

Opinion No. 68-35

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OPINION OF: BOSTON E. WITT, Attorney General

BY: Gary O'Dowd, Assistant Attorney General

TO: Harry Wugalter, Chief Public School Finance Division Department of Finance and Administration Legislative-Executive Building Santa Fe, New Mexico

BACKGROUND

For a short period in the month of February many public school teachers in a number of school districts in this state failed or refused to report to their classrooms without an excused or authorized absence. The reaction of the local school boards was by no means uniform. Some local boards took affirmative action in one way or another, others took no action. After the teachers reported back to their classrooms, the various local boards of education as well as representatives of the teachers sought the advice of the Public School Finance Division of the Department of Finance and Administration and the Department of Education. The numerous inquiries from the local boards as well as from the representatives of the teachers brought about this opinion request.

It was mentioned above that the reactions of the local boards to the teacher walkout were by no means uniform. Three school districts are representative of the patterns that were followed by the local school boards. For simplicity, we have designated the three representative school districts as Districts A, B and C. We will briefly set forth the events as they occurred in each of these school districts along with the questions presented to this office and our conclusions before setting forth our analysis and opinion.

SCHOOL DISTRICT A

On February 22, 1968, the schools of School District A were not closed by local school board action. Some teachers reported for work while many others did not. The board of education of School District A met and officially closed all schools in the district on February 23, 26, 27 and 28.

1. In order to comply with the minimum school year, must the board of education make up the days lost through official board closing on February 23, 26, 27 and 28?
2. Must the board of education of School District A pay the daily wage, as stipulated in the teaching contract, to those teachers who did not present themselves on February 22nd, and for whom there was no clarification of absence that might be covered via the sick leave provision, or other board policy provisions?

3. If the board of education of School District A wishes to make up February 22nd, is it legal for the board of education to compel those teachers who honored the school calendar and reported for duty that day, to add an additional day of service to the school year?

CONCLUSIONS

1. Not unless those days are necessary to meet the minimum requirement of 180 teaching days.

2. No, but see analysis.

3. No, but see analysis.

SCHOOL DISTRICT B

In School District B, the public school teachers requested time off from their assignments. This request was refused by the local school board of this district. On February 26th some teachers presented themselves for duty. Custodial, maintenance, cafeteria and pupil transportation services were performed. After an evaluation of the situation, the local school board through its superintendent closed school.

1. Is it legal for the local board of education to meet after the opening of school, and order the school closed retroactively in order that the day be added to the adopted school calendar?

2. May the local board of education of School District B compel those teachers who reported for duty on February 26th to add another day of service to the school calendar?

1. See analysis.

2. No.

SCHOOL DISTRICT C

The local board of education of School District C denied a request by a teacher organization to grant professional leave to its teachers or to close the school on a particular day. Schools in the district were not closed and some teachers reported to their classrooms as stipulated by the school district's calendar, while others did not. The school district hired substitutes to fill the positions of the teachers who did not present themselves for duty. Now a request has come from the teacher organization for the board of education to retroactively declare that day a professional study day, and that no deduction of pay be made for any of the certified personnel who participated.

1. Is it lawful for the board to retroactively close the schools in the district on that day and add an additional day to its school district calendar?

2. If it is legal, then must those teachers who presented themselves for service and taught that day, as well as those teachers who were absent because of verified bona fide reasons acceptable through board policy, be expected to add another day of service to the calendar without remuneration?

3. If the board of education of School District C wishes to require an additional day of service from those teachers who presented themselves as per terms of the school district's calendar and whose pay was not reduced, must the board amend those teachers' contracts if it desires to pay them for the additional day?

1. No, but see analysis.

2. No.

3. Yes.

Subsequent to the above factual situations and questions being presented to this office the following supplemental questions have been asked:

1. Is it legal or a local board of education to grant leave without pay for a given number of days to school personnel in order that they may engage in professional organization-sponsored activities?

2. Is it legal for a local board of education to grant leave with pay for a given number of days to school personnel in order that they may engage in professional organization - sponsored activities?

