

SCHOOLS: (1) Where an applicant for a public  
TEACHERS: schoolteacher certificate has the  
LICENSES: required amount of academic and pro-  
RELIGION: fessional preparation as required  
STATE BOARD OF EDUCATION: by Section 168.021, RSMo. Supp. 1965,  
and has presented evidence of good  
moral character as provided by Section  
168.031, RSMo. Supp. 1965, the State  
Board of Education must issue a certifi-  
cate; (2) The legislature in prescribing the requirements for  
certification as a public schoolteacher has not required that  
the applicant be presently employable, nor has it prohibited a  
cleric or religious from being certificated. The State Board of  
Education cannot lawfully add such as prerequisites in excess of  
those prescribed by statute; (3) Membership in the ordained  
clergy or in a religious order does not prevent a qualified per-  
son from being lawfully employed as a teacher of secular subjects  
in a public school; (4) An obligation to remit all or part of his  
salary to a religious organization or church does not prevent a  
qualified person from being lawfully employed as a public school-  
teacher; (5) The teaching of religion as such in the public schools  
by any person is prohibited; (6) In the absence of a valid statute  
or judicial decree meeting requirements of due process of law, a  
qualified person cannot be excluded from employment as a public  
schoolteacher because he has taken a religious vow.

OPINION NO. 164

June 2, 1966

Honorable Hubert Wheeler  
Commissioner of Education  
Jefferson Building  
Jefferson City, Missouri



Dear Mr. Wheeler:

This official opinion is issued in response to your request for a ruling.

You inform us as follows: A person has applied to the State Board of Education for a public school teaching certificate. This applicant has all the academic and professional qualifications required by statutes and regulations which are prerequisite to certification. The applicant is a member of a religious order or the clergy of the Roman Catholic Church. The State Department of Education has denied certification.

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In regard to the above you ask three questions, to wit:

"A.

"Under the law, should a public school teacher's certificate be granted to a person, otherwise qualified, whose regular vocation is of a church or clerical character and whose vows, religious loyalties or obligations may involve one or more of the following:

- (1) the wearing in the classroom of distinctive garb associated by the public with a particular religion or with religion in general;
- (2) the remittance of wages to a religious order pursuant to a vow of poverty or other obligation;
- (3) a religious vow which would or might be construed to require such a person to attempt to impart his religious views to students under his charge in the classroom?"

"B.

"Could such a person be legally hired by a local board of education to teach in the public schools, and if he could not, should or can the State Board of Education grant a certificate to him?"

"C.

"Is the denial of a public school teacher's certificate to such a person a violation of the Civil Rights Act of 1964?"

We shall discuss each question separately.

A.

May the State Board of Education lawfully refuse to issue a public schoolteacher's certificate to an applicant on the ground that the applicant is a cleric or religious with certain vows?

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The issuance of public school teaching certificates is provided for in Sections 168.021 and 168.031, RSMo Supp. 1965, to wit:

"168.021. Certificates of license to teach in the public schools of the state shall be granted as follows:

(1) By the state board of education, under rules and regulations prescribed by it,

(a) Upon the basis of college credit;

(b) Upon the basis of examination;

(c) To each student completing in a satisfactory manner at least a two-year course in a city training school as provided for in section 178.410, RSMo.

(2) By the Missouri state colleges, state teachers' colleges, the University of Missouri and Lincoln University to graduates receiving the degree of bachelor of science in education, a life teaching certificate bearing the signature of the commissioner of education and which shall be registered in the state department of education.

(3) By the county superintendents of schools upon the basis of examination as provided in section 168.041, a county certificate entitling the holder to teach only in the county of issuance for a period of one year."

"168.031. No person shall receive or hold any certificate who does not present evidence of good moral character, and who, except those persons who held certificates entitling them to teach in the public schools on September 1, 1927, has not satisfactorily completed a four-year approved high school course. The high school work may be done in any public, private or parochial school."

As manifested by Sections 168.021 and 168.031, a teacher's certificate certifies only that the holder has, upon the basis of college credit or examination, the required minimum of academic and professional preparation and has presented evidence of good moral character.

