Opinion No. 64-47

April 8, 1964

BY: OPINION OF EARL E. HARTLEY, Attorney General Thomas A Donnelly, Assistant Attorney General

TO: Mrs. Wynema Tully, Chairman, Ruidoso School Board, Ruidoso, New Mexico

QUESTION

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(1) Would a strike by public school teachers against a local school system constitute a violation of public policy?

(2) Would the circulation of petitions calling for the removal of local school officials and school board members by teaching personnel constitute an act of insubordination?

CONCLUSION

(1) In the absence of express statutory authority permitting public employees to strike against a sovereign state or public subdivision of such state, strikes against such public body are contrary to public policy.

(2) See analysis.

OPINION

ANALYSIS

Your first question inquires concerning the right of public school teachers to strike against their employer the local public school system. Almost universally the courts in the United States have adhered to the determination that in the absence of express statutory authority permitting school teachers to strike, such is violative of state public policy.

In 31 A.L.R. 2d. at page 1159, it is stated:

"Although there have been many strikes by public employees, very few of them have reached the courts, or at least, very few have been reported. Usually, temporary restraining orders are granted by the courts, the strikers' demands are met and the strike settled. However, in every case that has been reported, the right of public employees to strike is emphatically denied. . ."

In recent decisions of the courts of other jurisdictions this determination has been closely followed. **City of Manchester v. Manchester Teachers Guild** (N.H.) 131 A. 2d. 59; **City of Pawtucket v. Pawtucket Teachers' Alliance** (R.I.) 141 A2d. 624; **Norwalk Teachers' Ass'n. v. Board of Education,** 138 Conn. 269, 83 A. 2d. 482, 31 A.L.R. 2d. 1133; **Brown University v. Granger,** 19 R.I. 704, 36 A. 720, 721, 36 L.R.A. 847.

The case of **City of Manchester v. Manchester Teachers Guild,** supra, held:

"If this strike was properly enjoined it must be because public policy renders illegal strikes by school teachers in public employment. Although that question has not been decided heretofore by this court other jurisdictions have held that public employees have no right to strike against the government be it federal, state, or a political subdivision thereof. Norwalk Teachers' Ass'n. v. Board of Education, 138 Conn. 269, 83 A. 2d. 482, 31 A.L.R. 2d. 1133; City of Los Angeles v. Los Angeles Bldg. & C. Tr. Council, 94 Cal. App. 2d. 36, 210 P. 2d. 305; City of Detroit v. Division 26 of A.A. of S.E.R. & M.C.E. of A., 332 Mich. 237, 248-252, 51 N.W. 2d. 228; Annotation, 31 A.L.R. 1146. . . The underlying basis for the policy against strikes by public employees is the doctrine that governmental functions may not be impeded. Norwalk Teachers' Ass'n. v. Board of Education, supra; Spero, Collective Bargaining in the Public Service, 248 Annals 146-150."

In **Norwalk Teachers' Ass'n. v. Board of Education,** supra, the basis for public policy prohibiting strikes against the state or instrumentalities of the state is expressed as follows:

"In the American system, sovereignty is inherent in the people. They can delegate it to a government which they create and operate by law. . . The government so created and empowered must employ people to carry on its task. Those people are agents of the government. They exercise some part of the sovereignty entrusted to it. They occupy a status entirely different from those who carry on a private enterprise. They have the public welfare and not a private purpose. To say that they can strike is the equivalent of saying that they can deny the authority of government and contravene the public welfare."

The rule that strikes against public bodies are contrary to public policy has been further noted in **City of Alcoa v. International Bro. of Elec. Wkrs.** (Tenn.) 308 S.W. 2d. 476, where the court noted: "It has been repeatedly stated that it is against public policy for public employees to strike. Many courts have held that a strike by public employees is against public policy, is unlawful, illegal and may be restrained and enjoined." In prior Attorney General's Opinions it has been held that a labor union could not be organized at the New Mexico State Hospital nor could public employees of such institution lawfully strike or collectively bargain concerning matters of their employment, Opinion No. 6207, dated June 27, 1955. Under Attorney General's Opinion No. 6308, dated November 1, 1955, it was also held that public employees in the absence of legislative authority cannot lawfully organize into labor unions. See also Attorney General's Opinion No. 63-

52, dated May 10, 1963, regarding the right of private individuals and associations to collectively bargain with the state or public bodies.

Thus, in answer to your first question, the law is well settled that teachers and employees of a local public school system may not lawfully strike against the local school board in the absence of express legislative authority to so strike.

Secondly, you have inquired as to whether or not teachers of public schools may properly participate in the circulation of petitions calling for the removal of local public school officers and school board members.

Discussion of this question, necessarily requires recognition of the distinction between a constitutional "right" of any individual to express his social, economic, political or other beliefs, and the "duty" of a public employee to follow the rules, regulations and policies of his superiors. Article II, Section 17, of the New Mexico State Constitution guarantees the right of every citizen of this state to "freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." Similarly, the first amendment to the United States Constitution guarantees a right to freedom of speech.

