school teacher. See *State ex rel Anderson v. Brand*, 303 U.S. 95, reversing the Indiana Supreme Court, 5 N.E. 2d 531. The Indiana Court held teacher tenure rights as being a creature of the legislature. The Supreme Court of the United States held otherwise:

“The teacher tenure rights were contractual and could not be impaired by a subsequent act of the legislature.”

Mrs. Rees urges, therefore, that this last enactment of the legislature cannot impair her vested right to tenure which she obtained through a contract commencing in 1949, and continuing each year through 1953.

The full power and prestige of our state is being used to encourage high level education and teachers to do a better job. Recently a teacher retirement program has been adopted by this state which recognizes that teachers may be competent to serve until sixty and sixty-five years of age. Utah school boards did not require a

grant of legislative power to encourage teachers job security and tenure. They have exercised this power all along and their action is not without authority.

Anticipating that defendants would argue as they did below that without a legislative grant of authority, boards of education may only enter into contracts within the term of office of that board, appellant makes the following argument.

In the absence of a statutory provision limiting either expressly or by implication, the time for which a contract of employment of a school teacher may be made to a period within the contracting school board's or officers' term of office, *such board or officers may bind their successors in office by employing a teacher or superintendent for a period extending beyond their term of office.* See *Appeal of Black*, 298 P. 2d 96; 78 C.J.S. 185, pp. 1038-39.

In *Corum v. Common School District No. 21* (Idaho, 1935) 47 P. 2d 889, it was held:

"It is also contended that the contract was invalid by reason of the fact that it was entered into prior to the annual school meeting, at which a change in the personnel of the board occurred, for services to commence and to be performed after the annual meeting. This contention cannot be upheld. The board of trustees of a common school district has the power and it is its duty to employ certified teachers on written contract in form approved by the state board of education. I.C.A. paragraphs 32-615, subd. 1. The board is a continuous body or entity; the corporation contin-

ues unchanged and has the power to contract; its contracts are contracts of the board and not of its individual members; and the board can make a valid contract with a teacher for a term of school to begin in the next succeeding school year and after the term of one of the trustees has expired."

This is the general rule, provided the contract is made in good faith, without fraud or collusion and for a reasonable period of time.

It cannot be successfully argued that a tenure program for teachers which is designed to continue her annual contract from year to year until she reaches her retirement age of sixty-five is unreasonable. Rather, it must be conceded that such stability of employment is a desirable thing and that boards of education are not acting outside of their authority in establishing such practice even in the absence of permissive legislation.

B. Murray City School Board failed to Act in Accordance with its own Rules Regarding Orderly Dismissal of a Tenure Teacher.

If it is accepted that the Murray City School Board adopted a tenure program, then it must recognize its rules regarding the dismissal of a tenure teacher. All of the contracts provided:

"That the Board will give the teacher a notice of unsatisfactory work on or before April 1 of the school year."

This notice not only should be in writing, but it must have contained a statement of reasons for the board's refusal to re-employ the teacher for the following year

Any such notice not incorporating reasons for doing so was void and did not fulfill the terms of the contract.

See *Tempe Union High School District v. Hopkins*, 262 P. 2d 387.

The notice given Mrs. Rees that she would not be re-employed as a teacher was insufficient to satisfy the requirements of her contract and due process of law under the circumstances of this case. Teacher tenure is a valuable, substantial right and cannot be taken away except for good cause, once it is shown to exist.

See *State ex rel Saxtorph v. District Court, Fergus County*, 275 P. 2d 209.

Furthermore, the Murray City Board of Education apparently continued the policies of Dr. Clove, and they should be estopped from denying the validity of Mrs. Rees's claims under the circumstances of this case.

See *Lommasson v. School District No. 1*, 261 P. 2d 861:

“But school boards are not unlike the governing boards of other municipalities and corporations, and may by their subsequent acts so adopt or ratify contracts within the scope of their powers, informally entered into or executed, that the districts for which they act will be estopped to deny their validity. ****”

Finally, the board offered Mrs. Rees no hearing at all even though her contracts from 1949 on contained the provision that:

“**** there shall be no discharge without a

thorough investigation and a hearing before the board."

Once Mrs. Rees had acquired permanent rights as a teacher, this right to a fair hearing, with the burden of proof upon the board, became clearly fixed. That this language was omitted from the 1953-54 contract has previously been explained and as previously urged is as much a condition of that contract as if it had been expressly written in.

C. The Contract Covering the School Year 1953-54 was not Lacking in Mutuality.

The Court below raised this question, pointing out that paragraph 4 of the 1953-54 contract permitted termination by the teacher upon giving ten day's written notice.

This provision has been previously detailed in this brief entirely for the benefit of the board because of the financial bind the school districts were in at the opening of that school term. School contracts had been mailed out and had been unsigned and returned in many instances. The provision was written by the board and should be strictly construed against it and not the teacher.

Does the inclusion of this clause mean that the 1953-54 contract was so entirely lacking in mutuality of obligation that it should not be enforced? It is an elementary rule of contract law that unless both parties to a contract are bound, neither is bound. So tested, it is apparent that Mrs. Rees undertook to be bound to perform teaching services for the board for a term of one year.

