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1. CONTINUING CONTRACT — TEACHER IN PUBLIC SCHOOLS—QUALIFIED—SECTION 7690-2 G. C.—ENTITLED TO TENDER OF CONTRACT UNTIL ITS RECEIPT OR SURRENDER OF RIGHT EXPRESSLY OR BY CONDUCT THAT IN EQUITY WOULD BE AN ESTOPPEL TO ASSERT THE RIGHT.

2. TEACHER QUALIFIED FOR CONTINUING CONTRACT UNDER TEACHERS' TENURE LAW — WHERE BENEFIT DENIED BY BOARD OF EDUCATION, AND CONTRACT LATER GRANTED, TEACHER ENTITLED TO BE PAID AMOUNT HE WOULD HAVE EARNED UNDER SUCH CONTRACT, LESS AMOUNTS HE MAY HAVE EARNED, OR COULD HAVE EARNED DURING PERIOD CONTRACT WRONGFULLY WITHHELD, UNLESS NATURE OF HIS ACTS ESTOPPED HIM WITH ASSERTING SUCH CLAIM.

3. CONDUCT OF TEACHER FAILING TO ENFORCE HIS RIGHTS TO CONTINUING CONTRACT — DAMAGES BY REASON OF WRONGFUL WITHHOLDING OF CONTRACT — LACHES — ESTOPPED FROM ASSERTING RIGHTS — IN EACH CASE, PARTICULAR FACTS AND CIRCUMSTANCES QUESTION FOR DECISION OF CHANCERY COURT.

SYLLABUS:

1. A teacher in the public schools of Ohio, who is qualified by reason of the terms of the first proviso of Section 7690-2 of the General Code for the tender of a continuing contract, remains entitled to the tender of such contract until such time as he has either received such contract or has surrendered such right either expressly or by conduct of such nature that in equity he is estopped from asserting the right.

2. When a teacher, who has become qualified for a continuing service contract under the Teachers' Tenure Law, for a period of time, is wrongfully denied the benefit of such contract by the board of education and is later granted such contract, he is entitled to be paid the amount which he would have earned under such contract, had it not been withheld, less such amounts as he may have otherwise earned or with the use of reasonable diligence could have earned at other suitable employment in the period during which such contract was wrongfully withheld, unless, under the particular facts of his case, he has estopped himself from asserting such claim.

3. Whether the conduct of a teacher in failing to enforce his rights to a continuing contract or the damages by reason of wrongful withholding of a contract amounts to such laches as will estop him from asserting his rights is, in each case, a question to be decided by a chancery court upon the particular facts and circumstances there presented.

Columbus, Ohio, June 25, 1943.

Mr. Clarke B. Barbour, Acting Prosecuting Attorney,
Zanesville, Ohio.

Dear Sir:

You have submitted for my consideration and opinion a communication which reads as follows:

> "The Franklin Rural Board of Education by letter requested me to ask you for an opinion regarding the Teacher Tenure Act.
>
> An attorney for the teachers hereinafter mentioned wrote to the board in behalf of the teachers, demanding that continuing contracts be issued to his clients under favor of Section 7690-2, of the General Code of Ohio. I believe it best to copy herein that part of the letter pertaining to the facts and the questions asked which reads as follows:
>
> 'In May, 1941 Mrs. S. had completed 5 consecutive years of service as teacher of art in Franklin Rural School District. At that time she held a State Life Elementary Certificate dated September 1, 1940.
>
> Mrs. C. in May, 1941 had completed 6 consecutive years of service as teacher of music in the schools of Franklin District. She held at that time an Eight-Year Special Certificate in music, dated September 1, 1939.
>
> At this time the Franklin Board of Education had a resolution on its minute book against the employment or retention of married female teachers, and when during the summer of 1941 Mrs. S. and Mrs. C. were married, continuing contracts were not

tendered them by the Board. Neither of these teachers was present at the beginning of the 1941-1942 school year ready for work at their former duties.

During the school year 1941-1942 Mrs. C. was employed as teacher by the Muskingum County Board of Education, and did some substitute work in Franklin District Schools. Mrs. S. was employed part of the year 1941-1942 by the South Zanesville (Muskingum County) District Board of Education. During 1942-1943 Mrs. S. was employed as 5th grade teacher in the Duncan Falls School (Franklin District) under a one-year contract which was entered into on July 22, 1942. Mrs. C. was employed as a substitute teacher of music in the schools of Franklin District on October 14, 1942, to complete the school term. On March 29, 1943, on instructions from the Franklin Board of Education, Mr. H. C. S., Clerk of the Board, notified Mrs. S. and Mrs. C. in writing that "their services would not be required for the school year 1943-1944."

