
(You must insert the name
of your attending physician
here)

(Your attending physician
must sign here)

IF YOU DO NOT HAVE AN ATTENDING
PHYSICIAN—SECURE THE SIGNATURE OF A
REGISTERED ELECTOR OF YOUR VOTING DISTRICT
NOT RELATED TO YOU BY BLOOD OR MARRIAGE.

I declare that I am not related to the above applicant, that I
am a registered voter of the voting district of the applicant and
that the facts above regarding disability or illness are true to
the best of my knowledge and belief.

(Signature of Registered Elector Executing Declaration)

In our judgment, the foregoing conclusively demonstrates
a carefully designed legislative plan distinguishing between
absentee ballots issued to electors who will be absent from their
county of residence due to duties, occupation or business, and
electors who will be present in their county, but unable to
attend their polling place due to illness or physical
disability. We also find that the legislature imposed specific
conditions for the issuance of the absentee ballot for illness or
physical disability, viz., (1) identification of the illness or
disability, and (2) signature of applicant's attending physician
confirming the illness or disability, or (3) signature of a
non-related elector confirming the illness or disability.

To conclude that an absentee ballot issued in reliance upon
the elector's statement that he intends to be absent from the
county converts itself into an absentee ballot issued for use of
an ill or disabled elector flies in the face of the clear mandate of
the legislature and totally frustrates the legislative intention to
require compliance with certain conditions as a prerequisite to
the issuance of absentee ballot for the ill or disabled. As a
matter of law, the county board of elections would have no
right to issue an absentee ballot in reliance on an incomplete
application; and we conclude as a matter of law that this Court
has no right by legal legerdemain to convert an "absence from
county" absentee ballot to an "illness or physical disability"
absentee ballot.

We therefore, find no merit in the petitioner's second or
alternate contention.

The petitioner asserts as his first alternate theory that the
challenger failed to sustain the burden of proving that the
absentee electors were in Franklin County and able to attend
their polling place on November 8, 1977. (Underlining
ours) Counsel for petitioner has, however, conceded, and the
evidence conclusively establishes that both Mrs. Zimmerman
and Mrs. Secrist were, in fact, seen at or near their home on
election day at a time when the polls were open. In the light of
this concession, the type of absentee ballot applied for, and our
conclusion that absentee ballots are not "convertible", we are
persuaded that the physical ability or inability of the electors to
attend the polls was irrelevant, and the county board of
elections correctly sustained the challenges.

However, to avoid any misapprehension as to the position
taken by this Court, we are also of the opinion that the
evidence presented by the challenger did support the conclusion
of the county board that the absentee electors were able to
appear personally at the polls on November 8, 1977, and that
the board was guilty of no mistake of law, no clear abuse of
discretion and no capricious disregard of the testimony. The
Franklin County Election Board sat as the trier of fact in this
case. It is hornbook law that the judge of the facts must weigh
the credibility of the witnesses and may believe all, some or
none of the evidence presented. It is neither the duty nor the
right of this Court to substitute its judgment for that of the
board.

We, therefore, dismiss the petitioner's second major
challenge to the decision of the Franklin County Board of
Elections.

Editor's Note—

This case has been appealed to the Commonwealth Court. See 2465 C.D. 1977.

NOLDER v. CHAMBERSBURG AREA SCHOOL DISTRICT,
C.P. Franklin County Branch, No. 74 November Term, 1975,
No. 75 November Term, 1975

*School Code - Hiring - Temporary professional employee - Permanent
Substitute - Temporary Substitute*

1. Representations concerning matters of hiring by school administrators
are not binding upon the board of school directors nor can the terms of a
teacher's employment be supplemented or enlarged by actions of school
district officials.

2. The authority to employ teachers is a discretionary authority vested exclusively in the boards of directors of school districts.

3. A temporary substitute teacher's status does not automatically ripen into temporary professional employee status.

Thomas W. Scott, Esq., Counsel for Plaintiff

Jan G. Sulcove, Esq., Counsel for Defendant

DECISION AND ADJUDICATION

KELLER, J., March 7, 1978:

This action in mandamus was commenced on October 2, 1975, and at the same time the plaintiff filed an "Appeal and Exceptions to Adjudication" under the Local Agency Law. By stipulation of counsel at the pre-trial conference held October 31, 1977, it was agreed that the merits of the case would be presented in the mandamus action above captioned, and counsel and the Court would disregard plaintiff's proceeding under the Local Agency Law. The case was tried on January 23, 1978.

