

Opinion No. 65-118

July 6, 1965

BY: OPINION OF BOSTON E. WITT, Attorney General Frank Bachicha, Jr., Assistant Attorney General

TO: Mr. Benito Duran, Superintendent, Penasco Independent School District, P.O. Box 318, Penasco, New Mexico

QUESTION

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May the Penasco Board of education legally adopt the following policy: "A staff member may use physical force to restrain a pupil without notice to the principal when it is essential for self-defense or for the protection of other persons or property of the Board of Education."

CONCLUSION

See Analysis:

OPINION

{*202} ANALYSIS

The subject directive presents three separate problems. Therefore, we set forth the following three questions for purposes of analysis: (1) May a staff member use force to restrain a pupil in self-defense? (2) May a staff member use force to restrain a pupil in order to protect a third person? (3) May a staff member use force to restrain a pupil to protect property belonging to the Board of Education?

No statutory authority presently exists in New Mexico which would provide the answers to the above questions. In absence of such authority, the common law would control. See Sections 21-3-3 and 40A-1-3, New Mexico Statutes Annotated, 1953 Compilation and **Sellman v. Haddock**, 62 N.M. 391, 310 P.2d 1045. At common law it is well settled that any person may defend himself if attacked; he may stand his ground and meet force with force **to the extent that it is necessary for him to protect himself**. There is a qualification that he must have reasonable cause to believe that danger is imminent and must act as a reasonably prudent man would under similar circumstances. See 4 Am. Jur. "Assault and Battery", Section 38.

The New Mexico Supreme Court has said in the early case of **Brobst v. El Paso and Southwestern Co.**, 19 N.M. 609, 145 P. 258, that **a person defending himself must use no more force than it is necessary to repel the force being used against him.**

If more than necessary force is used, the person may become the assailant and may be considered the wrongdoer.

Our answer to question (1) above, therefore, is in the affirmative, with a caveat as to the force which may be used to repel the attack as discussed above.

Force may also be used to restrain a person in order to protect a third party, but only to the extent that such third party may use force to protect himself. Further, the person exerting the force must reasonably believe that the circumstances are such that "his intervention is necessary for the protection of the third person, and the third person is, or is reasonably believed by him to be, a member of his immediate family or household, **or a person whom he is under a legal or socially recognized duty to protect.**" 6 Am. Jur. 2d 129, § 152. (Emphasis supplied)

It is therefore our opinion that a staff member of the Penasco Independent School District may use force to restrain a pupil in order to protect a third person, with the qualification, however, as noted above.

The third question set forth above is by far the most troublesome.

In **Brown v. Martinez**, 68 N.M. 271, 361 P.2d 152, our Court had occasion to consider the law of defense of property. The case involved an action for injuries sustained by a boy who was shot while engaged with other boys in stealing watermelons from the defendant's land. In stating the general rule, the Court quoted first from 25 A.L.R. 508 at page 542 as follows:

"While a man may use as much force as is necessary in the defense of his property, it is generally held that, in the absence of the use of force on the part of the intruder, he is not justified in the use of such force as to inflict great bodily harm or to endanger {*203} life."

and, further quoting from Dean Prosser in his **Handbook of the Law of Torts**, the Court continued:

". . . And, since the law has always placed a higher value upon human safety than upon mere rights in property, it is the accepted rule that **there is no privilege to use any force calculated to cause death or serious bodily injury where only the property is threatened. . . .**" (Emphasis supplied)

It must be noted, however, that the above mentioned case involved the protection of the defendant's own property and further that the plaintiff was a trespasser. Nevertheless, the Court concluded that:

"There is no suggestion in the proof here that appellee in any way felt his safety was threatened. Accordingly, under the facts as proven and found, the appellee acted improperly and is liable for injuries caused in using a gun in the manner he did, and with

such unfortunate consequences, in order to drive away trespassers on his property, or to protect his watermelons, or to scare the intruders . . ."

In the instant situation, although it is doubtful that a staff member of the school would ever resort to such excessive force as was used in **Brown v. Martinez**, supra, the fact remains that such staff member would not be acting in defense of his own property, but rather, property belonging to the Board of Education. We feel that this circumstance calls for the use of a greater degree of caution in permitting the use of force to protect property. It is our opinion, therefore, in reply to question (3) above, that a staff member should not be authorized to use force to restrain a pupil in order to protect property. We might suggest that the proper procedure to be used by a staff member where damage to property is threatened would be to notify his superiors, who may then take proper remedial action.

With regard to the above quoted policy and in line with the above analysis, we suggest that it could be revised to read as follows:

"A staff member may use reasonable physical force to restrain a pupil, without notice to the school principal, when it is essential for self-defense or for the protection of other persons; but, in the latter event only to the extent that such other persons are permitted to use physical force to protect themselves."