3. Is it legal for a local board of education to grant leave with pay, less the amount required to pay a substitute, for a given number of days to school personnel in order that they may engage in professional organization-sponsored activities?

1. Yes.

2. Yes.

3. Yes, but see analysis.

ANALYSIS

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Section 77-6-9A of the Public School Code (Sections 77-1-1 through 77-20-11, N.M.S.A., 1953 Compilation (P.S.)) provides as follows:

"No budget for a school district shall be approved by the division (Division of Public School Finance) which does not provide for:

A. a school year consisting of at least one hundred eighty [180] **teaching days**. The state board shall, by regulation, establish the requirements for a teaching day." (Emphasis added).

Evidently, Section 77-4-2 of the Public School Code authorizes local boards of education to adopt regulations and pursuant thereto to enter into contracts with teachers providing for a school year exceeding 180 teaching days. A "school year" is defined as the total number of teaching days offered by public schools in a school district during a period of twelve consecutive months.

Employment contracts between local school boards and teachers must be on forms approved by the state board of education. See Section 77-8-8 of the Public School Code. The approved form contract provides that the teacher shall present himself or herself for duty at such times and places as designated. For each day's absence from duty not included in sick leave, or otherwise compensated for in accordance with rules and regulations of the local school board, the contract provides that there is to be deducted from the teacher's salary a proportionate amount or such lesser portion of the total annual salary as shall be established by the local school board. The contract further provides that these deductions are to be made from the installments due the teacher following such absence. Under this contract teachers agree to comply with the lawful rules and regulations of the local school board, which would include rules and regulations setting forth the days of the school year which will be teaching days as that term is defined by the State Board of Education.

At this point, we believe it is important to point out more specifically that the Public School Code requires a school district to have 180 teaching days while the teachers contractual form uses the phrase "duty days". These terms are not always synonymous in that a teacher may be paid for a duty day that cannot be classified as a "teaching day". An example of this is a day where teachers are paid for attending a professional meeting connected with their profession pursuant to Section 77-8-5 of the Public School Code. While this is to be considered a "duty day" under the teacher's contract, it cannot be considered a "teaching day" as that term is ordinarily used. See Attorney General Opinion No. 63-169, issued December 20, 1963.

With the above discussion in mind, it is fairly easy to answer a number of the inquiries presented in this opinion request. First of all we were asked if School District A must make up the days lost through the official board action of closing the schools on February 23, 26, 27 and 28. Section 77-6-9 A, supra, only requires a school district to have 180 teaching days. The local school board has the power to decide what days and the number of days that will be teaching days in the school district so long as they provide for at least 180 teaching days. If for any reason the local board closes the schools in the district on days that normally would be teaching days, those days must be made up at some time during the school year if the loss of the days would result in

the district holding less than 180 teaching days. See Attorney General Opinion 63-169, supra. If the days are not made up the school district could not receive its full distribution from the state equalization fund. If School District A has contracts {*64} with its teachers providing for 183 duty days and the school teachers have already attended 2 days of professional meetings the school board must make up at least 3 of the days lost through the official board closing on February 23, 26, 27 and 28 or the school district will not be able to comply with the requirement of 180 teaching days.

The second question directed to School District A asks if the local school board must pay the daily wage, as stipulated in the teaching contract, to those teachers who "walked out" on February 22, 1968. In answering this question, we believe that the provisions of the teachers' contract are controlling. That is, if the absence from duty is not included in sick leave, or otherwise compensated for in accordance with the rules and regulations of the local board, there must be deducted from the teacher's salary a proportionate amount or such lesser portion of the total annual salary as shall be established by the board. The only question is how much the local board will decide to deduct from the teachers' salaries. The amount to be deducted will be further discussed in our answer to question 3 of the supplemental questions.