We enter the following Findings of Fact:

1. The plaintiff is a graduate of Shippensburg State College with the requisite qualifications to teach in the public schools of Pennsylvania.

2. On February 16, 1973, the plaintiff applied for the position of history or social studies teacher at the Middle School, Junior High School or Senior High School of the Chambersburg Area School District.

3. In the Fall of 1974, the plaintiff applied for placement on the substitute teachers' list maintained by the defendant and was thereafter an "on call" substitute teacher at the Chambersburg Area Senior High School, when called. As a daily substitute, the plaintiff was paid \$40.00-\$42.00 per diem, Step 1 on the salary scale, but received no fringe benefits.

4. At the beginning of the 1974-1975 school year, Dorothy Bangs, John Osen and Lee Powell were professional employees of the defendant employed as district school psychologist, senior high school guidance counselor and senior high school social studies teacher respectively.

5. Prior to November 25, 1974, Dorothy Bangs sustained injuries in an accident which prevented her from serving as

district school psychologist for an indefinite but extended period of time.

6. John Osen was transferred to the position of district school psychologist, and Lee Powell was transferred to employment as senior high school guidance counselor by action of the defendant School Board on December 4, 1974. This created a teaching vacancy in the senior high school social studies department.

7. On November 25, 1974, the plaintiff was interviewed by Dr. Robert W. Kochenour, Superintendent of defendant, and Dr. William A. Robinson, Principal of the senior high school for employment as a substitute senior high school social studies teacher for the remainder of the school year to fill the position occupied by Lee Powell.

8. The plaintiff was not told he was being hired as a temporary professional employee or that he could anticipate that his employment would extend beyond that school year. The plaintiff was offered three years' credit for military service and prior teaching to permit him to start at Step 6 on the salary scale. He was also granted transfer of "sick days", given "personal days" and other fringe benefits.

9. The plaintiff accepted the employment offer and commenced teaching on November 26, 1974. The plaintiff did not have a full teaching schedule. He taught the three World Culture classes taught by Lee Powell, but not the two biology classes. The plaintiff was directed to fill-in and teach other classes if the assigned teacher was absent due to sickness, doctor's appointments or other reasons.

10. At the December 4, 1974 meeting of the defendant's School Board, the Superintendent recommended the plaintiff be hired as a substitute teacher for the remainder of the school year as a substitute for Mr. Powell.

11. The minutes of the School Board meeting of December 4, 1974, state inter alia:

"Elections On a motion by Mr. Jacobs, seconded by Mr. Elliott, voting yes: Gayman, Jacobs, Helman, Nuernberger, Karper, Shreiner, Elliott, Rife, Kelley, the following were elected as temporary professional employees or professional employees as noted:

"c. Mr. Robert R. Nolder, R.D.#8, Box 478, Chambersburg, Pa., was elected as a substitute to teach social studies at the

senior high school effective November 26, 1974, at a salary based on Step 6 of the bachelor's degree salary schedule. Mr. Nolder will be substituting for Mr. Powell."

12. On December 5, 1974, Superintendent Kochenour wrote to the plaintiff:

"It is my pleasant duty to advise you that your selection was confirmed by the Board of School Directors at its meeting held on 4 December 1974. We are very pleased to have you serve as a substitute social studies teacher for the period 26 November 1974 through the close of the current school term.

"Kindly have the enclosed Verification of Teaching Experience forms completed and returned to this office.

"If you have any questions about your assignment, do not hesitate to get in touch with me."

13. The plaintiff received the Superintendent's letter and conferred with the Superintendent's secretary concerning the fact that he had received no contract. The secretary satisfied his concern over the absence of a contract.

14. All teaching employees of defendant, except daily substitutes, receive the same sick leave, leave benefits, and are paid according to the salary scale.

15. Pamela J. Erickson was the chairwoman of the senior high school social studies department during the 1974-1975 school year. At no time during the school year was she aware of the plaintiff's employment status. In the discharge of her responsibility for supervision of department members, she treated plaintiff the same as other members of the department and prepared classroom visitation reports on January 13, 1975, and May 5, 1975. The plaintiff's overall adjectival rating was "satisfactory" on both reports.

