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FILE NO. S-661

SCHOOLS:
Legality of requiring teachers to sign loyalty oaths as a condition of employment.

Honorable Michael J. Bakalis
Superintendent of Public Instruction
State of Illinois
302 State Office Building
Springfield, Illinois 62706

Dear Superintendent Bakalis:

I have your letter in which you state:

"Please be advised that in the course of the past few months this office has received numerous inquiries relative to loyalty oaths as applied to teachers as a condition of their employment.

I am herewith requesting your opinion relative to loyalty oaths for teachers. Thank you for your consideration in this matter."

You have further advised that you are specifically concerned with the situation where a school district or school board would require a teacher to sign a loyalty oath as a condition of employment.

In order to form an opinion on this matter, it is essential to consider what are school districts and school boards and what is their relationship to the state. Section 1 of Article 10 of the Constitution of 1970 provides:

> "A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities.
>
> The State shall provide for an efficient system of high quality public educational institutions and services. Education in public schools through the secondary level shall be free. There may be such other free education as the General Assembly provides by law.
>
> The State has the primary responsibility for financing the system of public education."

Insofar as the State's duty to provide a system of free schools is concerned, the above quoted language is similar to that of section 1 of Article 8 of the Constitution of 1870 which provided:

> "The General Assembly shall provide a thorough and efficient system of free schools, whereby all children of this state may receive a good common school education."

In reference to the above quoted language of the Constitution of 1870, the court in Board of Education of Community Consolidated School District 606 v. Board of Education of Community Unit District 124, 11 Ill. App. 2d 408, stated at page 415:

> "The effect of this constitutional mandate is to require the legislature in the exercise of its powers to establish by appropriate legislative enactment a system of free schools. To meet the responsibility thus enjoined upon it, the legislature has provided for the creation of school districts. A district thus created is a quasi-municipal corporation or minor subdivision of the state and serves as an administrative arm of the legislature in putting into effect the will and intention of that body. People v. Wood, 411 Ill. 514, 104 N.E. 2d 800."

This will and intention is carried out by a school district through its board of education which is a separate and distinct corporation (People ex rel. Bodecker v. Community Unit School District No. 316, 409 Ill. 526; Board of Education of District No. 88 v. Home Real Estate Improvement Corporation, 378 Ill.

298; People ex rel. Petty v. Thomas, 361 Ill. 448; McCurdy v. Board of Education, 359 Ill. 188; 1956 Op. Atty. Gen. 233), operating as a State agency, that furnishes the method and machinery for the government and management of the district. People ex rel. Petty v. Thomas, 361 Ill. 448; McCurdy v. Board of Education, 359 Ill. 188; Wauconda Township High School District No. 118 v. County Board of School Trustees, 7 Ill. App. 2d 65; 1956 Op. Atty. Gen. 233.

In carrying out the will and intention of the legislature, the powers available to a school district are only those expressly granted by the legislature (Melin v. Community Consolidated School District No. 76, 312 Ill. 376; People ex rel. Dilks v. Board of Education of Paxton Community High School District No. 117, 283 Ill. App. 378; Goedde v. Community Unit School District No. 7, 21 Ill. App. 2d 79; Doto v. Village of Vernon Hills, 62 Ill. App. 2d 274),or such as result, by necessary implication, from those powers granted. (People ex rel. Dilks v. Board of Education of Paxton Community High School District No. 117, 283 Ill. App. 378; Goedde v. Community Unit School District No. 7.) Similarly, a school board's powers

are only those granted by the legislature, or such as result, by necessary implication, from those powers granted. Stowell v. Prentiss, 323 Ill. 309; Rosenheim v. City of Chicago, 12 Ill. App. 2d 382; Gustafson v. Wethersfield Township High School District 191, 319 Ill. App. 255; Bohn v. Stubblefield, 238 Ill. App. 450; Kuybendal v. Hughey, 224 Ill. App. 550; Mills v. School Directors of Consolidated District No. 532, 154 Ill. App. 119.

