Opinion No. 64-85

June 23, 1964

BY: OPINION OF EARL E. HARTLEY, Attorney General James V. Noble, Assistant Attorney General

TO: Mr. Simon J. Bustamante, State Representative, 747 Dalbey Drive, Las Vegas, New Mexico

QUESTION

QUESTION

May a school board lawfully increase or decrease a teacher's salary solely upon the basis of residence or non-residence within the school district?

CONCLUSION

No.

OPINION

ANALYSIS

The question presented would seem to have been fully answered by Attorney General Opinion No. 61-115, dated November 8, 1961 which affirmed Opinion No. 60-105, dated June 7, 1960. In the latter opinion it was held that under the contract in question, a school board had no authority to require a teacher to reside within the school district.

The facts as presented here indicate that although the school board does not intend to specifically require a teacher to live within the district, it will provide certain special benefits to teachers who do reside within the district and penalize those teachers who do not reside within the district. Unquestionably, there is discrimination between teachers based upon their place of residence. The question therefore resolves itself into the two pronged proposition of whether such discrimination is reasonable and if so, if it is lawful. A negative answer to either question is fatal to the attempted discrimination.

Attorney General Opinion No. 61-115, supra, discusses the question of the approval of teachers' contract by the State Board of Education. Specifically, the State Board of Education is vested with the "control, management and direction of all public schools . . ." and "shall determine public school policy . . ." Article XII, Section 6, New Mexico State Constitution. Likewise it is provided in Section 73-12-13, (F), N.M.S.A., 1953 Compilation (P.S.) as follows:

"Written contracts **on forms approved by the State Board** shall be executed by governing boards and certified personnel . . ." (Emphasis added)

Section 73-12-14, N.M.S.A., 1953 Compilation (P.S.) reads as follows:

"All contracts for public school personnel who are required to hold certificates issued by the state board of education **shall be on forms approved by the state board of education,** containing and specifying the term of service, **the salary to be paid,** the method of payment, the cause for termination of the contract, and such other provision as may be lawfully required **by the state board of education."** (Emphasis added)

This office is advised that neither the State Board of Education nor the Public School Finance Division of the Department of Finance and Administration has approved the contract change nor the specific variances in the salaries.

The statutes above cited likewise govern only lawful requirements. Article II, Section 18, New Mexico Constitution provides as follows:

"No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied the equal protection of the laws."

This provision has been construed by our courts in numerous cases as prohibiting a discriminatory classification that is arbitrary or unreasonable. The case of **State v. Sunset Ditch Co.,** 48 N.M. 17, 145 P2d 219 involved a question of forfeiture of a corporate charter of corporations organized under territorial law for failure to make annual reports. The provision did not apply to corporations organized after statehood. Our Supreme Court held the statute unconstitutional because the classification, based solely on time, bore no reasonable relationship to the legislative object. The court said at page 25:

"It is elementary that such classifications must be reasonable and not arbitrary, and that the classification attempted in order to avoid the constitutional prohibition must be founded upon pertinent and real differences as distinguished from artificial ones. Mere difference, of itself, is not sufficient."

Here the Court was discussing the 14th Amendment to the U.S. Constitution which, it being a regulation or rule of a state subdivision involved, would also be applicable. However, in the case of **State v. Martinez,** 48 N.M. 232, 144 P2d 124 the above cited section of our Constitution was held equally applicable. That case involved a restriction on liquor brought into this state for personal consumption by residents as opposed to the unrestricted transportation of liquor for such purpose unto this state by non-residents. Again, the court struck the provision down as unconstitutional as being an unreasonable classification and therefore discriminatory.

Cases and authorities too numerous to cite here all hold similarly.

Looking then to the classification here we see that it is that of residency as opposed to non-residency. Such classification **per se** bears no reasonable relationship to the teaching qualifications of the teacher. **On its face** under the provision and cases cited, it is unreasonable and arbitrary and any sanction by the local board of education or the state board would be unlawful and unconstitutional.

It follows that for the above enumerated reasons, the question need be answered in the negative.