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The State Board has discretion to determine whether or not an applicant has the prescribed college credits or has passed the prescribed examination and has presented evidence of good moral character. However, once these requirements are met, the State Board's discretion ends.

Section 168.021 is stated in express mandatory words, "Certificates . . . shall be granted."

The law is clear that once the statutory conditions have been complied with, the board has no discretion to refuse to issue the certificate. Numerous cases are annotated in 121 A.L.R. 1472. Also see: 47 Am.Jur., Schools, § 110.

If officials refuse to issue the certificate, mandamus will lie to compel them to act as required by law; 55 C.J.S., Mandamus, § 152d(1); State ex rel Gorman v. Offutt, Mo.App., 26 S.W.2d 830.

Do the statutes or regulations thereunder require as a prerequisite to issuance of a certificate that the applicant not be a cleric or religious?

The statutes, Section 168.021 and 168.031 quoted supra, do not contain any such requirement.

Our State Constitution and statutes require all administrative agencies to file their rules and regulations with the Secretary of State at least ten days before they are effective. Article IV, Section 16, Missouri Constitution 1945; Section 536.020, RSMo 1959.

You have furnished this office with all rules and regulations adopted by the State Board of Education for the certification of teachers. Upon examining these materials we do not find any rule or regulation concerning the certification of clergy or religious. We assume that the State Board of Education has not adopted any rule or regulation prohibiting the certification of clergy or religious.

Of course, only the State Board lawfully convened can adopt rules and regulations. Neither the Commissioner of Education nor any subordinate has the power to prescribe additional certification requirements.

If, however, the State Board of Education had, or should in the future adopt, a regulation prohibiting a cleric or religious from being eligible for certification, such a regulation would be without authority of law and void.

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Only the legislature has the power to make laws. Further, an attempt by the legislature to delegate its legislative powers would be invalid. The rule-making power of an administrative body is circumscribed by and may not exceed or contradict the statutes.

In a case dealing with the Public Service Commission, the Missouri Supreme Court stated:

"The legislature has declared the public policy of this state, regarding the transfer of certificates. Respondent is merely the instrumentality of the Legislature, created for the purpose of carrying out that policy. It has no power to adopt a rule, or follow a practice, which results in nullifying the expressed will of the Legislature.

It cannot, under the theory of 'construction' of a statute, proceed in a manner contrary to the plain terms of the statute; \* \* \*" State ex rel Springfield Warehouse and Transfer Co., et al, v. Public Service Commission, 225 S.W.2d 792, 794.

The power of a Board of Education to make rules was expressed by the Supreme Court of Missouri in Wright, et al, v. Board of Education of St. Louis, Mo., 246 S.W. 43, 45:

"The power of the board to make the rule in this case is to be considered prior to a determination of its reasonableness. The power delegated by the Legislature is purely derivative. Under a well-recognized canon of construction, such powers, however remedial in their purpose, can only be exercised as are clearly comprehended within the words of the statute or that may be derived therefrom by necessary implication; regard always being had for the object to be attained. Any doubt or ambiguity arising out of the terms of the grant must be resolved in favor of the people. \* \* \*"

Also see: 73 C.J.S., Public Administrative Bodies and Procedures, § 94.

Recently this office ruled upon the validity of a regulation concerning the registration of land surveyors (Opinion No. 356, Barton, 9-22-65, copy enclosed herewith). The proposed

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regulation attempted to enlarge the statute by imposing an additional requirement. Based upon the legal principles supra, the regulation was ruled to be invalid and beyond the power of the administrative board.

Subsequent to Opinion No. 356, the validity of this regulation was put in issue before the Administrative Hearing Commission of the State of Missouri.

In Schulte v. State Board of Registration for Architects and Professional Engineers, No. 65001, decided February 10, 1966, Commissioner Bushmann ruled:

" \* \* \* [The Board's] action, resulting from their construction of the law, is arbitrary, capricious and unreasonable. Respondent is authorized to administer the law as it is written. It is not empowered to add or subtract from the statute. Powers not conferred are just as plainly prohibited as those which are expressly forbidden. When powers are given to be performed in a specified manner, there is an implied restriction upon the exercise of those powers in excess of the grant."

