Opinion No. 124

State Board of Education, Regulations of—Contracts—Tenure of University Staff Members—Termination of Contract of Assistant Professor.

Held: A notice of non-renewal of a contract of an assistant professor given by the chief executive of the institution and approved by the Chairman of the Board of Education is, during the time the office of Chancellor is vacant, in substantial compliance with regulation 5 of the State Board of Education.

October 2nd, 1952.

Miss Mary M. Condon
Superintendent of Public Instruction
State Capitol Building
Helena, Montana

Dear Miss Condon:

You requested my opinion concerning the contract of an assistant professor at Eastern Montana College of Education. You advised me that the assistant professor was under a one year term contract. You also stated that she has not been under contract for three years. Notice was given to her that her contract would not be renewed by the president of the institution with the approval of the Governor as Chairman of the Board of Education.

The problem presented calls for an interpretation of regulation No. 5 adopted by the State Board of Education and incorporated in the contract signed by the assistant professor. This regulation reads as follows.

"At the expiration of the term of appointment of a professor or an associate professor, if appointed for a limited term, or of an assistant professor, lecturer, instructor, or assistant, there is no obligation whatever to renew the appointment, and without renewal the appointment thereupon lapses and becomes void. In every case of such non-renewal of appointment, official notice thereof shall be given by the chief executive of the institution, station, or division, with the approval of the Chancellor, not later than April 15th; provided, that a notice given ninety days prior to the expiration of the contract shall be sufficient in case of the non-renewal of the appointment of any member of the Agricultural Extension Staff."

From the above quoted regulation it appears that a term contract lapses and becomes void if not renewed. However, the regulation also requires that the chief executive of the institution give notice that the contract will not be renewed and such notice must have the approval of the Chancellor. As we know, there is not a Chancellor in Montana as the present time, and as a consequence the approval by the Governor as Chairman of the Board of Education would seemingly be sufficient as it would be unreasonable to preclude a unit of the university from terminating a contract because there is not an incumbent in the office of Chancellor. As I observed before, the notice must be given by the chief executive of the institution and approved by the Chancellor. This is required under the regulation, rather than a notice by the Chancellor. In State ex rel. Keeney vs. Ayers, 108 Mont. 547, 92 Pac. (2d) 306, our Supreme Court considered regulation No. 5 and recognized the sufficiency of a notice of termination given by the president of the institution. It is my understanding the assistant professor does not contend that she did not receive notice in ample time, but does contend that there being no Chancellor she can never receive a notice of non-renewal. Such a contention, if it were valid, would mean that any assistant professor who received a term contract for one year would thereby secure permanent tenure.

The subject of a permanent appointment is within rgulation No. 2, which reads as follows:

"Professors and associate professors are on permanent appointment; provided, however, that the initial appointment to a full professorship may be for a limited term. Such limited term appointment may be renewed; provided, however, that reappointment, after three years of service shall be deemed a permanent appointment."

Because she is an assistant rather than an associate professor, she cannot secure permanent tenure by three years of service. However, the acquisition of a permanent appointment is relevant to the issues involved in her case.

In State ex rel. Keeney vs. Ayers, supra, the court interpreted regulation No. 2 which held that any reappointment after three years of service constituted a permanent appointment. The distinction between a temporary and permanent appointment was expressed by the court in the following manner.

> "In this connection it should be emphasized that the only difference between a temporary and a permanent appointment under the rules is that as to the former, "without renewal the appointment thereupon lapses and becomes void" automatically and without hearing, and upon mere notice thereof (Regulation 5), which was given; whereas in the case of a permanent appointment, the employment automatically continues, unless terminated after an investigation and a hearing, as provided in regulations 7 and 8. The difference is thus not in the length of the tenure, but in the nature of it—whether terminable with or without an investigation and hearing."

If it were held that a temporary appointment could be terminated only by a notice which had the Chancellor's approval, then, so long as there is a vacancy in the office of Chancellor, a temporary appointment would in fact be a permanent appointment with permanent tenure and terminable only after an investigation and a hearing before the Committee on Service. Such an interpretation would nullify that part of regulation No. 5 which states in regard to a term appointment that "there is no obligation whatever to renew the appointment, and without renewal the appointment thereupon lapses and becomes void." A rule of construction which is of assistance here is found in the case of Egner vs. States Realty Company, 223 Minn. 305, 26 N. W. (2d) 464, where the court said:

> "Unless required by the contract as a whole, no construction of a subsidiary provision is permissible which runs counter to and is in frustration of the dominant purpose of the contract."

In applying this rule the portion of regulation No. 5 which requires notice of non-renewal be given by the chief executive of the institution with the approval of the Chancellor should not be given such a strict interpretation as to preclude the giving of notice during the vacancy in the office of Chancellor. In Snider vs. Carmichael, 102 Mont. 387, 58. Pac. (2d) 1004, the court said, concerning a contract, that "it must be so interpreted as to give effect to the intention of the parties at the time contracting." The intention of the parties in the contract under consideration was not to give her permanent tenure when she was employed for one year and in fact the limited term given is in derogation of permanent status.

A reasonable method was used in giving notice of non-renewal and the fact the Chairman of the Board of Education approved the notice in place of the Chancellor in no way injured her.

The fact the Committee on Service investigated and considered the non-renewal of her contract is not material as under regulation 7 and 8 such committee has jurisdiction to investigate proposed removals and suspensions of instructional and scientific staff members and here our problem is that of a legal nature.

It is, therefore, my opinion that a notice of non-renewal of a contract of assistant professor given by the chief executive of the institution and approved by the Chairman of the Board of Education is, during the time the office of Chancellor is vacant, in substantial compliance with regulation 5 of the State Board of Education.

Very truly yours,
ARNOLD H. OLSEN
Attorney General