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STATE CAPITOL  
PHOENIX, ARIZONA

November 15, 1968

DEPARTMENT OF LAW LETTER OPINION NO. 68-33-L (R-123)

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REQUESTED BY: Sarah Folsom, Superintendent  
STATE DEPARTMENT OF PUBLIC INSTRUCTION

QUESTION: What are the responsibilities of the State Superintendent of Public Instruction with regard to loyalty oaths as required by A.R.S. §§ 15-231 and 38-231?

ANSWER: See body of opinion.

Every public officer and employee is required to take and subscribe a loyalty oath in the form prescribed by the Legislature before entering upon his duties, A.R.S. § 38-231.

The United States Supreme Court in Elfbrandt v. Russell, 384 U.S. 11, 16 L.Ed.2d 321, 1966, held subsection E of A.R.S. § 38-231 unconstitutional. Subsection E provided that execution of the oath constituted a crime when executed by one who

"knowingly and wilfully becomes or remains a member of the Communist Party of the United States or its successors or any of its subordinate organizations or any other organization having for one of its purposes the overthrow of the government of Arizona or any of its political subdivisions where the employee had knowledge of the unlawful purpose."

However, the Arizona Supreme Court has subsequently interpreted the United States Supreme Court's opinion in the Elfbrandt case as not invalidating the loyalty oath requirement itself, nor the other subsections of A.R.S. § 38-231. (Attorney General's Opinions No. 66-14 and No. 67-32-L).

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Persons exercising the function of a public office without taking the oath are guilty of a misdemeanor, A.R.S. § 38-442, and are not entitled to any compensation until the oath is taken, A.R.S. § 38-231. Failure to file the oath within the time prescribed vacates the office, A.R.S. § 38-291. The time prescribed for filing the oath is within ten days after the officer has notice of his appointment, or if elected, at any time after receiving his certificate of election, and at least one day before commencement of the term of office, A.R.S. § 38-232. The oath must be taken before an officer empowered to administer oaths, such as a notary public, executive and judicial officers, or clerk or deputy clerk of courts of record, A.R.S. § 12-2222. In addition, A.R.S. § 15-231 provides that oaths of office of teachers and administrative officers in public schools may be taken before the State Superintendent of Public Instruction or the County School Superintendent in addition to any of the other officers empowered to administer oaths.

The oath of office of the Superintendent of Public Instruction must be filed with the Secretary of State, A.R.S. § 38-233.A. Oaths of employees of the Department of Public Instruction must be filed in the office of the Superintendent of Public Instruction, A.R.S. § 38-233.A and E. Both A.R.S. § 38-233.D and § 15-231 require that oaths of officers, teachers, and employees of school districts shall be filed in the office of the Superintendent of Public Instruction.

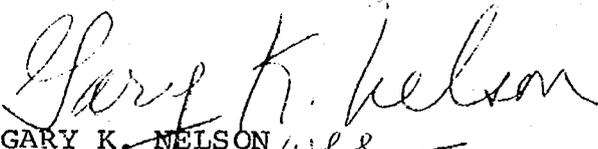
The copy of the oath of office must be maintained by the office in which it is filed as a permanent official record, A.R.S. § 38-233.F. Transfer of these records when no longer current may be made to the State Division of Arizona History and Archives for permanent preservation, A.R.S. § 41-710.

In the event you are presented with oaths of office which are defective in some particular, you may, as a matter of accommodation, wish to point out the defects to the individual

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employee and to the employing agency in order that they may correct same within the statutory filing period. However, there is no express statutory obligation on the part of the Superintendent of Public Instruction to review the oaths accepted for filing. (See also Attorney General's Opinion No. 67-32-L.)

Respectfully submitted,

  
GARY K. NELSON *wll*  
The Attorney General

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