\* \* \* \* \*

"Since petitioner satisfied all the requirements of the statute, he is legally entitled to a land surveyor's license. Respondent has no discretion to increase these legislative conditions. Since there is no dispute as to whether plaintiff meets the statutory requirements, then it is mandatory that the Board issue petitioner a license. The statute does not give respondent authority to make a determination on a subject not set out in the statute."

The factors here involved are quite similar to those in Schulte, supra.

Your letter refers to the case of Berghorn v. Reorganized School District No. 8, Franklin County, Mo., 260 S.W.2d 573. Seemingly this decision has been interpreted to prohibit the issuance of public school teaching certificates to clerics or religious.

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Since we shall discuss the Berghorn case under Part B, hereinafter, it suffices here to say that the certification of teachers was not an issue before the Supreme Court and nothing in the Court's decision authorizes the State Board of Education to deny certification because the applicant is a cleric or religious.

Therefore, as to the first question: it is our opinion that the refusal to issue a public school teaching certificate because the applicant is a religious or cleric is without any legal basis.

B.

The second question: Can a public school board lawfully employ as a teacher one who is a cleric or religious with vows involving one or more the following:

"(1) the wearing in the classroom of distinctive garb associated by the public with a particular religion or with religion in general;

"(2) the remittance of wages to a religious order pursuant to a vow of poverty or other obligation;

"(3) a religious vow which would or might be construed to require such a person to attempt to impart his religious views to students under his charge in the classroom?"

We shall assume, per your information, that the person in question meets the academic and professional qualifications prescribed by law, is of good moral character, has been duly certificated, has provided the health certificate required by Section 168.131, and met other legal requirements for employment as a public schoolteacher.

Chapter 168, RSMo Supp. 1965, deals with the employment of public schoolteachers. There is nothing in this chapter which prohibits a public school board of education from employing as a teacher a cleric or religious.

School boards are free to exercise sound discretion in the selection of teachers whom they believe to be competent. Boards

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are vested with the power to exercise their judgment and discretion in employing and removing teachers so long as their judgment is not unreasonable, arbitrary, capricious or unlawful. State ex rel Wood et al., v. Board of Education of City of St. Louis, Mo., 206 S.W.2d 566, 567.

Your letter refers to the case of Berghorn v. Reorganized School Dist. No. 8, Mo., 260 S.W.2d 573. We shall give detailed attention to the Berghorn case, and also the earlier case of Harfst v. Hoegen, Mo., 163 S.W.2d 609.

The Court's opinion in Berghorn sets forth at length the facts under which the schools in question there operated. These facts were as follows: The defendant was a reorganized public school district which operated three elementary schools. Prior to 1931 all three schools had been operated by the Roman Catholic Church as parochial schools. After 1931 the defendant public school district operated these three schools. Title to the school buildings remained in the church officials. With one exception, no rent was paid for the buildings. The buildings were on the same tract of land with the church and other church buildings. There were religious symbols on the buildings.

The teachers, with one exception, were all members of religious orders of the Roman Catholic Church. The teachers were educationally qualified. The directors of the district had, without exception, employed any nun assigned to teach in the district by the superior of the religious order. The nun teachers at all times wore distinctive religious garb including religious emblems and symbols. They had taken vows of poverty, obedience and chastity. They were paid salaries by the district and out of their salaries paid their living expenses, income taxes and teachers retirement contributions. They were bound by their vows to place any balance of their salary in the common treasury of their religious order. The Catholic pupils of the schools attended Mass and received religious instructions from the nun teachers. Catholic pupils were excused during school hours to serve as acolytes. Non-Catholic pupils were required to wait in the school buildings or grounds during morning religious services. They were permitted to attend the services if they desired.