In **Smith v. Board of Education of Ludlow,** Ky., 264 Ky. 150, 94 S.W. 2d. 321, the court recognized that a right to apply for redress of grievances to the proper authorities was a constitutional right. The court there stated:

"The right of applying to those invested with the power of government for redress of grievances or other proper purposes, by petition, address, or remonstrance, is a constitutional one. Kentucky Constitution, Sec. 1, subsec. 6. And the courts and other tribunals are always open to all citizens to assert their rights, and the mere failure to sustain a charge will not of itself subject one to any form of penalty. Otherwise people would be deterred from asserting rights to which they may be entitled. In bringing the charges against the members of the board, appellant was not acting in his official capacity as superintendent of schools, but in an individual capacity as a citizen, and therefore such act did not constitute insubordination as an official."

We think that the right of a teacher or school employee to express his views is protected by constitutional guarantee to the extent that such is not detrimental to the employing school system and is not an open, willful refusal of a teacher to obey the reasonable rules and regulations of his or her employing board of education.

As stated in Attorney General's Opinion No. 62-93, July 20, 1962, a board of education as a public employer has the general power to create and enforce reasonable regulations or policies which it determines to be beneficial to the proper administration of the public schools under its control. **Ransom v. Los Angeles City High School Dist.,** 277 P. 2d. 455, 129 CA 2d. 500; **Casey County Bd. of Ed. v. Lustera,** 282 S.W. 2d. 333 (Ky. Ct. Apls.); **Burkitt v. School Dist. No. 1 Multnomah Co.,** 246 P. 2d. 566 (Ore.); **Thorp v. Bd. of Trustees of Schools,** 6 N.J. 498, 79 A2d. 462.

A public school board has the right to terminate any school employee whenever a clear violation of any **reasonable** school policy, regulation or rule is shown and where the violation was a serious instance constituting insubordination or defiance of such school policy. In **Shockley v. Bd. of Ed., Laurel Sp. Sch. Dist.** 149 A2d. 331, the court held:

"Insubordination" was defined in State ex rel. Richardson v. Board of Regents of University of Nevada. 70 Nev. 347, 269 P. 2d. 265, 276, in the following language: "From the many definitions found in the cases we may say without greater elaboration that 'insubordination' imports a wilful disregard of express or implied directions, or such a defiant attitude as to be equivalent thereto. 'Rebellious', 'mutinous', and 'disobedient' are often quoted as definitions or synonyms of 'insubordinate'."

In State ex rel. Steele v. Board of Education, 252 Ala. 254, 40 So. 2d. 689, 695, the Court had this to say: "The term 'insubordination' is not defined in the statute, but unquestionably it includes the wilful refusal of a teacher to obey the reasonable rules and regulations of his or her employing board of education."

* * * * a fair and reasonable definition (of the term insubordination) is as follows: "a constant or continuing intentional refusal to obey a direct or implied order, reasonable in nature, and given by and with proper authority."

Similar discussions of what acts constitute "insubordination" are contained in **Cafferty v. Southern Tier Pub. Co.,** 173 NYS 774, 186 App. Div. 136; **Kostanzer v. State ex rel. Ramsey,** 187 N.E. 337, 205 Ind. 536; **Shockley v. Bd. of Ed. Laurel Special School Dist.** Del. 149 A. 2d. 331; **State el rel Richardson v. Bd. of Regents of Univ. of Nev.,** 269 P. 2d 265, 70 Nev. 347; **State ex rel. Steele v. Bd. of Ed. of Fairfield,** 40 So. 2d. 689, 252 Ala. 254; **Smith v. Bd. of Ed. of Ludlow,** Ky. 94 S.W. 2d. 321, 264 Ky. 150; and **Millar v. Joint School Dist. No. 2, Village of Wild Rose,** 86 N.W. 2d. 455, 2. Wis. 2d. 303.

From a careful study of the foregoing authorities it is our opinion in answer to your second question, that a public school teacher has a constitutional right to publish his ideas or opinions, sign petitions, or speak his views, and such does not constitute cause for dismissal, violation of contract, or insubordination unless such conduct clearly is demonstrated and found to actually amount to a disobedience of **reasonable** school policies, regulations, orders or rules, or that such conduct amounts in fact to a rebellious, mutinous or disobedient action contrary to the best interests of the public school system. In situations where a teacher has a tenure status under Section 73-12-13, N.M.S.A., 1953 Compilation, he is entitled to all rights enumerated by law, and to a hearing upon any charges specified against him. In instances where the individual is a non-tenure teacher, dismissal may be predicated upon specific **bona fide** cause constituting a contract violation and the current contract terminated, or at the option of the school board any future employment contract may be withheld or not renewed. The actual determination of whether or not under a particular fact situation "insubordination" or breach of contract has occurred rests in the sound discretion of the school board, or the courts upon appeal.