On July 22, 1942, the Franklin Board of Education had by resolution suspended its previous resolution against female married teachers for the duration of the war.

Mr. H. C. W.'s letter of March 27, 1943, was the first request made to the Franklin Board of Education by Mrs. C. and Mrs. S. for continuing contracts.

The Franklin Board of Education is hereby requesting through you that the Attorney General of Ohio render an opinion on this case as follows:

1. Must the Franklin Board of Education tender a continuing contract at this time to either Mrs. S. or Mrs. C?

2. If the answer to Question 1 is yes, are Mrs. S. and Mrs. C. entitled to salary compensation for the period not employed by the Board?

3. If the answer to Question 1 is no, may the Board employ either or both teachers under a one-year limited contract for 1943-1944?'

I would be pleased to receive your opinion on the three above questions asked by the Board of Education of Franklin Rural School District."

After submitting the above letter, there apparently was some correspondence carried on between Mr. W., who is the attorney representing Mrs. C. and Mrs. S., and the Franklin District Board, as well as yourself.

Later, in a letter addressed to me by you, you state that Attorney W., as counsel for Mrs. S. and Mrs. C., contended that the facts as stated by the Franklin District Board were not as he had understood them to be and requested that all the facts be submitted. Thereupon, you submitted a later letter signed by the Clerk of the Franklin District Board, wherein as you state, the Franklin Board feels that its later correspondence clarifies its original letter to you, and states all the facts in the case. In this letter of the Clerk, after referring to Mr. W.'s letter in which he contended that the facts regarding the attempt of his clients to secure continuing contracts had not been fully stated, continues in part:

> "We were assuming that Mr. W.'s letter of March 27, 1943, to the Franklin Board of Education (a copy of which was sent you) was part of the evidence to be considered. This letter related that Mrs. C. and Mrs. S. had stated repeatedly to Mr. S., local Superintendent, that they thought they were entitled to continuing contracts.
>
> The statement in our letter of March 31, 1943 to you, asking for an opinion on the status of Mrs. C. and Mrs. S. that Attorney W.'s demand for continuing contracts for his clients was the first request made to the Board of Education was intended to mean the first *formal* request made by Mrs. C. and Mrs. S. It is true, as stated in Attorney W.'s letter of March 27, that statements had been made to Mr. S., on several occasions that they felt that, under the law, they were entitled to continuing contracts. These statements were, on every occasion, brought to the Board's attention.
>
> In regard to the Board's statement that Mrs. C. and Mrs. S. were not 'present at the beginning of the 1941-42 school year ready for work at their former duties' was meant to mean that they were not at the school building at the opening of the school term. They were at their homes in the community at this time and they state that they were 'ready, willing and able to work'. It is true that the Board of Education had declared the positions vacant and had employed two teachers to fill the vacancies. * * *
>
> In the light of this additional information and the facts as previously stated in our letter to you of March 31, we ask that the Attorney General render an opinion on the matter.
>
> H. C. Seyerle, Clerk
> Franklin Rural Board of
> Education, Philo, Ohio."

You then state that with this additional information you desire my opinion with respect to the situation as requested in your original letter.

Upon all the facts as they appear in the several communications of the Board of Education of Franklin Rural School District, I gather that Mrs. C. and Mrs. S. under the first proviso of Section 7690-2, General Code, both qualified by reason of certification and years of service for continuing contracts on September 1, 1941, and if they had then pursued their claims, I have no doubt they each could have enforced them.

At that time Mrs. S. was the possessor of a life elementary certificate dated September 1, 1940, and had completed five consecutive years of service as teacher of art in Franklin Rural School District. Mrs. C. at that time held an eight year special certificate in music, which is known as a professional certificate, dated September 1, 1939, and had completed six consecutive years of service as teacher of music in the schools of Franklin District. In the case of State, ex rel. Bishop v. Board of Education, 139 O. S., 427, it is stated in the first syllabus:

> "Under the first proviso of Section 7690-2, General Code (119 Ohio Laws, 451), a part of the Ohio Teachers' Tenure Act, a teacher in the public schools holding a professional, permanent or life certificate, who was completing five or more consecutive years of employment by any board of education at the time of the passage of the act, was entitled to the tender of a continuing contract of employment by such board on September 1, 1941, or within a reasonable time thereafter."