The principal issue before the Court was whether the school was a free public school entitled to public funds. The lower court seemingly had the view that the Roman Catholic nuns in the case could not lawfully qualify as public schoolteachers(1.c. 579). The trial court, in the course of enjoining the operation of the parochial school as a part of the public school system, enjoined

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the public school board from employing as teachers the nuns of the particular religious orders involved. However, since the schools in question were not public schools, but as the trial court found, parochial schools unlawfully operated by a public school district, the question of whether these nuns could be lawfully employed as teachers in a public school was not in issue before the trial court.

Not being before the trial court, likewise this question was not before the Supreme Court on appeal. After stating at length that appellants had failed to comply with court rules and thus had not preserved all errors of the trial court for review, the Court said that the only issues before the appellate court were, l.c. 580:

" \* \* \*(1) 'The trial court erred in recognizing respondents' right to sue'; (2) 'The trial court erred in finding that the teachers in defendant schools are not indispensable parties'; and (3) 'The trial court erred in finding that defendant schools are not free public schools and in enjoining their operation, in that there was no finding by the trial court that children in defendant schools have been influenced or coerced by any sectarian matter.' \* \* \*"

The Supreme Court ruled only on these three issues.

As to the third issue, which the court referred to as the "pole star" inquiry in the case, the Court stated, l.c. 583:

"In determining the issue presented we are not limited to a consideration of any particular fact separate and apart from all other facts and circumstances shown by the whole record. We must consider the total effect of all of the facts and circumstances in evidence in determining whether the schools in question are in fact free public schools."

After reciting the totality of evidence, summarized supra, the Court held, l.c. 584:

"From these and other facts shown by this record, we think the conclusion is inescapable that these schools, as main-

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tained and operated by defendant District 8 and its officers at Gildehaus and Krakow, were in fact 'controlled in the main by members of recognized orders of the Roman Catholic Church and by officials thereof'; that said schools to a great degree were 'managed and administered in a manner to promote the interests and policies of the Roman Catholic Church and of adherents of the Roman Catholic faith'; and that said schools were not in fact free public schools and were not entitled to be supported by public school money or public funds. Harfst v. Hoegen, 349 Mo. 808, 163 S.W.2d 609, 141 A.L.R. 1136."

Appellants contended that the nun teachers were indispensable parties to the action because their employment relation with the public school district was determined. The Court ruled against the appellant stating, l.c. 585:

" \* \* \* The matter of the existence of any lawful or unlawful contractual relationships between the defendant districts and the teachers in the respective schools was not decisive or material to the issues on trial between the parties to this action, nor could the validity or invalidity of any such contracts constitute a defense to the plaintiffs' action."

\* \* \* \* \*

" \* \* \* The matter of the validity of contracts between the districts and the teachers has not been presented to or determined by this court. Neither the contracts nor the teachers were before this court."

Although the trial court had made statements on this issue, in light of the fact that the appeal court did not defer to the trial court's findings, in light of the fact that this issue was not presented to the court on appeal, and further in light of the fact that the court expressly said that it was not ruling upon this issue, we must conclude that the Berghorn case does not determine the question before us.

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The sole substantial issue in Berghorn was, under the total effect of all the facts and circumstances in evidence, whether or not the schools in question were in fact free public schools. The Court concluded that they were not free public schools and therefore affirmed the trial court's orders enjoining the continuation of maintenance of these schools by the public school district.

Another case similar to Berghorn is Harfst v. Hoegen, Mo., 163 S.W.2d 609. The facts in Harfst are substantially the same as those before the Court in Berghorn. The parochial school had been under the nominal supervision of the public school board. The Court found that this was not a free public school and that the inclusion of it in the public school system where children of every faith would be compelled to attend, constituted a denial of our constitutional guarantee of freedom of religion.

The Supreme Court in Harfst also considered the actions of the teachers in the school. Article II, Section 7, Missouri Constitution 1875, the provisions of which are now contained in Article I, Section 7, of our present Constitution, states that public money cannot be used in aid of any religion or in aid of any "teacher thereof, as such." Upon the evidence, the Supreme Court found that the nun teachers had conducted religious instruction in the school in question and that they were teachers of religion as such. The Court held that under the constitutional interdiction, payment to them as teachers of religion, from the public school funds was forbidden.