Illinois has a statutory provision prohibiting payment from any appropriations to an employee of any State agency or instrumentality unless such employee has signed a loyalty oath. (Ill. Rev. Stat. 1971, ch. 127, par. 166b.) The oath requires the individual to swear or affirm he is "not knowingly a member of nor knowingly affiliated with any organization which advocates the overthrow or destruction of the constitutional form of the government of the United States or of the State of Illinois, by force, violence or other unlawful means." The paragraph thus denies compensation for employment to members of subversive organizations who have knowledge of the group aims, but who have no specific intent to further those aims.

In Thalberg v. Board of Trustees of University of Illinois, 309 F. Supp. 630 (1969), a three judge Federal district court specifically found this statute unconstitutional. The court found that the issues raised were fully and finally determined by three United States Supreme Court cases: Elfbrandt v. Russell, 384 U.S. 11 (1966), Keyishian v. Board of Regents, 385 U.S. 589 (1967), and Whitehill v. Elkins, 389 U.S. 54 (1962).

In Elfbrandt the court held unconstitutional an Arizona statute which made the signing of its loyalty oath, perjury if the signer was a member of the Communist Party. The court stated at page 19:

> "A law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms. It rests on the doctrine of 'guilt by association' which has no place here."

The other cases made similar determinations.

While the Illinois Supreme Court found this statute constitutional in Pickus v. Board of Ed. of City of Chicago, 9 Ill. 2d 599, 138 N.E. 2d 532 (1957), the above cited U. S. Supreme Court decisions, all decided after the Pickus case, clearly changed the law so that the Illinois Supreme Court decision is no longer valid.

The U. S. Supreme Court has not found loyalty oaths unconstitutional per se and in a recent case, (Cole v. Richardson, 92 S.Ct. 1332 (1972)) found the following Massachusetts oath constitutional:

> "I do solemnly swear (or affirm) that I will uphold and defend the Constitution of the United States of America and the Constitution of the Commonwealth of Massachusetts and that I will oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence or by any illegal or unconstitutional method."
>
> p. 1335

In this case the court reviewed its recent decisions and in effect set forth six guidelines for loyalty oaths:

> "[1] * * * We have made clear that neither federal nor state governments may condition employment on taking oaths which impinge rights guaranteed by the First and Fourteenth Amendments respectively, as for example those relating to political beliefs. * * * "
>
> p. 1335

> "[2] * * * Nor may employment be conditioned on an oath that one has not engaged, or will not engage, in protected speech activities such as the following: criticizing institutions of government; discussing political doctrine that approves the overthrow of certain forms of government; and supporting candidates for political office. * * * "
>
> p. 1335

> "[3] * * * Employment may not be conditioned on

an oath denying past, or abjuring future associational activities within constitutional protection; such protected activities include membership in organizations having illegal purposes unless one knows of the purpose and shares a specific intent to promote the illegal purpose. * * * "

p. 1335

"[4] * * * And, finally, an oath may not be so vague that 'men of common intelligence must necessarily guess at its meaning and differ as to its application, [because such an oath] violates the first essential of due process of law.' Cramp v. Board of Public Instruction, 368 U.S. at 287, 82 S.Ct. at 280. Concern for vagueness in the oath cases has been especially great because uncertainty as to an oath's meaning may deter individuals from engaging in constitutionally protected activity conceivably within the scope of the oath. * * * "

p. 1335

"[5] * * * Several cases recently decided by the Court stand out among our oath cases because they have upheld the constitutionality of oaths, addressed to the future, promising constitutional support in broad terms. These cases have begun with a recognition that the Constitution itself prescribes comparable oaths in two articles. Article II, §1, cl. 7, provides that the President shall swear that he will 'faithfully execute the office . . . and will to the best of my ability preserve, protect and defend the Constitution of the United States.' Article VI, cl. 3, provides that all state and federal officers shall be bound by an oath 'to support this Constitution.'

p. 1336

"[6] The Court has further made clear that an oath need not parrot the exact language of the constitutional oaths to be constitutionally proper. * * * "

p. 1336

While thus it is possible for a constitutional loyalty oath to be written, I am unable to find any provision (except that which has been found unconstitutional) which either expressly or impliedly empowers school districts or school boards to require teachers to sign loyalty oaths as a condition of employment. Since school districts and school boards lack a statutory basis in this regard, I am of the opinion that they may not require teachers to sign loyalty oaths as a condition of employment.

Very truly yours,

ATTORNEY GENERAL