



DEPARTMENT OF LAW
OFFICE OF THE
Attorney General
STATE CAPITOL
Phoenix, Arizona 85007
April 19, 1976

R75-519

BRUCE E. BABBITT
ATTORNEY GENERAL

76-126

J. William Brammer, Jr., Esq.
DeConcini, McDonald, Brammer & Yetwin, P.C.
901 Lawyers Title Building
199 North Stone Avenue
Tucson, Arizona 85701

LAW LIBRARY
ARIZONA ATTORNEY GENERAL

Dear Mr. Brammer:

We have reviewed your letter opinion dated August 19, 1975, addressed to Dr. Thomas L. Lee, Superintendent, Tucson Public Schools, concerning that district's inability to employ a teacher who is unwilling to sign the entire loyalty oath set forth in subsection G of A.R.S. § 38-231. We concur in the result reached in your opinion and only would add the following.

Pursuant to the United States Supreme Court's mandate to the Arizona Supreme Court in Elfbrandt v. Russell, 364 U.S. 11 (1966), then Chief Justice Struckmeyer, on May 26, 1966, ordered the Superior Court of Pima County (1) to enter judgment in favor of the plaintiff-teacher declaring subsection E of A.R.S. § 38-231 unconstitutional and void and (2) upon the plaintiff-teacher subscribing to the oath set forth in subsection G of A.R.S. § 38-231, to enter judgment in favor of the plaintiff-teacher ordering the defendant school district to pay her in full for all past services, together with interest. In effect, Justice Struckmeyer considered the various subsections of A.R.S. § 38-231 as severable, and only declared unconstitutional subsection E. Therefore, A.R.S. § 38-231 remains in effect, but as if subsection E thereof had been deleted. Consequently, as you state, Cole v. Richardson, 405 U.S. 676 (1972), supports its constitutionality.

An additional point requires mention. The teacher in this case has apparently only objected to that portion of the loyalty oath which states "that I will bear true faith and allegiance to the [Constitution of the United States and the Constitution and laws of the State of Arizona], and defend them against all enemies, foreign or domestic." [Emphasis added.] She has not objected to the portion of the oath which declares that the oath taker will support the Constitutions of the United States and Arizona and that the oath taker will faithfully and impartially discharge the duties of the office of teacher. She may believe that, by signing the oath, she is making a commit-



J. William Brammer, Jr., Esq.
April 19, 1976
Page two

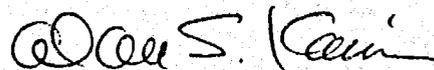
ment to take up arms to defend the United States and Arizona Constitutions. Of course, because of the construction given to the Massachusetts' loyalty oath by the United States Supreme Court in Cole v. Richardson, supra, that is not the case. As the United States Supreme Court stated in Cole:

We cannot presume that the Massachusetts Legislature intended by its use of such general terms as "uphold," "defend," and "oppose" to impose obligations of specific, positive action on oath takers. Any such construction would raise serious questions whether the oath was so vague as to amount to a denial of due process. 405 U.S. at 684-685.

Thus, the language that the teacher is objecting to is only a "commitment not to use illegal and constitutionally unprotected force to change the constitutional system." 405 U.S. at 684. If the teacher were made aware of this fact, she might not object to signing the oath in its entirety.

Sincerely yours,

BRUCE E. BABBITT
Attorney General



ALAN S. KAMIN
Assistant
Attorney General

BEB:ASK:lg

EVO DeCONCINI
JOHN R. McDONALD
J. WM. BRAMMER, JR.
RICHARD M. YEATMAN
JOHN W. LOVELL

RECEIVED
AUG 21 9 51 AM '75

ATTORNEY GENERAL
PHOENIX, ARIZONA

DECONCINI McDONALD & BRAMMER, P.C.
ATTORNEYS AT LAW
901 LAWYERS TITLE BUILDING
199 NORTH STONE AVENUE
TUCSON, ARIZONA 85701

Sophy

TELEPHONE
623-3411
AREA CODE 602

August 19, 1975

R75-519

Dr. Thomas L. Lee
Superintendent
Tucson Public Schools
1010 East Tenth Street
Tucson, Arizona 85719

Dear Dr. Lee:

In response to your letter of July 31, 1975, regarding employing a teacher who does not sign the entire Loyalty Oath without exclusions, this letter is our opinion in response. It is the opinion of this office that the School District may not employ a teacher who objects to signing the Loyalty Oath in its entirety.

