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ARIZONA ATTORNEY GENERAL

January 27, 1951

Op. No. 51-30

Barry De Rose, Esq.
County Attorney
Gila County
Globe, Arizona

Dear Mr. De Rose:

This acknowledges receipt of your letter of January 10, 1951, in which you ask the opinion of this office on the following questions:

- "1. Can a person who does not own sufficient enclosed land be prosecuted for letting his livestock run at large at or near the highway, under Section 43-3615?
2. Assuming the person does not own any land but permits cattle to graze adjacent to or on the highway, can he be prosecuted under this section?
3. Would this conflict with Section 50-602 and Section 50-605, or with the ruling in the case of Garcia v. Sumrall, 58 Ariz. 526, 121 P. 2d 640?"
4. Referring to a school teacher who has been employed by contract from year to year for the past ten years and who has taken time off to attend sessions of the State Legislature and is now a member thereof, and who "requested two months' leave of absence, but it is denied and she was replaced. Does the School Board have the authority to revoke

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her contract if she does take time off to attend the State Legislature? Also, if they can revoke her contract for taking this time off, do they waive this right if they knew she was an elected legislator at the time they entered into the contract with her and knew or should have known that she would have to have at least two months' leave of absence during the school year?" (Emphasis supplied)

Answering your question No. 1:

The section of the Arizona Code to which you refer was enacted in 1945 and relates to overstocking of unenclosed land by any person who owns, or has the lawful right to use, the same.

We believe this section of the Code to be self-explanatory and subject to be invoked in a proper case wherein the facts and circumstances warrant.

Allowing such person as is defined in the above mentioned section to permit livestock to run at large "at or near the highway" would not seem to subject him to prosecution under the section but it would be necessary that the livestock leave his land and graze or feed upon the land or range of another person to the injury of such other person.

Answering your question No. 2:

It is not necessary that such person own any land, but it is sufficient if he have the lawful right to use the same. Again the answer is the same as that to your question No. 1. It would seem to be necessary that the cattle be permitted to, and that they do actually, graze or feed upon the land of another person to his injury.

Answering your question No. 3:

There would seem to be no conflict between Section 43-3615, supra, and Sections 50-602 and 50-605, since these latter sections relate to different circumstances than those involved

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in the former section. That is, Section 43-3615 concerns the matter of overstocking unenclosed land with which Sections 50-602 and 50-605 are not concerned.

Since this section was enacted after the ruling in the Garcia v. Sumrall case, 58 (not 60) Ariz. 526, 121 P. 2d 640, which you cited as construing Section 50-602, it would, insofar as it conflicts with that ruling, supersede it. The Garcia case holds:

" * * * that the mere knowledge or expectation by one who turns cattle loose in a place where he has a right to release them that they may or probably will wander upon the lands of another, or that he overstocks his own land so that the same effect may be produced, is not alone sufficient to constitute willful trespass. There must be some overt and unlawful act on the part of a defendant which tends to increase the natural propensity of cattle to wander and to direct them upon the premises of another." (Emphasis supplied)

Section 43-3615, on the other hand, makes such overstocking

" * * * prima facie evidence of the intent that such live stock shall leave the land on which so placed and graze or feed upon the land of another person."

and thus willful trespass.

Answering your question No. 4:

Looking to the general law of the subject we refer to 47 Am. Jur., page 386, Section 125, which provides:

"Dismissal.--In the absence of a statutory provision to the contrary, the power to employ teachers and other school officials presupposes the power of dismissal, both of these powers generally being lodged in the local school boards.

The right of dismissal thus given to a board is absolute, and cannot be bargained away or limited by contract. Every contract made with a teacher includes by implication any statutory provisions for dismissal, and in the absence of statutory provisions, includes the implied power of the board to dismiss for adequate cause. Conversely, statutory terms favorable to the teacher are likewise written into the contract of employment and cannot be circumvented by any act of the school board.

