



STATE OF WEST VIRGINIA
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March 8, 1990

Dr. Henry Marockie
State Superintendent of Schools
West Virginia Department of Education
Building 6, Room 358
State Capitol Complex
Charleston, West Virginia 25305

Dear Dr. Marockie:

This is in response to your letter of March 8, 1990 requesting the official opinion of this office regarding the current strike by teachers in West Virginia. Specifically, you asked our opinion on the following questions:

- "1. Is the current teachers' strike a legal activity?"
- "2. If not, what are the remedies available to address this work stoppage?"

There is no right to strike against the state. Thus, any strike or concerted work stoppage by the public teachers of this state is illegal. This fact has been repeatedly stated by several Attorneys General over the years. See, 37 Ops. Att'y Gen. 402 (1938); 39 Ops. Att'y Gen. 218 (1942); 46 Ops. Att'y Gen. 383 (1956); 49 Ops. Att'y Gen. 448 (1962); 51 Ops. Att'y Gen. 683 (1966); 55 Ops. Att'y Gen. 300 (1974); 60 Ops. Att'y Gen. 101 (1983).

In the United States, strikes or work stoppages by public officers or employees are almost universally prohibited. This unyielding principle remains a rule of wide application repeatedly upheld by both federal and state courts in other jurisdictions. See, 37 A.L.R.3d 1147, 22 A.L.R.4th 1103, and 48 Am. Jur. 2d, Labor & Labor Relations § 2026 and cases cited therein.

The prohibition against public employees striking is firmly rooted in the common law of this state and the nation as a whole. Article VIII, Section 13 of the West Virginia Constitution incorporated that common law prohibition into the law of West Virginia. In Kirker v. Moore, 308 F. Supp. 615 (1970), aff'd, 436 F2d 423 (4th Cir. 1970), cert. den. 404 U.S. 824, 92 S.Ct. 49, 30 L.Ed.2d 51 (1971), the federal court dealt with former Governor

Arch A. Moore's immediate dismissal of all striking West Virginia State Road Commission employees and ruled that the law of this state forbids strikes by public employees. "It is axiomatic that a strike by public employees for any purpose is illegal under the common law, and no statutory declaration of their illegality is necessary." 308 F. Supp at 622.

The Kirker Court noted that throughout the years courts, statesmen, and commentators have agreed that ". . . to permit a strike by public employees at any level is inconsistent with the orderly processes and sovereignty of government." Id. Not only were the discharges of the striking workers upheld in Kirker, but the Court also ruled that the illegal strike took away any rights to grieve or sue the state over their dismissal.

A strike or work stoppage by teachers is viewed with particular disfavor and constitutes an attack upon the most important duty and function of this state. In discussing the issues of strikes in this context once before, a previous Attorney General strongly drew the distinction between the public and private sector:

This office recognizes the clear distinction between public and private employees in this regard. Public employees, in some instances, should have--and in this State do have--a higher degree of obligation to their "employers" (all citizens of the State of West Virginia) than do their counterparts in the private sector. The acceptance of such a position of trust and responsibility in public employment imposes upon the public employee a solemn duty and obligation, namely, the conduct of his or her employment in such a manner, consistent with existing laws, that the public welfare will best be served. There is certainly no more important area of public service than in our educational system. The responsibility--teaching and nonteaching, professional and nonprofessional--for the education of the youth of our State is an awesome responsibility, one not to be entered into lightly or without recognition of the duties, obligations and limitations that must accompany such employment.

In our educational system we are not making cars or chemicals and we are not manufacturing televisions or trucks. Instead, we are, in fact, determining the very future of our State and our Nation. This is as much the responsibility of the school bus drivers, cooks, janitors, teachers' aides, maintenance men, clerical and other employees as it is the teachers and

administrators--each has an equally important role within our educational system.

Because of that unique responsibility, one that is shared in other areas such as law-enforcement agencies, fire departments, health services, and other areas of public employment, the laws of this State do not permit strikes by public employees. This is as it should be, in view of the equally great responsibility and opportunity for service to one's fellowman imposed upon and given to those engaged in public service.

55 Ops. Att'y Gen. 300, 307 (1974).

Some have argued, though, that the West Virginia Supreme Court of Appeals, in City of Fairmont v. Retail, Wholesale, & Department Store Union, AFL-CIO, 166 W. Va. 1, 283 S.E.2d 589 (1980), held that public employees may strike. They are mistaken.

City of Fairmont dealt with a one day work stoppage by hospital workers at a municipal hospital. Subsequent to this work stoppage the municipal hospital sought to sue the employees' union for damages. The Court narrowly ruled on procedural grounds that such damage suits could not be brought under those particular circumstances. They also upheld the uncontested right of employees to organize themselves into an employees' association.

However, the Court in City of Fairmont primarily based its decision on the fact that the involved employees had no written employment contracts with the hospital breached by their work stoppage. In contrast, public teachers in West Virginia have written employment contracts that expressly prohibit strikes or work stoppages. Furthermore, City of Fairmont clearly did not disturb the law against public employees striking and expressly held that public employees do not have collective bargaining rights held by the private sector.