16. Mrs. Erickson, for reason unknown to her at the time of trial, assumed that the plaintiff needed one more year of satisfactory teaching service to receive tenure, i.e., she assumed

he was a temporary professional employee; and recommended on her May 5th report that he be "given one more year on probation". She also assumed he would return for the 1975-1976 school year and prepared a room and class schedule which included the plaintiff.

17. From communications with Mrs. Erickson, the plaintiff believed he was a permanent member of the teaching staff.

18. On January 24, 1975, the Superintendent of defendant rated the plaintiff "satisfactory" on a rating card bearing the plaintiff's name, school and subject. In small print on the card appears inter alia: "Temporary and Professional Employee's Rating Card". At the top of the card in large type appears: "(11/26/74-Sub. for Powell)". The plaintiff received a copy of the card in the school mail near the end of January 1975. The plaintiff acknowledged that the typewritten insertion at the top of the card meant he was a substitute for Mr. Powell, and that concerned him.

19. On June 13, 1975, the Superintendent of defendant rated the plaintiff "satisfactory" on a rating card identical to that referred to in Finding No. 18. Under the "Detailed Appraisal" the plaintiff was rated "unsatisfactory" in "Classroom Generalship" in the "Technique" column and "Habits of Conduct" in the "Pupil Reaction" column.

20. In June 1975, the plaintiff discussed the June 13, 1975, rating card with the senior high school principal, Dr. Robinson, and inquired as to his future employment in the school district and the effect the "unsatisfactory" marks would have on that employment. The plaintiff was told that as far as the principal was concerned, he was a member of the teaching staff of the senior high school.

21. The senior high school principal had not been present at the December 4, 1974, school board meeting, had not read the minutes of that meeting and had not received a copy of the Superintendent's letter of December 5, 1974 to the plaintiff; and at the time of the June 1975 meeting with the plaintiff, he had forgotten that the plaintiff was hired as a substitute.

22. After receiving an inquiry from the Superintendent's Office and reviewing the employment status of the plaintiff, Dr. Robinson notified the plaintiff by telephone in July 1975 that he had been hired as a substitute until the end of the 1974-1975 school year, that he would not be recommended for rehiring, that other applicants for the position would be considered, and that he would not be returning as a social studies teacher.

LEGAL NOTICES, cont.

- Bonebrake Second and final account, statement of proposed distribution and notice to the creditors of Katherine E. Mentzer, Executrix of the estate of Gail M. Bonebrake, late of the Borough of Waynesboro, Franklin County, Pennsylvania, deceased.
- Bonebrake First and final account, statement of proposed distribution and notice to the creditors of Katherine E. Mentzer & Mildred B. Harshman, Executrices of the estate of Linnie G. Bonebrake, late of the Borough of Waynesboro, Franklin County, Pennsylvania, deceased.
- Chambers First and final account, statement of proposed distribution and notice to the creditors of Ronald S. Chambers, Administrator of the estate of Martha S. Chambers, late of the Borough of Chambersburg, Franklin County, Pennsylvania, deceased.
- Fisher First and final account, statement of proposed distribution and notice to the creditors of Howard Fisher, Executor of the last will and testament of Annie M. Fisher, late of Peters Township, Franklin County, Pennsylvania, deceased.
- Gordon First and final account, statement of proposed distribution and notice to the creditors of Bessie E. Diffenderfer & Rhoda Wood, Executrices of the estate of Elsie M. Gordon, late of Montgomery Township, Franklin County, Pennsylvania, deceased.
- Grove First and final account, statement of proposed distribution and notice to the creditors of Mabel H. Grove, Executrix of the last will and testament of Harry E. Grove, late of the Borough of Shippensburg, Pennsylvania, deceased.
- Pugh First and final account, statement of proposed distribution and notice to the creditors of The Chambersburg Trust Company, Executor of the estate of Edna E. Pugh, late of The Borough of Chambersburg, Franklin County, Pennsylvania, deceased.
- Suders First and final account, statement of proposed distribution and notice to the creditors of Helen M. Suders, executrix of the estate of Paul L. Suders, late of the Borough of Chambersburg, Franklin County, Pennsylvania, deceased.

GLENN E. SHADLE
Clerk of the Orphans' Court
Franklin County, Pennsylvania

(4-7, 4-14, 4-21, 4-28)

23. On the first day of the 1974-1975 school year, the plaintiff reported for work at the Chambersburg Area Senior High School and was informed there was no teaching position for him.

