OPINION
57-124

June 5, 1957 (OPINION)

LABOR

RE: May School Compel Teacher Membership in Organization

This is in reply to your request of May 2, 1957, for an opinion from this office relative to three questions. As we understand it, the questions are as follows:

1. Is it permissible for a board of education to deduct from the pay checks of teachers membership dues in the North Dakota Education Association and the National Education Association without obtaining the consent and signed authorization of the individual teachers?

2. Is it permissible for a board of education to include a rider to the teaching contracts requiring membership in the North Dakota Education Association and the National Education Association?

3. Would the compulsion by a board of education requiring reachers to be members in either of the associations be violative of section 34-0114 of the 1953 Supplement to the N.D.R.C. of 1943?

These questions, numbered 1, 2, and 3, will be answered below respectively.

1. In the case of Mugford v. Mayor and City Council of Baltimore, 44 A. 2d. 745, the court held, in effect, that the city could permit members of a labor union to have dues deducted from their wages if they individually so requested, but the city could not make deductions at the instances of demand of the union. This office, of November 19, 1951, issued an opinion which stated: "It is the opinion of this office that no employer can withhold from a pay check any amounts except duly authorized taxes unless the employee consents to withholding of a certain amount for other purposes."

From the above, it is the opinion of this office that it is neither permissible nor legal for a board of education to withhold any amounts from a teacher's pay check that is not duly authorized by statute or the individual affected.

2. In answering question number 2, there appears to be no authority directly in point as to whether a board of education may compel membership in an association. Attaching a rider to teaching contracts which requires the membership in an association, in effect, is the creation of a condition precedent to the employment of the teachers. It is undisputed that boards of education have discretionary powers in the State of North Dakota, but these powers must be fairly implied from the statutory powers conferred. Chapter 15-36 of the N.D.R.C. of 1943 sets out the various requirements that

must be met before a teacher is allowed to teach in the schools of North Dakota. We find nothing in these requirements that indicates the necessity for a teacher to be a member of either the NDEA or the NEA before teaching in the schools of North Dakota. The question therefore arises whether an individual board of education may under its power to contract with teachers require in the contract of employment the membership of the teachers in the NDEA and the NEA.

The powers and duties of a board of education of an independent school district are enumerated in section 15-3207 of the N.D.R.C. of 1943. Subsection 6 of this section states:

> "The board shall have power and it shall be its duty:
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> 6. To contract with and employ a superintendent and all teachers in the schools for the period not to exceed three years, and to remove them for cause;
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> * * * *."

It is well established by the weight of authority that a board of education has only the powers that are conferred upon it by statute or that can be fairly implied from those powers conferred. In the North Dakota Supreme Court case of Seher v. Woodlawn School District No. 26, 59 N.W. 2d. 805 the court stated: "The public schools of the state are under legislative control and school boards have no power except those conferred by statute upon them." See also Gillespie v. Common School Dist. 56 N.D. 194; Batty v. Board of Education, 67 N.D. 6; Pronovost v. Brunette, 36 N.D. 288; Rhea v. Board of Education, 41 N.D. 449; Board of Education of the City of Minneapolis v. Sand, 34 N.W. 2d. 89; Silverlake Consolidated School District v. Parker, 29 N.W. 2d. 214; School District of Omaha v. Adams et al, 39 N.W. 2d. 5501 and Abshire et al v. School No. 1 of Silver Bow County, 220 P. 2d. 1058.

It was also stated in the North Dakota case of Seher v. Woodlawn School District No. 26 that: "School officers have and may exercise only such powers as are expressly impliedly granted by statute. And in defining these powers the rule of strict construction applies, and any doubt as to their existence or extent must be resolved against it." Also see Lang v. Cavalier, 59 N.D. 75; Batty v. Board of Education, 67 N.D. 9; Andrew Supt. of Banking v. Stuart Savings Bank, et al, 215 N.W. 807; and State v. Rural High School District No. 7, 233 P. 2d. 727.