The illegality of a teacher's strike in this state is made even clearer by the pronouncements of our Supreme Court of Appeals regarding the important function of public education. In Pauley v. Kelly, 162 W. Va. 676, 255 S.E.2d 859 (1979), our Court ruled: "The mandatory requirements of 'a thorough and efficient system of free schools' found in Article XII, Section 1 of the West Virginia Constitution, make education a fundamental, constitutional right in this State." Id., Syl. Pt. 3. Public education "is a prime function of our State government", Pauley at 719, 255 S.E.2d at 884, and has "a constitutionally preferred status" Syl Pt. 1, State ex rel. Bd. of Education of Kanawha County v. Rockefeller,

167 W. Va. 72, 281 S.E.2d 131 (1981). See also, Pauley v. Bailey, W. Va. ___, 324 S.E.2d 128 (1984); Potter v. Miller, 168 W. Va. 601, 287 S.E.2d 163 (1981); State ex rel. Brotherton v. Blankenship, 157 W. Va. 100, 207 S.E.2d 421 (1973).

Any strike by teachers would deprive students of their fundamental, constitutional right to a thorough and efficient education. Even absent the common law prohibition against such strikes, and the express contractual terms in teachers' contracts prohibiting work stoppages, it is our opinion that the constitutionally based right to a full education dictated by our Court would make work stoppages by teachers illegal and in violation of public policy.

Having determined that work stoppages by teachers are illegal and against the fundamental public policy of our state, the question becomes what action public officials may take in response to a work stoppage or strike by teachers. It is our conclusion that a wide range of actions may be taken to stop the illegal actions of a teachers' strike.¹

Any teacher participating in a strike or work stoppage is failing to fulfill their contract and shall, pursuant to W. Va. Code § 18A-2-2 (1989 Supp.), be disqualified from teaching in a public school for one year, and the state department of education or county board of education may withhold all papers and credentials of such teacher. Furthermore, a county board may suspend or dismiss a striking teacher for insubordination or willful neglect of duty under the provisions of W. Va. Code § 18A-2-8 (1988). The procedural due process protections of § 18A-2-8 are also forfeited by the striking teachers' own misconduct and their voluntary and knowing relinquishment, by their illegal acts, of any right to grieve their dismissal. Kirker v. Moore, supra; Kalme v. West Virginia Board of Regents, 539 F.2d 1346 (4th Cir. 1976).

It is also clear that any striking teacher shall not be paid during a work stoppage. W. Va. Code § 18A-4-10 (1988). Further, it is the duty of the county and state boards to make necessary salary adjustments when a teacher is absent without cause. W. Va. Code § 18A-4-10 (1988).

The State board of Education has the power and authority under W. Va. Code § 18-2-5 (1988) and Article XII, § 2 of the West

¹ This opinion is limited to the question presented by the State Superintendent and, therefore, does not address the authority which the Governor or other state officials may possess.

Virginia Constitution to make rules governing the operation of the public schools. West Virginia Board of Education v. Hechler, ___ W. Va. ___, 376 S.E.2d 839 (1988). Thus, the board may promulgate emergency rules dealing with a teachers' strike or work stoppage and take whatever action is necessary to stop the illegal action. Id. County boards must comply with any such emergency rules. Bailey v. Truby, ___ W. Va. ___, 321 S.E.2d 302 (1984).

The state superintendent of schools is vested with the general supervision of the public schools. W. Va. Code § 18-3-3 (1988). He has the authority to institute any lawsuits or actions necessary to enforce the education laws or any rule or direction of the state board. W. Va. Code § 18-3-4 (1988). W. Va. Code § 18-3-4 (1988) also gives him the power to institute actions to dismiss any school official for neglect of duty or failure to comply with the law or rules of the state board.

County boards or the state superintendent may seek injunctions against the individual striking teachers to compel their return to work, as well as the employee associations involved and officers of said associations. If an injunction is obtained and not complied with, then persons may be jailed or fined. As well, injunctions or restraining orders may also be sought for denying students their fundamental and constitutional right to a thorough and efficient education in violation of the Fourteenth Amendment and their civil rights.

Criminal sanctions could also be levied against an illegal work stoppage. W. Va. Code § 61-5-16 (1988) makes it a misdemeanor for any officer of the state to willfully neglect or refuse to enforce or execute the law. W. Va. Code § 61-5-17 (1989) makes it a misdemeanor for any person to illegally hinder, obstruct, oppose, or attempt to obstruct or oppose, or counsel, advise or invite others to hinder, obstruct or oppose any officer in the lawful exercise or discharge of his official duty.

In addition, W. Va. Code § 61-5-28 (1989) states that "Any person holding any office or appointment in this State, who shall wilfully fail or refuse to perform any duty required of him by law . . ." shall also be guilty of a misdemeanor. As to picketing at school sites, W. Va. Code § 61-6-14 (1989) makes it a misdemeanor for anyone to wilfully interrupt, molest or disturb a school. W. Va. Code § 61-6-14a (1989) makes it a misdemeanor to loiter in or about any school or school grounds in violation of posted rules.

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In conclusion, it is our opinion that any strike by public teachers is illegal and may be dealt with accordingly by school officials.

Very truly yours,


ROGER W. TOMPKINS
ATTORNEY GENERAL

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