24. The plaintiff testified that he believed on and after November 25, 1974, that he had been employed as a temporary professional employee to fill a permanent teaching position. Despite the Superintendent's letter of December 5, 1974, and the notation "(11/26/74-Sub. for Powell)" appearing of his rating cards, the plaintiff did nothing to definitely ascertain his employment status or to put the defendant on notice that he believed his status to be anything but that reflected on the records of the defendant.

25. In February 1975, the defendant's Superintendent was advised by Dorothy Bangs that she would be unable to return to her employment "during this semester", i.e., the remainder of the 1974-1975 school year but was looking forward to her return for the 1975-1976 school year. Mrs. Bangs was on sick leave until it was exhausted and then on leave without pay.

26. Dorothy Bangs returned to her employment for the 1975-1976 school year. John Osen and Lee Powell remained in their respective positions as school psychologist and high school guidance counselor.

27. On November 25, 1974, the only vacancy in the senior high school social studies department was the position previously occupied by Lee Powell.

28. In the Summer of 1975, there were two vacancies in the senior high school social studies department, one of which had previously been filled by the plaintiff as substitute for Lee Powell.

29. The defendant recognizes as categories of teachers: (1) professional employees, (2) temporary professional employees, (3) permanent substitutes and (4) temporary or term substitutes.

30. A permanent substitute is hired by the defendant by that designation and is a temporary professional employee, who acquires tenure and professional employee status after two years satisfactory service. A permanent substitute is not hired to fill a specific vacancy, but rather to be assigned to vacancies such as sabbatical or maternity leaves as they develop.

31. A term or temporary substitute is employed by the defendant as a substitute for a professional or temporary professional who is absent. The employment may be for a specified term or as needed.

DISCUSSION

Section 1101 of the Public School Code of 1949 P.L. 30, Art. XI, as amended, 24 P.S. 11-1101 provides:

“(1) The term ‘professional employee’ shall include those who are certified as teachers, supervisors, supervising principals, principals, assistant principals, vice-principals, directors of vocational education, dental hygienists, visiting teachers, home and school visitors, school counselors, child nutrition program specialists, school librarians, school secretaries the selection of whom is on the basis of merit as determined by eligibility lists and school nurses.

“(2) The term ‘substitute’ shall mean any individual who has been employed to perform the duties of a regular professional employe during such period of time as the regular professional employe is absent on sabbatical leave or for other legal cause as authorized and approved by the board of school directors or to perform the duties of a temporary professional employe who is absent.

“(3) The term ‘temporary professional employe’ shall mean any individual who has been employed to perform, for a limited time, the duties of a newly created position or of a regular professional employe whose services have been terminated by death, resignation, suspension or removal.”

In the case at bar there was no “newly created position” and no “regular professional employee whose services have been terminated by death, resignation, suspension or removal” which would be the conditions precedent to the appointment of a temporary professional employee. Instead Mrs. Bangs was on sick leave and then leave without pay as a result of injuries suffered in an accident. To fill the vacancy created by her leave, the school board transferred Osen to her position and Powell to Osen’s. In our judgment this would constitute an absence by Powell from his regular assigned position for the 1974-1975 school year for “legal cause authorized and approved by the board of school directors”. See *Gorski v. Dickson, City Borough School District*, 178 Pa. Super. 158 (1955).

As a matter of law the defendant’s school board could not on December 4, 1974, hire any employee to fill the position of Mr. Powell except as a substitute. The school board did precisely what the School Code permitted it to do when it elected the plaintiff “as a substitute to teach social studies...”, and noted he would be substituting for Mr. Powell. Concluding that the plaintiff was hired as a substitute, we do also conclude he had no expectancy or right of continued employment, and no right to a hearing before his employment was terminated or before another teacher was employed to teach in the social studies department.

The plaintiff contends that the school board’s use of the words “elected as temporary or professional employees as noted” in the recital preceding paragraph (c), wherein the plaintiff was elected as a substitute, conclusively establishes his employment as a temporary professional employee. We are not persuaded that the general language of the recital controls the specific language of the operative provision. See *Neal D. Ivey Company v. Franklin Associates, Inc.*, 370 Pa. 225, 231, 232 (1952).

