

Opinion No. 55-6254

August 15, 1955

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. Richard F. Rowley, District Attorney, Ninth Judicial District, Clovis, New Mexico

You have requested the opinion of this office as to the powers of a local school board with respect to the discharge of teachers where, as a result of a drop in attendance, one school in a county school system must employ one less teacher for the ensuing year than formerly. Your general question relates to the problem of whether, in such an instance, a tenure teacher may be discharged if there is a non-tenure teacher within the county, on the payroll of the County Board of Education.

The pertinent statute is Section 73-12-13, N.M.S.A., 1953 Compilation. This statute provides generally that notice and a hearing must be granted if a tenure teacher is to be discharged. In the event the final decision of the local board is unsatisfactory, the teacher may appeal to the State Board of Education, and "should the State Board of Education find alleged causes insufficient for termination of his or her services, said teacher shall be considered employed for the following year . . ." As can be seen from the foregoing, the expressed wording of the statute does not clearly answer your question. Any decision of the State Board of Education upon an appeal by a tenure teacher discharged because of financial requirements of the district, would be tested by the courts on the basis of whether or not the decision of the State Board was arbitrary, unreasonable and capricious. **McCormick vs. State Board of Education** 58 N.M. 648, 274 P. 2d 299.

This being the rule, it is difficult to determine the rights of local boards of education in such a situation. It is very possible that a ruling by the State Board of Education on either side of such a problem would be upheld by the courts under the rule announced in the McCormick case. This conclusion is fortified from a reading of cases in other jurisdictions where decisions holding both ways are found. 47 Am. Jur., Schools, Section 139, 63 A.L.R. 1416, 1421.

It is our feeling that the proper course of action for the county board of education to follow in this instance is to attempt to provide the best educational facilities for the children attending the schools within the budgeted number of teachers. The teacher who, in the opinion of the board of education, is least needed or desirable from the standpoint of the school system as a whole should be the teacher discharged. Whether this is the policy that will be followed by the State Board of Education if the question reaches it, we cannot say. We are not familiar with any similar case decided by the Board of Education to provide a precedent in this matter.

We realize that the foregoing is somewhat vague. However, in view of the broad powers granted the State Board of Education in such situations, it is impossible for this office to

determine what ruling would be made by the State Board of Education on any given hypothetical fact situation.

By: W. R. Kegel

Assistant Attorney General