The Arizona law on this point appears to be clear. A.R.S. §15-232 makes it unlawful for any person "charged with the employment, dismissal or suspension of teachers...in any public school" to teach without having first complied with the provisions of §15-231. The latter statute, in turn, requires teachers to take the oath demanded of all public employees which is set out in §38-231. A.R.S. §38-231(B) specifically covers all employees of a school district; and subsection D prohibits any employee who has not taken the oath from receiving compensation. Finally, the oath that the School District requires of its teachers is copied verbatim from §38-231(G). Thus, if the School District refuses to employ a teacher who has not taken the oath, it is in fact conforming to the laws of the state.

As to the constitutionality of such a loyalty oath, it should be noted that the decision in Elfbrandt v. Russell, 364 U.S. 11, 86 S.Ct. 1238, 16 L.Ed.2d 321 (1966), was based on the statutory gloss which A.R.S. §38-231(E) placed on the loyalty oath. That statute made it a felony for an employee who took the oath to become or remain a member of the communist party or other subversive organization with knowledge of the unlawful purpose of that organization. By not basing the definition of the crime on specific intent to further the illegal aim of the organization, the statute, ruled the Supreme Court, unconstitutionally infringed on an employee's freedom of association. It is true that the Court in Elfbrandt stated that "[t]he oath and accompanying gloss challenged here suffer from...constitutional infirmity", 384 U.S.

COPY

Dr. Thomas L. Lee
August 19, 1975
Page Two

at 16, 86 S.Ct. at 1241, thus appearing to strike down the oath for all purposes. Yet the rest of the opinion makes it clear that only the freedom of association question was at issue and that no decision as to the constitutionality of loyalty oaths per se was being made.

The teacher in the case at hand is not attacking the statutory interpretation of the oath. Rather, she is objecting to the words, "I will bear true faith and allegiance to the [Constitution of the United States and the Constitution and Laws of Arizona], and defend them against all enemies, foreign or domestic...."

This type of oath has been upheld as constitutional in Cole v. Richardson, 405 U.S. 676, 92 S.Ct. 1332, 31 L.Ed. 593 (1972). Richardson's employment at the Boston State Hospital was terminated when she refused to take the oath required of all Massachusetts public employees. The oath reads as follows:

"I do solemnly swear (of 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 this Commonwealth by force, violence or by illegal or unconstitutional methods." Cited in Cole v. Richardson, 405 U.S. at 677-8, 92 S.Ct. at 1334.

The Supreme Court held not only that this oath was constitutional but that an employee discharged for refusal to take the oath need not be granted a hearing before employment is terminated.

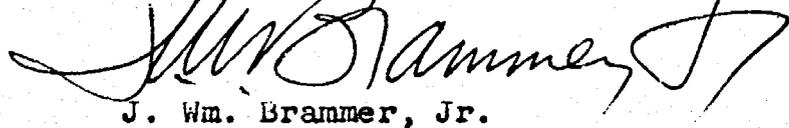
The oath required of Arizona public employees is substantially no different from that upheld in Richardson. Its terms do not impose any "obligation of specific, positive action on oath takers" Id., 405 U.S. at 684, 92 S.Ct. at 1337, but only require a promise of future constitutional support couched in broad terms. As held in Ohlson v. Phillips, 304 F.Supp. 1152 (D. Col. 1969), aff'd 397 U.S. 317, 90 S.Ct. 1124, 25 L.Ed. 337, the State has a right "to be concerned about possible advocacy of overthrow of the government by force and violence," 304 F.Supp. at 1155, especially in the case of teachers who are able to shape the attitudes of students. Thus, if the Arizona oath were to be subjected to judicial scrutiny, it is my opinion that its constitutionality would be upheld.

Dr. Thomas L. Lee
August 19, 1975
Page Three

A copy of this letter is being sent to the Attorney General pursuant to A.R.S. §15-122(B) for concurrence or revision.

Very truly yours,

DeCONCINI McDONALD & BRAMMER, P.C.



J. Wm. Brammer, Jr.

JWB/cd

CC: Bruce E. Babbitt ✓
Attorney General
1700 West Washington
Phoenix, Arizona 85007