

en banc, and that the foregoing seven (7) typewritten pages constitutes a true and correct transcript of the Opinion of the Court in the above entitled cause.

Dated: February 14, 1968.

Evelyn Alguire  
Official Court Reporter

700624.6

**TEACHERS' TENURE:** Discontinuance of services by teacher on continuing tenure.

A teacher on continuing tenure and not under contract who withholds his services because of a labor dispute has not thereby discontinued his services as provided in Article V, Sec. 1 of the tenure of teachers act.

No. 4704

June 24, 1970.

Hon. Edgar A. Geerlings  
State Representative  
The Capitol  
Lansing, Michigan

You have requested my opinion on the following questions:

1. May a teacher on continuing tenure, who is not under contract and who withholds his services as the result of a labor dispute, be replaced permanently and without further legal obligation by a school district for discontinuing his services in a manner other than as provided by Article V, Section 1 of the Michigan tenure of teachers act?

2. If the answer to the first question is "yes," must a hearing as provided in Article IV of the tenure of teachers act, or any other hearing, precede a dismissal under such circumstances?

Act 4, P.A. 1937 (Ex. Sess.), as amended, being M.C.L.A. § 38.71 et seq.; M.S.A. 1968 Rev. Vol. § 15.1971 et seq., is known as the tenure of teachers act.

The tenure of teachers act, supra, was enacted to reduce the large turnover in the teaching profession and its provisions must be interpreted against the background of the evils sought to be remedied. One of the purposes of the tenure of teachers act, supra, was to prescribe rules of administrative action for school boards as to the discharge of teachers which would insure a greater degree of security to teaching employees. *Wilson v. Flint Board of Education* (1960), 361 Mich. 691.

In Article III, Section 1 of the tenure of teachers act, supra, the legislature has provided that upon satisfactory completion of the probationary period specified in the act, a teacher shall be continuously employed by the board of education of the school district where he completed his probation and shall not be dismissed or demoted except as specified in the act. Thereafter, the status of such teacher is one of a teacher on continuing tenure.

A teacher on continuing tenure may be discharged only for reasonable and just cause as provided in Article IV, Section 1 of the tenure of teachers

act, supra, and only after written charges, notice, hearing and determination as set forth in Article IV of the tenure of teachers act, supra.

However, a teacher on continuing tenure may forfeit his rights to continuing tenure if he discontinues his services with his controlling board of education without compliance with Article V, Section 1 of the tenure of teachers act, supra. This section of the act provides:

"Section 1. No teacher on continuing tenure shall discontinue his services with any controlling board except by mutual consent, without giving a written notice to said controlling board at least sixty [60] days before September first [1st] of the ensuing school year. Any teacher, discontinuing his services in any other manner than as provided in this section shall forfeit his rights to continuing tenure previously acquired under this act."

A reading of the terms employed by the legislature in Article V, Section 1 of the tenure of teachers act, supra, fails to reveal any legislative intent to forfeit the rights of a teacher on continuing tenure without a contract, who withholds services because of a labor dispute.

Such a reading of Article V, Section 1 of the tenure of teachers act, supra, is supported by the decision of the Michigan Supreme Court in *School District for the City of Holland v. Holland Education Association* (1968), 380 Mich. 314. In the *School District for the City of Holland* case, supra, the school teachers not under contract with the school district withheld their services because of a labor dispute. The school district sought and obtained a temporary injunction from the Circuit Court restraining the school teachers from withholding their services and their teacher organization from encouraging, inducing or persuading teachers to strike.

It was contended by the teachers withholding services that because they were not under contract with the school district, they were not employees of the school district. The majority of the court held that the teachers temporarily withholding their services because of a labor dispute were, nevertheless, employees of the district even though not under contract with the school district.

Thus, such persons were public employees within the meaning of the provisions of Act 336, P.A. 1947, as amended, being M.C.L.A. § 423.201 et seq.; M.S.A. 1968 Rev. Vol. § 17.455(1) et seq. It is noted that Section 1 of Act 336, P.A. 1947, supra, defines the term "strike" as the stoppage of work or the absence, in whole or in part, of performing one's duties for the purpose of inducing or influencing a change in the conditions or compensations, or the rights, privileges or obligations of employment, and Sec. 2 thereof forbids persons holding positions by appointment or employment in the public school service from striking. Having found the teachers of the Holland School District employees of the district, even though they were temporarily withholding their services, the majority of the court dissolved the temporary restraining order enjoining the withholding of such services in the absence of a factual showing that the board of education of the school district was bargaining in good faith, whether an

injunction should issue, if any, upon what terms, and remanded the case to the trial court for proofs in this regard.

The clear import of the holding of the Michigan Supreme Court in the *School District for the City of Holland* case, supra, is that teachers who are not under contract and who withhold their services as the result of a labor dispute remain as employees of the district. If they are considered employees for the purposes of Act 336, P.A. 1947, supra, there is no valid basis to conclude that they are not also employees of the school district for the purposes of the tenure of teachers act, supra. It must follow that such teachers have not discontinued their services contrary to Article V, Section 1 of the tenure of teachers act, supra.

This conclusion is also supported by *McAleer v. Jersey City Incinerator Authority* (N.J. Sup. Ct. App. Div. (1963), 190 Atl 2d 891. In *McAleer*, supra, at issue was whether or not an employee who was involved in a labor dispute terminated his employment by his act of withholding services so that he could not avail himself of the benefits of a veterans tenure act which provided that a qualified employee could not be removed from his employment without a hearing. The New Jersey Appellate Court held that the termination of employment is a matter of intent and that participation in the labor dispute was no indication in fact or in law of any intent of terminating employment. Indeed, the act of withholding services in the context of the labor dispute belied any such intent. Even though the employee participated in the strike against a public body, the court held that such participation did not constitute either a voluntary termination of the public employment, an abandonment of the employment, or a forfeiture of the rights of the employee under the veterans tenure act.

Moreover, when Article V, Section 1 of the tenure of teachers act, supra, speaks in terms of "discontinuance," such act of discontinuance of services must be in the nature of termination of employment with an intention to sever the employer-employee relationship. In *State, ex rel Brown v. Hatley, et al* (N.M. 1969), 450 Pac. 2d 624, the New Mexico Supreme Court held that the resignation of a teacher is in the nature of a termination of employment and is ineffective without an intention on the part of the teacher to sever the employer-employee relationship. It has also been held that a teacher who tendered her resignation for the purpose of avoiding the tenure law upon definite understanding she would be reemployed did not intend to terminate the employer-employee relationship so that her resignation was ineffective. *Sherman v. Board of Trustees of Siskiyou Union High School* (Cal. Ct. of App. 1935), 49 P 2d 350.

Therefore, in response to your first question, it is my opinion that a teacher on continuing tenure not under contract who withholds his services as a result of a labor dispute has not discontinued his services within the meaning of Article V, Section 1 of the tenure of teachers act, supra.

Your first question is answered in the negative.

In view of answer to your first question, I find it unnecessary to reply to your second inquiry.

FRANK J. KELLEY,  
*Attorney General.*