And again, in the case of State, ex rel. v. Board of Education, 140 O. S., 512, it is stated in the syllabus of the case:

> "Under the first proviso of Section 7690-2, General Code (119 Ohio Laws, 451), a public school teacher, holding an elementary life certificate, who, near June 2, 1941, was completing more than five consecutive years of employment as a teacher by a board of education, was entitled to the tender of a continuing contract by such board on September 1, 1941, or within a reasonable time thereafter, for a position for which her certificate qualified her."

The fact that there may have been in force at the time a rule of the board of education against the employment of married women teachers did not absolve the board from tendering Mrs. S. and Mrs. C. continuing contracts. In the case of State, ex rel. Brown v. Board of Education of the City of Elyria, 139 O. S., 427, it is held as stated in the seventh syllabus of the case:

> "Under the first proviso of Section 7690-2, General Code, a certificated female teacher completing five or more continuous years of employment by a board of education was entitled to the tender of a continuing contract from such board on September

> 1, 1941, or within a reasonable time thereafter, even though she was then married and there was a rule of the board in force against the employment or retention of married women teachers."

In this connection your attention is also directed to my opinion which will be found in the reported Opinions of the Attorney General for 1941, at page 648, where it was held as stated in the fourth syllabus of the opinion:

> "A woman teacher who is qualified as to certification and years of service for continuing service status under the terms of the proviso or exception contained in the third paragraph of Section 7690-2, General Code, is entitled to the tender of a continuing contract on September 1, 1941, even though she be then married and there exists a rule of the board of education against the employment of married women teachers in the schools of its district."

A similar position was taken by the Court of Common Pleas in the case of Davidson v. The Board of Education of the City School District of the City of East Cleveland, 26 O. O. 142, which decision was affirmed by the Court of Appeals. The third paragraph of the syllabus of such opinion reads:

> "Female married teachers who possess the requisite qualifications are entitled to a continuing contract notwithstanding the fact that they were married prior to September 1, 1941 in violation of a rule of a board of education."

Under the circumstances presented in your inquiry it would seem that both Mrs. S. and Mrs. C. were entitled to the tender of continuing contracts on September 1, 1942 and it was the duty of the Franklin District Board of Education to tender such contracts to them.

It would appear from the facts stated in your inquiry that neither of such parties expressly waived their rights to the continuing contracts. However, the question arises as to whether one or the other, or possibly both of such persons, have lost their rights by reason of estoppel or laches.

In a matter of this kind, we may not at any time overlook the fact that under the plain terms of the law and the clear language of the Supreme Court, the burden of tendering continuing contracts to teachers who qualified therefor in pursuance of the said first proviso of Section 7690-2, General Code, rested upon the board of education. A teacher who qualified could rest upon his rights thus acquired and, unless he lost or forfeited them by some action amounting to a waiver or estoppel or an implied or express resignation, those rights continued especially

where he persistently continued to assert his claim, which so far as appears, is the case here.

In the absence of a statutory provision making a failure to take legal action for the enforcement of a right within a specified period a limitation on the thereafter bringing such action, it is impossible to say, as a matter of law, that the lapse of time alone would ripen into a waiver of the rights of a teacher to a continuing contract acquired by virtue of the provisions of Section 7690-2 of the General Code. As stated in 16 O. Jur. 266:

> "The determination of what constitutes laches is one of those matters in which the sound judicial discretion of the chancellor plays a relatively important part, because no universal rules can be formulated, but the question is predominantly one of fact, to be resolved in each case according to its special circumstances."

In the case of State, ex rel. Swartley v. Kalina, City Treasurer, 46 O. App. 19, the court had before it a question of whether a person who is wrongfully deprived of civil service employment through his replacement by another employe is entitled to be restored to his position and compensation during the time he was wrongfully deprived of his employment. In that case the employe did not bring any action to restore himself to his former position and did not bring an action to recover his compensation for approximately a year, at which time he sought a writ of mandamus to compel the restoration of his job and to recover his compensation. The court held in the second and fourth branches of the syllabus as follows:

> "2. One permitting another to hold city job, to which former claimed to be entitled under civil service rule, for over year, without doing anything except to protest and demand appointment thereto orally, *held* not entitled to writ of mandamus.
> * * *
>
> 4. Municipal officer, wrongfully suspended or discharged, may deprive himself of right to recover salary on ground of waiver and estoppel by acquiescence in such action."