Briefly stated, Berghorn and Harfst are authorities on the question of what school is lawfully a public school. Harfst further defines what subjects may be taught in a public school, that is, not religion. The question for determination in this opinion is: What person can lawfully be a teacher of secular subjects in a public school. The questions are distinct and neither Berghorn nor Harfst answers the latter. We are not aware of any Missouri case deciding this question. Our burden is one of resolving a question of first impression.

You have raised three factors and ask whether they would prevent the lawful employment of a religious or cleric by a public school district as a teacher. We shall consider each in the order presented.

(1)

Would the wearing of distinctive religious garb in the classroom prevent a person from being lawfully employed as a public schoolteacher?

We are informed that the applicant in question is not required to wear other than conventional attire in the classroom.

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Since the question is academic here and further being without specific facts, we make no ruling upon this issue.

(2)

Would the obligation to remit wages to a religious order prevent a person from being lawfully employed as a public schoolteacher?

Employment of a public schoolteacher is a contractual relation wherein the public school district pays compensation for services rendered.

Since religion is not taught in the public school, we assume the teacher is to be hired to teach secular subjects.

Our State Constitution prohibits the use of public monies in the support of religion. See: Article I, Section 7, and Article IX, Section 8, Constitution of Missouri 1945. Our constitution also prohibits the granting of public money to any private person. See: Article III, Section 38(a) and Section 39.

Would the circumstances you describe violate these constitutional prohibitions?

The Supreme Court of our State has ruled that where there is an exchange of considerations there is not aid to religion.

In Kintzele v. City of St. Louis, Mo., 347 S.W.2d 695, the plaintiffs complained that the sale of land under the Redevelopment Law (Chapter 99, RSMo) to a private sectarian school violates the prohibitions of the State and Federal Constitutions against use of public funds in aid of religion. The Court ruled against the plaintiffs' contention, quoting a New York court, to wit, l.c. 700:

" \* \* \* '[S]ince this sale is an exchange of considerations and not a gift or subsidy, no "aid to religion" is involved and a religious corporation cannot be excluded from bidding.' \* \* \*"

Employment of a public schoolteacher is a contractual relation wherein the public school district pays compensation for services rendered. In the court's words, this is an exchange of considerations and no aid to religion is involved. Just as

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it made no legal difference that the sectarian school would use the land purchased to promote its sectarian purposes, likewise it makes no legal difference here that a teacher give all or any part of his salary to support the church of his preference.

The disposition that the schoolteacher makes or is obliged to make of his or her income from teaching or any other source, cannot be any basis for holding that public funds are being used in aid of religion.

Therefore, it is our opinion that the obligation to remit all or any part of one's salary to a sectarian organization would not prevent such person from being lawfully employed as a public schoolteacher.

(3)

Can a person be lawfully employed as a public schoolteacher if he has taken "a religious vow which would or might be construed to require such a person to attempt to impart his religious views to students under his charge in the classroom?"

Our State Constitution prohibits the use of public monies to aid teachers of religion "as such." Article I, Section 7, Missouri Constitution 1945. Clearly, if a person in fact is employed to give religious instruction he cannot be lawfully paid for that service out of public monies and if payment is attempted the courts will enjoin it. Harfst v. Hoegen, supra, l.c. 614.

Our State Constitution further prohibits the use of public funds to provide religious education. Article IX, Section 8, Missouri Constitution 1945. Religious instruction as such in a public school is also prohibited by the First Amendment of the United States Constitution. E.g., McCullum v. Board of Education, 333 U.S. 203.

These prohibitions apply to the conduct of all persons whether they be members of religious orders, ordained ministers, laymen or atheists.

The same Constitution which guarantees religious freedom and protects a public school pupil from intrusion into his preferred religious convictions equally prohibits impairment of the right to due process of law and the freedom of speech, association, religious conviction and right to employment of the teacher.

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One has a right to engage in lawful employment. Even as to public employments, the Constitution protects against arbitrary or discriminatory exclusion. Wieman v. Updegraff, 344 U.S. 183, 192.

It is the public policy of this State that the right to public employment be not dependent upon the applicants' religious belief.