The plaintiff has urged us to conclude that representations made to him by various members of the defendant’s administration gave him a reasonable expectation of continued employment binding upon the defendant school board. As indicated by our Findings of Fact, only the statement of Dr. Robinson that plaintiff was a member of the senior high school teaching staff, the recommendation of Mrs. Erickson that he be given one more year on probation, and the preparation of the 1975-1976 room and class schedule, including the plaintiff, by Mrs. Erickson, even remotely approach being representations by the school administration. When these incidents are considered in the context in which they occurred, we are satisfied that they do not rise to the level of representations upon which the plaintiff could rely. Further, as a matter of law, we know of no authority and plaintiff has provided us with none that would make representations concerning matters of hiring by school administrators binding upon the board of school directors. In *Commonwealth ex rel. Hetrick v. Sunbury School District*, 335 Pa. 6, 10 (1939), the Supreme Court of Pennsylvania held that the terms of employment of a teacher cannot be supplemented or enlarged by actions of officials of the school district.

Finally, the plaintiff has contended that even if he was originally employed as a substitute, his substitute status ripened into temporary professional employee status by reason of the existence of two vacancies in the social studies department by the Summer of 1975. This precise issue was presented to the

Commonwealth Court in *Tyrone Area Education Association v. Tyrone Area School District*, 24 Commw. Ct. 483 (1976), and that court held, "Appellant's employment cannot ripen into the status of a temporary professional employe" (p. 486). This decision is dispositive of plaintiff's contention.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and the subject matter.
2. No vacancy was created in the social studies department of the Chambersburg Area Senior High School on or about December 4, 1974, by reason of the intraschool transfers of John Osen and Lee Powell, which would permit the employment of a temporary professional employe.
3. The plaintiff was hired as a substitute for Lee Powell who was absent from his assigned teaching position with the approval of the defendant's board of school directors.
4. The plaintiff, as a substitute teacher, had no quasi-tenure or reasonable expectation of continued employment.
5. Subject to the applicable provisions of the Public School Code the authority to employ teachers is a discretionary authority vested exclusively in the boards of directors of school districts.
6. This Court has no authority to grant the writ of mandamus or the other relief prayed for by the plaintiff.

DECISION

NOW, this 7th day of March, 1978, the Complaint in Mandamus of Robert R. Nolder is dismissed.

Costs to be paid by the Plaintiff.

Editor's Note—

See earlier decision on discovery reported with respect to this case, at 1 Franklin 120.

MAXWELL v. STEVENSON, C.P., Franklin County Branch, A.D. 1977-677; MAXWELL v. PENWELL, C.P., Franklin County Branch, A.D. 1977-645

Assumpsit - Construction Contract - Restitution - Measure of Damages - Anticipatory Breach - More Specific Complaint - Pa. R.C.P. 1019(h)

1. Upon a breach of contract by a party, the other party has the right to bring an action claiming breach of contract or treating the contract as rescinded.
2. The fact that there is a written contract does not bar an action where the aggrieved party treats the contract as rescinded and seeks restitution.
3. Under the theory of restitution, the builder may recover the reasonable value of all that the owners have received. The value of goods and services performed is not limited by the contract price.
4. Where an owner withdraws the entire balance in his mortgage account, it is reasonable for a builder to demand assurances that he will be paid.
5. The plaintiff must provide the defendant with a list of "extras" which plaintiff claims he provided over and above the terms of the contract.
6. Where a party seeks to have a contract rescinded, his claim is not based on the contract and the contract need not be attached to the Complaint.

Marcus A. McKnight, III, Esq., Attorney for Plaintiff, John E. Maxwell

Jan G. Sulcove, Esq., Attorney for Defendants, Dale S. Penwell and Kathleen J. Penwell, his wife

William H. Kaye, Esq., Attorney for Defendants, John A. Stevenson and Nancy K. Stevenson, his wife

OPINION AND ORDERS

EPPINGER, P.J., March 29, 1978:

These are companion cases, involving many of the same issues. In each case John E. Maxwell (builder) agreed to construct a house for the defendants, John A. Stevenson and Nancy K. Stevenson (Stevensons) and for the defendants, Dale S. Penwell and Kathleen J. Penwell (Penwells). In each case the builder contended that the owners breached the contract and seeks to recover substantial sums based on a restitutionary theory of recovery.

The owners have filed preliminary objections in the nature of motions to strike, motions for more specific complaint and demurrers.

RESTITUTIONARY THEORY OF RECOVERY

In each case the owners' motions to strike assert that the builder's claim for restitutionary damages is an improper measure of damages. When a contract has been breached by