Since doubtful claims of power must be resolved against a board of education and the statutes must be strictly construed, it is the opinion of this office that it is not within the purview of powers granted a board of education to compel teachers to belong to the NDEA or the NEA. It is further the opinion of this office that a rider attached to a teaching contract requiring membership in the above mentioned organizations is beyond the express or implied powers of a board of education.

3. Section 34-0114 of the 1953 Supplement to the N.D.R.C. of 1943

states:

> "No person shall be deprived of life, liberty and property without due process of law. The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization, and all contracts in negation or abrogation of such rights are hereby declared to be invalid, void and unenforceable."

The statute specifically states "membership or non-membership in any labor union or labor organization". Therefore, it would be necessary in determining a violation of the statute to determine whether the NDEA and the NEA are either labor unions or labor organizations. There appear to be no cases which decide this question. Although it may be true that the two organizations mentioned negotiate for salaries and working conditions, it is nevertheless a question of fact as to whether these organizations are labor organizations within the meaning of the statute. Therefore, we believe it is a question for the courts.

If the courts would decide that these organizations are labor organizations within the meaning of the statute, it is assumed that the statute would apply. To our knowledge there have been two cases which have tested the right to work law, one originating in North Carolina and the other in Nebraska. Both of these states have a right to work law similar to the one in North Dakota. In the North Carolina case which was decided finally by the Supreme Court of the United States (Lincoln Fed. L.U. v. Northwestern I and M Co., 6 ALR 2d. 473) the court stated:

> "The constitutional right of workers to assemble, to discuss and formulate plans for furthering their own self interest in jobs cannot be construed as a constitutional guarantee that none shall get and hold jobs except those who will join in the assembly or will agree to abide by the assembly's plans.
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> "Much of the appellant's argument here seeks to establish that due process of law is denied employees and union men by that part of these state laws that forbids them to make contracts with the employer obligating him to refuse to hire or retain non-union workers. But that part of these laws does no more than provide a method to aid enforcement of the heart of the laws, namely their command that employers must not discriminate against either union or non-union members because they are such. If the states have constitutional power to ban such discrimination by law, they also have power to ban contracts which if performed would bring about the prohibited discrimination." Also see Chicago, B & Q. R. Co. v. McGuire, 219 U.S. 549.

It is recognized that the courts have in the past enforced union shop agreements but it is also recognized that the states have power to legislate against injurious practices in the internal affairs of the state. In the case of Hanson v. Union Pacific Railroad Company, 71 N.W. 2d. 526, the court stated:

> "But it is recognized in the cases cited as in many others, that the freedom of contract is qualified, and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses. * * * * Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulation and prohibitions imposed in the interest of the community."

The court went on to state:

> "To compel an employee to make involuntary contributions from his compensation for such a purpose is a taking of his property without due process of law."

In further answering question number 3, section 34-0901 of the 1953 Supplement to the N.D.R.C. of 1943 states:

> "The public policy of this state is declared to be that a worker shall be free to decline to associate with his fellows and shall be free to obtain employment wherever possible without interference or being hindered in any way, but that he shall have the right to association and organization with his fellow employees and designation of representatives of his own choosing. * * * "

In the North Dakota Supreme Court case of Seher v. Woodlawn School Dist. No. 26, supra, the Supreme Court stated:

> It must not be forgotten that the right of private contracts is no small part of the liberty of a citizen and that the usual and most important function of the courts of justice is to maintain and enforce contracts, unless it clearly appears they contravene public policy or express law." See also State ex Rel. Cleverings v. Klein, 249 N.W. 128.

Section 34-0901 of the 1953 Supplement to the N.D.R.C of 1943 is, of course, a statement of public policy and the quoted case states in effect that contracts should not contravene public policy. It is opinion of this office that a public board acting on behalf of the public should follow the declarations of public policy as an example to all.

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