Opinion No. 57-310

November 27, 1957

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

TO: Honorable Georgia L. Lusk, Superintendent of Public Instruction, Santa Fe, New Mexico

QUESTION

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1. Is a municipal board of education liable under the Workmen's Compensation Act?

2. May workmen's compensation insurance be carried by said board?

CONCLUSIONS

1. No.

2. Yes.

OPINION

ANALYSIS

Our delay in answering your inquiries was occasioned by the pendency of State ex rel Hovey Concrete Products Co., et al vs. Mechem, 63 N.M. --. The same having been finally decided, this office is now at liberty to dispose of the issues.

Your first question involves the problem of whether a municipal school board may successfully employ the defense of sovereign immunity. Our research discloses no instance in which the Supreme Court of New Mexico has passed upon the question. But see Opinion of the Attorney General No. 5108, dated November 25, 1947, holding that a municipal school board is not liable **in tort** for injuries received by a pupil on the school grounds, and pointing out that the existence of a statute granting the power to sue and be sued did not alter the result. We agree.

Generally, municipal school boards have like powers as do county school boards. Section 73-10-2, N.M.S.A., 1953 Compilation. Among the powers conferred by statute upon county school boards is the power ". . . to sue and be sued . . ." Section 73-9-1, N.M.S.A., 1953 Compilation. In Opinion of the Attorney General No. 4408, dated November 15, 1943, it was held that municipal boards of education have the power to sue and be sued, but that such does not impose tort liability upon the board for collapse

of bleachers at a football game. Cited authority therein disclosed that the reason for such conclusion was the fact a school organization is a subdivision of the state, which posses sovereign immunity.

In 47 Am. Jur., Schools, Sec. 56, 1957 Cumulative Supplement, it is said that the underlying reason for non-liability of a school board or district in tort is that as public bodies, they partake of the state's immunity as a sovereign, **at least while engaged in performing governmental functions.**

A lengthy annotation in 160 A. L. R. 7 is devoted to this subject. Generally, and in the absence of statute, a school board or district is immune from suit. 160 A.L.R. 17-18. At least this is so as to activities of a governmental nature, whether the tort be that of the district or board itself, or that of officers, agents, or employees. 160 A.L.R. 37-38. As above noted, the basic reason for the rule is sovereign immunity 160 A.L.R. 53, although other reasons have been advanced, such as the illegality of diverting school funds for noneducational purposes; and the public policy of not disrupting public education. 160 A.L.R. 55-57. However, certain exceptions to the immunity doctrine have been evolved by the courts, some of them being the distinction as to injuries arising out of proprietary functions as distinguished from governmental functions; liability for nuisances; and liability for intentional misconduct. 160 A.L.R. 63-75. The general rule is not altered by a statute conferring the power to sue or be sued. 160 A.L.R. 89.

So much for the general authorities. In Hathaway v. New Mexico State Police, et al., 57 N.M. 747, 263 P 2d. 690, it was held this state had not given consent to be sued under the provisions of the Workmen's Compensation Act, and that such could not rest upon implication. It was further held (and this is of significance in answering your second question) that while a judgement against the State of New Mexico would be void, it would be proper as against the insurer.

Vigil v. Penitentiary of New Mexico, 52 N.M. 224, 195 P 2d 1014, involved the issue of whether an individual could maintain a tort action against the State Penitentiary, a corporation but also a state institution. By statute, now compiled as Section 42-1-1, N.M.S.A., 1953 Compilation, the corporation had the right ". . . **to sue** and be sued. . ." (Emphasis supplied.) The court observed that statutes authorizing suits against the state are to be strictly construed, being in derogation of sovereignty, and that the permission to sue and be sued does not include the right to sue the penitentiary (State of New Mexico) in tort.

We detect no difference between the "power" to sue or be sued, and the "right" to sue or be sued.

Day v. Penitentiary of New Mexico, 58 N.M. 391, 271 P 2d, 831, comes close to disposing of this matter. First, it was noted that the penitentiary had the right ". . . to sue and be sued. . ." Then the Court pointed out that the penitentiary is within the provisions of the Workmen's Compensation Act, citing, among other provisions what is now

Section 59-10-2, N.M.S.A., 1953 Compilation. It was held that no recovery pursuant to the Act was authorized.

We would do well to pause at this point to evaluate the Day case, supra. The defendant was not only authorized to be sued, but was under the provisions of the Workmen's Compensation Act. Comparing that situation to the one at hand, we find that municipal boards of education are not only authorized to be sued but are within the provisions of the Workmen's Compensation Act. Section 59-10-2, supra. Since then, as a general proposition, school districts or boards possess sovereign immunity, it is our opinion a negative answer to your first question is required. While the exceptions to the general rule of non-liability of school districts, given in 160 A. L. R. 63-75, supra, might in certain instances cause doubt to arise, we think all doubts, insofar as the instant question is concerned, are dispelled by Day v. Penitentiary of New Mexico, supra.

But since, as above noted, school districts are within the Workmen's Compensation Act, we can only assume the legislature had some basis for so providing. Certainly for such district to carry workmen's compensation insurance, would not be the making of an illegal contract or the misapplication of school funds. Otherwise, the provisions of the Act applicable to public bodies are meaningless, and we decline to so hold. Very obviously, the Hathaway case would permit recovery, if otherwise well founded, against the insurer of the school district.

We limit this opinion to the conclusions above reached, and express no view upon what actions, if any, are authorized by statute to be brought against school boards or districts. Nor do we express any opinion upon the liability (or lack thereof) of cities, towns, or villages.