1981 WL 158146 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
February 12, 1981

***1 Re: Requested Opinion**

The Honorable Harry A. Chapman, Jr.
Senator
Greenville and Laurens Counties
Gressette Office Building
Post Office Box 142
Columbia, South Carolina 29202

Dear Senator Chapman:
You have requested an opinion concerning § 59-65-230, Code of Laws of South Carolina, 1976, which statute requires that school attendance supervisors be certified by the State Board of Education. [1] Further, that statute vests the State Board with authority to determine certification requirements, such determination to be effected '. . . in the same manner . . .' as '. . . for all other teachers . . ..' Specifically, you have asked whether a school district, employing an uncertified attendance supervisor, must seek a waiver from the State Board before receiving state funding for the position. [2]

Section 59-65-230 is contained in Article 3, Chapter 65, Title 59 of the Code, and nothing in that article either expressly or impliedly addresses your question. The present Article 3 is the product of Act No. 369, Acts and Joint Resolutions of South Carolina, 1961, which substantially amended Act. No. 52, Acts and Joint Resolutions of South Carolina, 1955. Under the 1955 Act, the duties of supervising school attendance were assigned to the 'county visiting teacher', required to hold a 'first-grade certificate', or in the alternative, a county superintendent of education could hold the position of 'visiting teacher' under certain circumstances. While the duties remained virtually unchanged, Act No. 369 of 1961 created and required funding for the position of 'attendance supervisor', superseding the former 'county visiting teacher'. Act No. 369 apparently envisioned the attendance supervisor's position to be full-time and included an express provision that attendance supervisors be certified. An apparent anomaly arises in the statute, however, in the provision that certification qualifications for the attendance supervisors, '. . . be determined . . . in the same manner as the board now determines qualifications for all other teachers . . .'. Thus, even though the duties in question here are no longer assigned to teachers in the normal sense of that term, the certification qualifications of 'attendance supervisors' are for all intent and purposes the same as for 'teachers'. [3]

That certification requirements for attendance supervisors are to be determined similarly to 'other teachers' possibly evinces an intention by the General Assembly that attendance supervisors be treated as teachers under the South Carolina School Code. Certification, hiring, retention, and dismissal of public school teachers are statutorily governed in this state. Should attendance supervisors be deemed teachers, then § 59-25-20, Code of Laws of South Carolina, 1976, is applicable. That statute states in pertinent part:
No board of school trustees shall hereafter employ any teacher who has not a certificate to teach in the free public schools of the state.

***2** This statute is absolutely clear and unambiguous; moreover, its provisions are mandatory rather than merely directory. Logic would indicate that, even though attendance supervisors are not teachers in every sense of the term, the certification requirement for attendance supervisors is intended as a prerequisite to employment. Thus, no board of school trustees possesses the discretion to employ an attendance supervisor who has not been certified by the State Board of Education.

Should § 59-25-20 not be applicable to attendance supervisors, certification remains a prerequisite to public employment; otherwise, the requirement of § 59-25-20 would amount to a futile gesture by the legislature. Our Supreme Court has ruled that statutes must be construed in a manner to give them some effect. State ex rel. McLeod v. Montgomery, 244 S.C. 308, 136 S.E.2d 778 (1964).

Generally recognized school law reflects a consistent view that public school personnel are eligible for employment only after satisfying qualifications specified in state statutes and regulations, as indicated in the following excerpts from 78 C.J.S. Schools and School Districts, §§ 158, 161:
Generally, where qualifications for teachers or principals are prescribed by statute, rules and regulations of school boards or boards of education cannot increase or override such requirements . . .

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Where statutes vest such authority in the State Board to determine the qualifications of teachers, the local board is without power to prescribe qualifications for teachers . . .

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Generally, under the statutes, it is a prerequisite to an applicant's appointment or employment as teacher, or principal, vice-principal, or superintendent . . . that he have in his possession or file with the proper board or officer a license or certificate of his qualifications, as prescribed by law, which certificate must be of the requisite class; and the necessity exists regardless of what his other qualifications for employment as a teacher may be.

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The requirement of a license or certificate is statutory, not contractual, and it cannot be waived or dispensed with. A contract of employment without a license or certificate as required by statute is void and not susceptible of ratification . . .

As previously noted, the requirements of §§ 59-25-20 and 59-65-230 are mandatory; further, research has revealed no authorization, either by statute or State Board of Education Regulation, providing for a waiver of any provision of either of the two cited statutes. [4] Assuming, arguendo, that the State Board of Education could grant a waiver of one or more individual criteria out of the entire list of attendance supervisor certification requirements, such partial waiver would not circumvent or lessen the statutory requirement that an attendance supervisor be certified.

Based upon the foregoing discussion, the opinion of this Office is that the State Board of Education lacks authority to grant a waiver to any school district, allowing such school district to receive state funding to pay the salary of a non-certified attendance supervisor. Further, school districts are without authority to hire a non-certified attendance supervisor, even though such supervisor's entire salary would be paid from local funds.