Proceedings for the dismissal of a teacher are frequently regulated by statute, and consequently depend on the wording of the particular statute in force. In such statutes, although the grounds of dismissal are generally stated in the broadest of terms, the board is limited to the grounds specified. * * * (Emphasis supplied)

Thus we must look to the Arizona statutes to determine what provisions, if any, there are for dismissal of teachers employed by contract and by implication included in such contract. We find in Section 54-1009 ACA 1939 the definition of "continuing teacher" to mean:

* * * any certificated teacher who is employed under contract in a school district as a full time classroom teacher, * * * and whose contract has been renewed for the school year commencing in September, 1950, for his fourth consecutive year of such employment in said district, or for any school year thereafter, for his fourth consecutive year of such employment in said district; * * *

The subject of your inquiry would seem to fall within this definition of "continuing teacher", and would therefore be

entitled to the protection afforded by Sections 54-1011, 54-1012 and 54-1013 ACA 1939, outlining the procedural steps in order to effect her dismissal.

Section 54-1011 provides:

"Dismissal of continuing teacher.-- No continuing teacher shall be dismissed or his contract of employment terminated unless written notice specifying the cause or causes therefor is first given to such teacher by the school board, a member thereof acting on behalf of such board, or the superintendent. (Laws 1949, ch. 52, § 3.)"

Section 54-1012 provides for a hearing affording the dismissed teacher an opportunity to be heard and Section 54-1013 provides for right of appeal, as a trial de novo, to the superior court of the county within which the teacher was employed.

In the event the subject of your inquiry does not fall within the definition of "continuing teacher" then she would fall under the definition of "probationary teacher", as provided in Section 54-1009.

Section 54-1012 provides:

"Hearing.--Within fifteen (15) days after receipt of notice of dismissal or termination, a continuing teacher may serve upon a member of the school board, or upon the superintendent, a written request for either a public or private hearing before said board, which hearing must be held by the school board not less than ten (10) days nor more than fifteen (15) days after such request is served, and notice of the time and place for the hearing shall be given such teacher not less than three (3) days prior to the date of hearing. At such hearing the teacher shall have the right to appear in person and by counsel, if desired, and to present any testimony, evidence or statements, either oral or in writing, in his behalf. Within ten (10) days following such hearing the board shall determine whether there existed

good and just cause for such notice of dismissal, which cause shall not include religious or political beliefs or affiliations unless in violation of the oath of such teacher, and shall render its decision accordingly, either affirming or withdrawing the notice of dismissal or termination." (Emphasis supplied)

Thus it appears that while no grounds for the dismissal of a teacher are specified, the notice of the dismissal must "specify the cause or causes" therefor and the board shall at the hearing provided for in Section 54-1012, supra, determine:

" * * * whether there existed good and just cause for such notice of dismissal, which cause shall not include religious or political beliefs or affiliations unless in violation of the oath of such teacher, and shall render its decision accordingly, either affirming or withdrawing the notice of dismissal or termination."

Article 4, part 2, Section 5 of the Constitution of Arizona expressly exempts teachers in the public school system from ineligibility to hold public office while holding membership in the Legislature. It would certainly follow that membership in the Legislature of itself would not be "good and just cause" for dismissal as a teacher. The cases cited in Volume 17, Words and Phrases, at page 235 construe the term "for cause" in the phrase "removal for cause" to mean "for reasons which the law and sound public policy recognize as sufficient warrant for removal." (State ex rel Matsen v. O'Hern, 65 P. 2d 619, 623; State ex rel Nagle v. Sullivan, 40 P. 2d 995, 998; 99 A.L.R. 321.)

The expression contained in the Constitution is clearly in accord with public policy.

Certainly the school board, being aware of the fact that a teacher with whom it contracted for a school year was at the time a member of the Legislature, would recognize that such teacher would necessarily be required to be away from her teaching duties during the sessions of the Legislature and would be

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estopped to set up this reason as "good and just cause" for dismissal.

A different situation might prevail if the board should refuse to renew such a teacher-legislator's contract at the beginning of the school term by giving her notice within the appropriate time to terminate her contract as provided in Section 54-1010 ACA 1939.

It does not appear from your letter whether or not the subject teacher was dismissed according to the procedure outlined in Sections 54-1011, 54-1012 and 54-1013. If you mean by the term "replaced" that she was dismissed or her contract presumably terminated without the board's following the procedure above outlined for dismissal, it would appear that she might have a cause of action against the school board for breach of her contract.

Sincerely yours,

FRED O. WILSON
Attorney General

PHIL J. MUNCH
Assistant Attorney General

PJM:f