

Opinion No. 57-142

June 19, 1957

BY: OPINION OF FRED M. STANDLEY, Attorney General Robert F. Pyatt, Assistant Attorney General

TO: Mr. Edward M. Hartman, State Comptroller, Santa Fe, New Mexico

QUESTIONS

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1. May a refund of compensation paid be obtained from a teacher who has taught without a certificate of any kind?
2. May the amount of such compensation be recovered from the official of the school district who approved such payment?
3. May the amount of such compensation be recovered from the members of the school board who approved such payment?

CONCLUSIONS

1. Probably.
2. Yes.
3. Yes.

OPINION

ANALYSIS

As to the first question, recovery from the teacher would be under § 73-12-3, N.M.S.A., 1953 Compilation, which is as follows:

"Any person who teaches in the public schools without the required teacher's certificate shall forfeit all claim to compensation for services rendered."

It can readily be seen that such statute, by express terms, involves a forfeiture. It is fundamental that forfeitures are not favored. **State v. Sunset Ditch Co.**, 48 N.M. 17, 145 P. 2d 219; **Hargrove v Lucas**, 56 N.M. 323, 243 P. 2d 623. And under such rule of construction, a plausible argument could be made that § 73-12-3, supra, is restricted to instances where no compensation has as yet been received (not the case in this instance) due to the statutory language ". . . forfeit all **claim** to compensation . . ."

(Emphasis supplied). However, in **Vick Consolidated School District No. 21 v. New**, 208 Ark. 874, 187 S.W. 2d 948, New taught several months in a public school, without a certificate, and received compensation for services rendered. The board later discovered that New had no certificate, and sought recovery of the sums paid as compensation under the Arkansas statute reading as follows:

"Any person who shall teach in a public school in this state without a legal certificate of qualification to teach shall not be entitled **to receive** for such services any compensation from the school fund." (Emphasis supplied.)

If anything, the language of § 73-12-3, supra, is stronger than the statute under construction in the New case. The Arkansas Court held that the theory and intention of the statute was that one who instructed pupils should be competent to do so; that instruction by one incompetent could be worse than no instruction at all; and that to allow one to instruct without a certificate was a misappropriation of public funds. The Court further said that this was a case of an individual receiving public funds in direct violation of statute, and that the rule was that not only is such individual precluded from a recovery in quantum meruit for services rendered, but that the governmental body may recover any moneys paid on such contract forbidden by law. It was held in addition that the rule against non-recovery of money voluntarily paid is not applicable where wrongful payment is made by a public officer.

As thus interpreted, the Arkansas statute, quite similar in language to § 73-12-3, supra, was held to provide for a forfeiture of all moneys received for teaching when done without a certificate. While we must remain cognizant of the rule that forfeitures are not in favor, it is our opinion that a right of recovery probably exists against the teacher in question. It is also to be borne in mind that misuse of public funds, as well as forfeitures, is not favored.

Bearing on the second and third questions, § 73-7-17, N.M.S.A., 1953 Compilation, reads as follows:

"Any county or school officer diverting or expending any school money contrary to the budget allowance, with his sureties, shall be liable to the state for the amount thereof."

In Opinion of the Attorney General No. 5637, dated January 15, 1953, it was held that under this statute, it would be illegal to pay the full annual sum to a school principal who died prior to completion of the contract period. You will observe that the statute purports to be restricted to an inhibition against payment contrary to budget allowances. The above Attorney General's Opinion was not so restricted, but rather was based on illegality itself of payment to a particular person, or rather his representative. Accordingly, such interpretation of § 73-7-17, supra, lends credence to the view that any school official approving or acquiescing in misuse of public funds together with his (or her) sureties, would be liable to the state. While officials would include administrative officials, it would also include elected officials, such as board members, approving or acquiescing in the illegal expenditure of school funds.

A statute which, in our opinion, covers the second and third question, is § 11-1-15, N.M.S.A., 1953 Compilation, which reads as follows:

"The assistant auditors as provided for in this act (11-1-3, 11-1-5 to 11-1-20, 11-1-23 to 11-1-25), shall immediately on completion of any audit, examination or other duty devolving upon them by the terms of this act or the provisions of law, forward to the state comptroller (state board of finance) their check sheets and such other data and documents as may be necessary to enable the state comptroller (state board of finance) to acquire full and detailed information regarding the matter so reported, and it shall be the duty of the state comptroller (state board of finance) to prepare a full and complete report from such check sheets, data and other documents so presented, one (1) copy thereof to be delivered to the governor, and one (1) to each official, bureau, board or commission so examined, or interested. Such errors or discrepancies or shortages in cash or property as shall be disclosed in such check sheets, and other documents and data, shall be treated fully in such reports, and each official so examined shall have the right to satisfy the state comptroller (state board of finance) within thirty (30) days after the receipt of such report, that such charges therein are erroneous, and if the state comptroller (state board of finance) be satisfied from the data and documents and check sheets at hand, or by any independent and additional investigation, that such charges, or any part of them are erroneous, the state comptroller (state board of finance), may remove such charges and clear the official from such charges. If the official does not take up the matters therein within thirty (30) days, as herein provided, then the state comptroller (state board of finance) may proceed to bring suit and enforce repayment or refund to the state, county or municipality, as in this act provided. The state comptroller (state board of finance) and his assistants shall have the power to correct palpable clerical errors, to assist state and county and other officials in making proper entries and corrections on their books, to bring their books in balance and similar duties, at the time of such audits or examinations and, in general, to assist public officials in every way in the proper discharge of their duties."

We believe that such clearly includes illegal expenditure of public funds, and that an administrative official of a school district, as well as board members who participate in or approve such expenditures, are officials from whom refund or repayment may be enforced.

Suit should be brought against all the above parties as codefendants, if refund is not otherwise obtained. We express no opinion upon the ultimate rights, if any, between such defendants.