***3** Finally, you have asked what recourse a citizen has in enforcing § 59-65-230. In the contingency that an individual's personal persuasive powers prove insufficient to convince public officials to adhere to the statute, an individual taxpayer may have the necessary standing to institute a civil action. This question is not entirely free from doubt as will be demonstrated in a review of several cases.

In Duncan v. Heyward, 78 S.C. 227, 54 S.E. 760 (1907). the court refused to grant injunctive relief to individual taxpayers to prevent the creation of a state central textbook repository, stating:
The injury which the petitioners allege they would suffer does not differ in kind from that which would be suffered by the people at large patronizing the public schools, and if there had been any cause of action, the suit should have been instituted by or on behalf of the state.

The Duncan decision was cited as authority in Crews v. Beattie, 197 S.C. 32, 14 S.E.2d 351 (1941); wherein, the court more fully delineated the particular interest that a taxpayer must possess in order to obtain standing to sue. The Crews court denied the petitioner's right to sue because no tax funds were involved, and the petitioner could cite to the court only cases in which, '. . . plaintiff or petitioner had an immediate, direct, and special interest in the matters involved.'

In the same year the Supreme Court decided Crews v. Beattie, supra, it also handed down Crouch v. Benet, 198 S.C. 185, 17 S.E.2d 320 (1941); wherein, the court, without citing Crews seemed to liberalize its position on taxpayer suits. The following excerpt from Crouch speaks for itself:
A preliminary question is also raised by the respondents to the effect that the petitioner cannot maintain this suit because the taxes levied by the Act for the State Hospital are indirect and not ad valorem in their nature and will not be paid by the petitioner as a taxpayer. Perhaps this ground would be well taken in some other case under different circumstances, but it is the duty of every good citizen to protect the public interest, and especially to scrutinize the spending of money by the State and not only that of the actual taxpayers on an ad valorem basis. We think that the petitioner is to be commended for his diligence and public spirited interest in the welfare of the State under the facts of this case. The beneficial interest in the results of a suit of this nature is undoubtedly in the public, and may be maintained by a taxpayer generally under all of the pertinent decisions of this Court.

See also, Mims v. McNair, 252 S.C. 64, 165 S.E.2d 355 (1969).

Based upon the cases discussed, no absolute opinion can be stated that an individual taxpayer would have standing to maintain a civil action to enforce § 59-65-230. § 59-65-210, however, declares that the state will make certain appropriations for salaries and expenses of attendance supervisors and also declares, 'This sum shall be the State's portion of the attendance supervisor program'. Thus, if local property taxes are used to supplement salaries and expenses of attendance supervisors, an individual taxpayer might possess the requisite interest to obtain standing.
Yours very truly,

***4** Daniel R. McLeod
Attorney General

Footnotes

1 § 59-65-230. 'Attendance supervisors shall be certified by the State Board of Education. Qualifications for the certification of attendance supervisors shall be determined by the State Board of Education in the same manner as the Board now determines qualifications for all other teachers, provided that such certification requirements shall not adversely affect attendance supervisors who were employed prior to the passage of this article.'

2 State funding for attendance supervisors is provided in § 28 of Act No. 517, Acts and Joint Resolutions of South Carolina, 1980 (General Appropriations Act). A proviso to § 28 mandates that state appropriations for attendance supervisors are restricted to supervising attendance programs and directs a distribution of the funds; however, § 28 does not address certification and employment of attendance supervisors.

3 A representative of the State Department of Education, possessing knowledge of the activities of attendance supervisors statewide, states that, almost without exception, attendance supervisors do not perform classroom teaching duties, homebound instruction, or evaluation of truant childrens' educational needs. In that attendance supervisors do not perform the duties of a 'teacher' (See § 59-1-130, Code of Laws of South Carolina, 1976), questions may arise as to the advisability and legality of requiring their certification qualifications to be determined in a manner as for teachers. For example, one current certification requirement for attendance supervisors is attaining a minimum score of 510 on the Common Examinations of the National Teacher Examinations. Your attention

is directed to Griggs v. Duke Power Company, 401 U.S. 424, 91 S. Ct. 849, 22 L. Ed.2d 158 (1971), and its progeny. The subject of this digression is not central to the resolution of the question presented; therefore, this opinion will not further pursue this point. Also, questions may arise as to the application, if at all, of Act No. 187, Acts and Joint Resolutions of South Carolina, 1979.

4 One limited exception does exist as specified in the proviso to § 59-65-230 (see Footnote No. 1), exempting attendance supervisors already employed by a school district on the date of the passage of Article 3 from state certification requirements. This opinion does not consider the meaning of 'the date of passage'; however, Act No. 369 of 1961 bears an effective date of May 23, 1981.

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