As to your second inquiry relative to whether or not Mrs. C. and Mrs. S. are entitled to compensation for the period during which they were entitled to continuing service status but which had been denied them by reason of the failure of the Franklin District Board of Education to tender continuing contracts to them, I assume, for the purposes of this opinion, that such contracts would have been accepted by them had they been tendered.

The only case involving a like question that has come to my attention arose in Portage County, and was decided by the Common Pleas Court for that county. In a short memorandum opinion it was held that a teacher who had been tendered a continuing contract which the court later found to be her due, should be paid for time lost on account of her not having been tendered a continuing contract at the proper time in pursuance of Section 7690-2, General Code. The case is not officially reported. In the case of Cleveland v. Luttner, 92 O. S. 493, it was held that a police officer who had been unlawfully ousted from office and later restored thereto by order of court should recover his salary, less the amount he otherwise earned in the exercise of due diligence during the period he had been wrongfully ousted. Although in the Luttner case the rights of a public officer were involved, I believe the same principle applies to the holder of any public position and that in the instant case the principle involved in the Luttner case is controlling. In the course of the court's opinion in the Luttner case, it was said:

> "The constitution of Ohio guarantees to everyone redress for any injury done him in his land, goods, person, reputation, etc., and assures him remedy by due course of law and that justice shall be administered without denial or delay. If the public servant, a policeman in this case, be wrongfully dismissed from public office, he should have the same remedy for such wrong as a private servant for any wrong done him in his employment. The theory in both cases should be to make the wronged party whole; that is, to reimburse him for his loss. The mere fact that the wronging party employs or appoints some one else during the period of wrongful ouster should not excuse him for the full measure of his duty and liability."

There was a strong dissenting opinion in that case by Judge Jones, and on several subsequent occasions the soundness of the decision has been questioned. However, it has not been overruled, and was referred to with approval by Judge Williams, in the comparatively recent case of State, ex rel. Giovanello v. Village of Lowellville, 139 O. S. 219, when he said:

> "It is the general rule in Ohio that one who is unlawfully ousted and excluded from a position is not entitled to a writ of mandamus to compel the payment of salary covering a period for which another has filled the position and received the emoluments * * *. But the wrongfully ousted claimant is relegated to an action at law. City of Cleveland v. Luttner, 92 O. S., 493."

As I have above pointed out, the question as to whether either or both of the teachers in question have lost their right to back compensation by reason of the failure to enforce their right by an action at law, or,

in other words, have lost the rights which they possessed by reason of equitable estoppel or laches, must be decided by the court on the facts of each individual case. The court would take into consideration whether or not by their failure to act during the periods in question permitted the board of education to assume and incur additional obligations which they would not have otherwise incurred and whether such additional obligations were incurred by reliance upon the fact that no action was contemplated, and further, whether the board of education could right the wrong done to the two teachers in question without unduly burdening the taxpayer who probably was not cognizant of the fact that such teachers were entitled to the continuing contracts or that they were withheld. In other words, the court of equity might well apply the equitable maxim that where one of two innocent parties must suffer from a wrong, that person who put it within the power of the wrongdoer to perform the wrongful act must suffer the damage; that is, the teacher rather than the taxpayer.

In view of the fact that the Attorney General is not a court and that the entire picture is not before me, I am unable to say that either of the teachers in question is or is not estopped from asserting her claim for salary during the time she should have but did not possess continuing contract.

Specifically answering your inquiries, it is my opinion that:

1. A teacher in the public schools of Ohio, who is qualified by reason of the terms of the first proviso of Section 7690-2 of the General Code for the tender of a continuing contract, remains entitled to the tender of such contract until such time as he has either received such contract or has surrendered such right either expressly or by conduct of such nature that in equity he is estopped from asserting the right.

2. When a teacher, who has become qualified for a continuing service contract under the Teachers' Tenure Law, for a period of time, is wrongfully denied the benefit of such contract by the board of education and is later granted such contract, he is entitled to be paid the amount which he would have earned under such contract, had it not been withheld, less such amounts as he may have otherwise earned or with the use of reasonable diligence could have earned at other suitable employment in the period during which such contract was wrongfully withheld, unless, under the particular facts of his case, he has estopped himself from asserting such claim.

3. Whether the conduct of a teacher in failing to enforce his rights to a continuing contract or the damages by reason of wrongful with-

holding of a contract amounts to such laches as will estop him from asserting his rights is, in each case, a question to be decided by a chancery court upon the particular facts and circumstances there presented.

Respectfully,

THOMAS J. HERBERT,
Attorney General.