

## Opinion No. 51-5446

October 16, 1951

**BY:** JOE L. MARTINEZ, Attorney General

**TO:** Mr. Floyd Santistevan Assistant Superintendent Department of Education

{\*153} Some weeks ago you requested from this office an opinion concerning writs of garnishment in cases where the defendant is an employee of a municipal board of education. This request was supplemented and clarified by our telephone conversation of October 15. You asked whether in such instances the Board of Education is the proper garnishee, and whether, once the writ is properly served, there should be withheld from the defendant any of the salary due him.

In answer to your first question, it is my opinion that the board of education is not the proper garnishee in such a case and that the disbursing officer of the board of education should be named as the garnishee. The general rule is that no public official or public corporation, such as a school board, may be summoned as garnishee in any action unless such procedure is specifically authorized by statute. (4 Am. Jur. 640.) There is no such New Mexico statute relating to public corporations, but § 22-228 authorizes the summoning of a public officer as garnishee **when the plaintiff has a judgment against the defendant**. This section reads as follows:

"No public officer shall be summoned as a garnishee in his official capacity, excepting in all cases where the plaintiff has a judgment against the defendant, in some court of the state against any public official, or any employee of the state of New Mexico, any county, city, town, village, municipality, or school district thereof, the salaries of any public official and the salaries or wages of any such person, so employed by the said state of New Mexico, or any such county, city, village (,) town, municipality, or school district thereof, shall be subject to garnishment; Provided, nothing in this act (§§ 22-227, 22-228) shall be construed to impair the rights of such public officials, or such employee of said state, county, city, town, village, municipality, or school district, to claim exemption of wages, or salaries as provided herein. In all cases where the plaintiff has a judgment in some court of the state against the defendant, any public officer may be summoned as garnishee and the return of such public officer shall be by statement over his official signature of the amount due the defendant, which said statement shall be filed by such public officer without any cost in the action."

In my opinion, an employee of a municipal board of education is an employee of a "school district" as this term is used in § 22-228, and the disbursing officer of the board may be named as the garnishee.

It has been suggested that the summoning of the "board" as garnishee is not a fatal departure from the language and intent of this statute. However, in the case of *Dollman v. Moore*, 77 Miss. 267, 12 So. 23, the Court held that a board of school trustees was

not a "person" within the meaning of a statute authorizing attachment against {<sup>\*154</sup>} "persons". Similarly, it is my opinion that in § 22-228 the term "public officer" cannot be so liberally construed as to embrace a "board of education". It should be mentioned at this point that some courts have held that a public corporation may waive its immunity from garnishment. However, this question does not appear to have been passed upon in New Mexico, and it is consequently my opinion that no such waiver should be made by one of our boards of education. Instead, the board's disbursing officer should be named as garnishee, as I have stated above.

Once the disbursing officer has been summoned as garnishee and properly served with the writ, his duty becomes clear. The latter portion of § 22-228, quoted above, states that the public officer shall answer the writ by a statement indicating the amount due the defendant. The effect of a properly served writ is stated in § 22-212, which I quote in part:

"A writ of garnishment served as provided by this article shall have the effect of attaching all personal property, money, rights, credits, bonds, bills, notes, drafts, or other choses in action, of the defendant in the garnishee's possession or charge or under his control at the time of the service of the garnishment or which may come into his possession or charge or under his control or be owing by him between that time and the time of filing his answer \* \* \* \*."

Therefore the disbursing officer should withhold all salary due the defendant at the time this writ is served, and, in addition, that salary which becomes due before the answer to the writ is made.

I trust that this opinion answers all your questions on this subject and has proved helpful.