Article I, Section 5, Missouri Constitution 1945, provides:

"That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no human authority can control or interfere with the rights of conscience; that no person shall, on account of his religious persuasion or belief, be rendered ineligible to any public office of trust or profit in this state, be disqualified from testifying or serving as a juror, or be molested in his person or estate; but this section shall not be construed to excuse acts of licentiousness, nor to justify practices inconsistent with the good order, peace or safety of the state, or with the rights of others."

Sections 296.010, et seq., RSMo Supp. 1965, recently enacted, prohibit discriminatory employment practices because of creed or religion. The intent of the legislature is manifest in express words. Section 296.070, states:

"The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof, and any law inconsistent with any provision hereof shall not apply. Nothing contained in this chapter shall be deemed to repeal any of the provisions of any law of this state relating to discrimination because of race, creed, color, religion, national origin, or ancestry."

In this opinion we are called upon to determine whether a person shall be barred from employment as a public school-teacher on the basis of a religious vow. We have not been provided with the terms of a particular existent vow.

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We are informed that the applicant seeks employment in a public school. Since the public school does not (and lawfully cannot) teach religion, necessarily he will be employed to teach some secular course as reading, writing, arithmetic, etc., with textbooks and curriculum as provided by the public school system under the supervision of the State Board of Education. A vow of a religious has no operation in the field of secular education. Thus, such a vow cannot affect the lawful employment of the person as a secular public schoolteacher.

Obviously any person, whether under a vow or not, can deviate from the authorized secular curriculum and, surreptitiously or overtly, introduce religious doctrines into a public school classroom. It is the policy of the courts not to presume from the mere possibility that persons will act unlawfully. We cannot presume any teacher will act unlawfully. Nor, can we presume that they have taken a vow which requires unlawful conduct.

If a school board employs a teacher for the purpose of teaching religion, as such, or if a teacher after employment deviates from the authorized curriculum and teaches religion as such, or if it is threatened that unlawful instruction will be given, there are adequate judicial remedies.

Therefore, we are of the opinion that in the absence of a valid statute or a judicial decree meeting due process of law requirements, a qualified person cannot be deprived of the right to employment as a public schoolteacher for having taken a religious vow.

C.

Your last question is: "Is the denial of a public schoolteacher's certificate to such a person a violation of the Civil Rights Act of 1964?"

Having found under Point A, supra, that there is no authority to refuse to issue a certification to a qualified applicant, this inquiry is moot.

CONCLUSION

Therefore, it is the opinion of this office that:

(1) Where an applicant for a public schoolteacher certificate has the required amount of academic and professional preparation as required by Section 168.021, RSMo Supp. 1965, and has presented evidence of good moral character as provided by Section 168.031,

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RSMo Supp. 1965, the State Board of Education must issue a certificate;

(2) The legislature in prescribing the requirements for certification as a public schoolteacher has not required that the applicant be presently employable, nor has it prohibited a cleric or religious from being certificated. The State Board of Education cannot lawfully add such as prerequisites in excess of those prescribed by statute;

(3) Membership in the ordained clergy or in a religious order does not prevent a qualified person from being lawfully employed as a teacher of secular subjects in a public school;

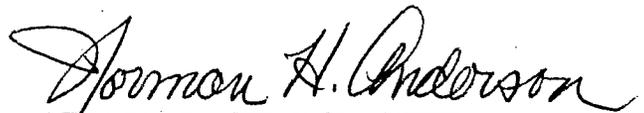
(4) An obligation to remit all or part of his salary to a religious organization or church does not prevent a qualified person from being lawfully employed as a public schoolteacher;

(5) The teaching of religion as such in the public schools by any person is prohibited;

(6) In the absence of a valid statute or judicial decree meeting requirements of due process of law, a qualified person cannot be excluded from employment as a public schoolteacher because he has taken a religious vow.

The foregoing opinion, which I hereby approve, was prepared by my assistant Louis C. DeFeo, Jr.

Yours very truly,



NORMAN H. ANDERSON  
Attorney General

Enclosure: Opinion No. 356,  
Barton, 9-22-65.