She entirely executed this contract. This is not a case of promised future performance by a party. Here, one party agrees to render services in consideration of the other's promise to pay. Mrs. Rees was never free to reject, change or alter her own performance unless she exercised the ten day notice provision. There was nothing vague or illusory about her promise or her performance under that promise. The ten day reservation does not render the contract lacking in mutuality.

D. The Married Teacher Rule did not Bar Appellant from Benefits of Tenure Program.

The Court below was disturbed about the married teachers rule. Exhibit C (R. 24) points out that the policy for that year contains a married woman's clause which provides:

"The board of education may cancel this contract because of marriage of a female teacher during the year."

The letter of March 17, 1950, written by Dr. Clove establishes that any attempt to deny tenure to married, female teachers ought to be accompanied with a showing that there were unmarried teachers available for work. The question of married teachers was an old controversy having its roots in the war and postwar emergency and employment programs. Actually, there are so few single teachers now, male or female, there is no reason for a return of the policy and consequently to impose the rule. Mrs. Rees was not dismissed because she was a married teacher. Continuing married teachers in employment

has caused no economic problems for the board of education. The fact is, school boards can use as many teachers as are available without regard to whether they are married or single.

It is important to point out that the contract for 1953-54 entirely eliminated paragraph 6 which had appeared in the 1949, 1950, 1951 and 1952 contracts, but which was not incorporated in the August 29, 1953, contract. See Exhibit 10.

Mrs. Rees urges that if her dismissal arose because of her married status, such dismissal would be contrary to good public policy and unreasonable. This is the holding of *State ex rel Wood v. Board of Education*, 206 SW 2d 566.

In the opinion of the Justices, 303 Mass. 661, 222 NE 2d 49-57, 123 ALR 199, the Massachusetts Supreme Court concludes that a contract which would exclude married women from public employment could have no real tendency to advance the public welfare, and held such statute unconstitutional.

Because of such basic unfairness, and reason for the rule ceases to exist, Mrs. Rees cannot be denied her tenure right on the basis of the so-called married teacher's clause.

POINT III.

THE COURT BELOW ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BY HOLDING THAT MEMBERS OF THE BOARD OF EDUCATION

COULD NOT INDIVIDUALLY BE LIABLE FOR TORTIOUS AND WILLFUL INTERFERENCE WITH APPELLANT'S CONTRACTUAL RIGHT ON THE SECOND CAUSE OF ACTION.

Appellant's Second Cause of Action is predicated upon the familiar Tort Law:

“One who without privilege to do so induces or otherwise purposely causes a third person not to (a) perform a contract with another or, (b) enter into or continue a business relationship with another, is liable to the other for the harm caused thereby.”

Restatement of Torts, Section 766.

The gist of appellant's claim on her Second Cause of Action (See Amended Complain, R. 11) is that all defendants wrongfully conspired and interfered with her right of contract for which she is entitled to damages from all who participate in such wrongful activity.

The unjustified conduct of all the defendants in interfering with Mrs. Rees's contract and expectancy, conceding that she had tenure rights, is the tort set forth under her Second Cause of Action.

The Court below reasoned that defendants' Motion for Summary Judgment must be granted as against all except Principal Mortenson and Superintendent Parry, conceding that as against those two defendants, Mrs. Rees had stated a cause of action, but holding that the Board of Education and its officers could not induce a breach of its own contract with itself. This, we believe, is an oversimplification. At least, the members of the

board, acting outside the scope of their authority should have personal liability for their wrongful and tortious acts. Corporation officers are not shielded from individual liability merely because their unauthorized acts are committed in the name of a corporation if they do or participate in acts clearly wrongful. Contrary rule would enable directors and officers of the corporation to perpetrate flagrant injustice behind the shield of this vicarious character, even though the corporation might be insolvent or irresponsible. 13 Am. Jur. p. 1019, Sections 1086-87.

See *Cameron v. Kenyon-Connell Commercial Co.*, 22 Mont. 312, 56 Pac. 358.

It is a general rule that a corporation should be liable in damages to one injured by its acts brought about by conspiracy among its board members or other persons. 13 Am. Jur. 1057, Section 1132; 4 ALR 166.

Murray City Board of Education is a public corporate body having the right by statute to sue and be sued, and it should be required to respond for its tortious conduct like any other corporation.

CONCLUSION

A careful review of the whole record demonstrates what may happen under the cloak of administrative authority. Mrs. Rees was a dedicated public servant who taught satisfactorily for five full years and accepted heavy extra-curricular activities for her school. In 1953, she briefly interested herself in a respected labor organi-

zation, The American Federation of Teachers, for which she was deprived of her job and career. A review of the whole record demonstrates that the defendants had absolutely no justification for their arbitrary action except to punish Mrs. Rees for union interests and to forewarn other teachers what might be their fate.²

We are daily reminded of the need for more teachers, certified teachers and higher educational standards. More and more tax dollars are being requested to support our public school program. By what prerogative may a school board seek additional millions to improve its program and at the same time frustrate its teachers as in this case? The tenure program which existed was the Murray School Board's own procedure. It should have observed its procedure with a greater propriety.

Now, while public opinion is highest, and thoughtful people are concerned about their public school program, this Court should reverse the lower Court's rulings dismissing the First and Second Causes of Action and remand the case for trial on the merits.

Respectfully submitted,

A. W. SANDACK
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Appellant*

2. Notwithstanding the contracts from 1949 through 1952 which provided that "you belong to the N.E.A., U.E.A. and Murray Teacher Association."