Next we are asked if a local school board may compel teachers who reported for duty on a regular school day to add an additional day of service during the school year. Again we look to the teachers contract and find that the answer is unequivocally, no. Such a teacher has contracted to present himself or herself for duty on a certain number of duty days during the school year. If the teacher tenders his or hers services on a day that school has not been closed by the local school board, the local board must recognize this as a "duty day" under the terms of the teacher's employment contract. The teacher is obligated to tender his or her services only on the number of duty days prescribed in the teaching contract, and no more.

In School District B. the local school board did not close school until after some teachers had presented themselves for duty. Custodial, maintenance, cafeteria and pupil transportation services were performed, and then the local school board closed the schools. It is the opinion of this office that this day must be included as a "duty day" under the terms of the teachers employment contract and those teachers who presented themselves for duty must be given credit for having worked on that day. This is not to say that the day can be included as a teaching day under the provisions of Section 77-6-9, supra. If the local school board wishes to add a day to the school year, it may do so, but those teachers who have already reported on the number of duty days required under their contract may not be compelled to teach an additional day.

An additional problem arises with adding another day to the school year due to the fact that transportation services have already been performed on a day that the school board of School District B now wishes to classify as a day that schools in the district were closed. The transportation distribution from the state equalization fund is based on 180 teaching days. Presumably no other moneys would be available from the state to

help pay for the transportation of students on the extra day proposed by the local school board of School District B.

Question 1 under the heading "School District C" asks if a school board may retroactively declare a school day to be a professional study day. Section 77-8-5 of the Public School Code provides that local school boards may pay teachers:

". . . **according to their em-employment contracts** on evidence of attendance at any professional meeting connected with their profession as educators or associated with the courses of instruction in which they specialize." (Emphasis added).

{*65} We must therefore look to the teachers form employment contract to determine whether the board may retroactively declare a school day to be a professional school day. The teachers form contract provides:

"For each day's absence from duty not included in sick leave, or otherwise compensated for in accordance with the rules and regulations of the Board, **there shall be deducted from said salary** a proportionate amount of such lesser portion of the total annual salary as shall be established by the Board." Emphasis added).

We are told that in School District C, the teachers requested a professional study day and such request was denied by the local school board. Thus it cannot now be argued that the days absence for a "professional study day" was pursuant to a rule or regulation of the board. Since the teachers in School District C were not excused by a rule or regulation of the Board, the board must now, pursuant to the teacher form contract, make the appropriate deduction from the salaries of those teachers who failed to report to class without an authorized absence.

In answer to the second and third questions directed to School District C, those teachers who have already taught or offered to teach on a day that schools were open cannot be required to add another day of service without receiving compensation beyond the compensation provided for in their contract. This also applies to those teachers who were absent because of verified reasons acceptable through board policy. They cannot be expected to teach an extra day without additional compensation being paid by the school board. If the board of education wishes to ask those teachers who performed pursuant to their contractual obligations to teach an additional day the teachers contract should be amended to provide for the additional duty day and the additional compensation that will be paid for this additional duty day.

The supplemental questions asked are all related to attendance by teachers at professional meetings connected with their profession or associated with the courses of instruction in which they specialize. In answer to the first question, we can find nothing which would prohibit a local board of education from granting a teacher leave without pay to attend professional organization-sponsored activities. The local school board, in its discretion, may pay teachers attending such professional organization-sponsored activities. See Section 77-8-5, supra.

Last of all we have been asked if a local board of education may grant leave with pay, less the amount required to pay a substitute, so that the teachers may engage in professional organization sponsored activities. As pointed out above, the teachers form contract provides that if the absence is unauthorized absence, the board may deduct from the teacher's salary either a proportionate amount of the total annual salary or such lesser portion of the total annual salary as shall be established by the board. Thus if the teacher has contracted to perform 183 duty days and is absent 1 day for which absence is unauthorized, the board may deduct $1/183$ of the teachers annual salary. The board, however, may establish a policy of deducting a lesser amount from the teachers salary. Certainly a deduction for unauthorized leave in an amount equal to the cost of hiring a substitute teacher is authorized under the teacher form contract.