Answer by Letter (Bartlett)

September 14, 1970

**OPINION LETTER NO. 30**

FILED
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**Honorable Robert H. Branom**
**State Representative**
**District No. 35**
**2151 69th Street**
**Hillsdale, Missouri**

**Dear Representative Branom:**

**This letter is in response to your request for a ruling on the following:**

> **Is the immunity clause of, Chapter 168, Section 168.115, Missouri Revised Statutes, 1959, the Teacher Tenure Law constitutional; and, if so, what is its scope?**

**Section 168.129, RSMo 1969, contains the following immunity provisions:**

> **"Board member exempt from civil liability resulting from charges against teacher.-- No member of a board of education or duly designated administrative officer of a board of education shall be liable in a civil action based on a statement of charges against a school teacher."**

**It is our understanding that your inquiry is whether such statute violates the provisions of Section 40(28) of Article III of the Constitution of Missouri.**

**Such section provides as follows:**

> **"The general assembly shall not pass any local or special law:**
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> *** * ***

> "(28) granting to any corporation, association or individual any special or exclusive rights, privilege or immunity, . . ."

> ". . . 'It is well established in this state that a law is not a special law if it apply to all alike of a given class, provided the classification thus made is not arbitrary or without reasonable basis.' . . ." ABC Liquidators, Inc. v. Kansas City, 322 S.W.2d 876, 885 (Mo. 1959)

In Marshall v. Kansas City, 355 S.W.2d 877, 884 (Mo. 1962) the Missouri Supreme Court stated:

> ". . . As a general rule, it is not what a law includes that makes it unconstitutional as a special law, but what it excludes, and a law is not special in the constitutional sense if it applies alike to all of a given class provided the classification thus made is not arbitrary or without a reasonable basis. . . ."

We believe that Section 168.129 is not a local or special law for the following reasons: (1) the classification is not arbitrary or without a reasonable basis and (2) the statute applies equally to everyone in the described class, and does not exclude anyone who should be included within the class. For the above given reasons, it is our view that this section would not violated Article III, Section 40(28) of the Missouri Constitution.

For many years school boards in Missouri have had a qualified privilege to make statements about teachers which would otherwise be defamatory. In Finley v. Steele, 159 Mo. 299, 60 S.W. 108 (1900), the defendants, members of the local school board, had written a letter to the county school commissioner accusing plaintiff, Mrs. Finley, a school teacher, of being "totally unfit to teach our school and being very tyrannical and abusive and indecent. . . ." The board went on to accuse her of whipping the children unmercifully, pulling their ears and otherwise mistreating the children. Mrs. Finley sued the defendants for $10,000 damages in an action for defamation.

The Missouri Supreme Court stated:

> "The publication in question was with respect to plaintiff as school teacher, and is, upon its face, clearly defamatory, and, if false,

> actionable per se, unless absolutely or qualifiedly privileged. Absolutely privileged publications are legislative and judicial proceedings and naval and military affairs, while a qualified privilege 'extends to all communications made bona fide upon any subject-matter in which the party communicating has an interest, or in reference to which he owes a duty to a person having a corresponding interest or duty, and to cases where the duty is not a legal one, but where it is of a moral or social character of imperfect obligation.' . . ." Id. at 109.

The court went on to discuss the limitations of a qualified privilege, saying that:

> ". . . the 'party defamed may recover, notwithstanding the privilege, if he can prove that the words used were not used in good faith, but that the party availed himself of the occasion willfully and knowingly for the purpose of defaming the plaintiff.' . . .
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> ". . . a communication, to be privileged, must be made on a proper occasion, from a proper motive, and must be based upon reasonable or probable cause. When so made in good faith, the law does not imply malice from the communication itself, as in the ordinary case of libel. Actual malice must be proved before there can be a recovery, and in the absence of such proof a nonsuit should be granted. . . ." Id. at 109.

In Finley there was no statute conferring immunity on the board. Nevertheless, the court held that the teacher could not recover because the board had a qualified privilege to make the statements it did.

The decision in Finley was relied upon by the Missouri Supreme Court in Williams v. Kansas City Transit, Inc., 339 S.W.2d 792 (Mo. 1960). In this case plaintiff, an employee of defendant, was discharged. Plaintiff in due course requested from defendant a service letter. Defendant was under a statutory obligation to furnish plaintiff such a letter stating truthfully the reasons for discharge. After the letter was delivered to plaintiff, plaintiff sued defendant for libel.

The Missouri Supreme Court held that, since defendant was under a statutory obligation to deliver the letter to plaintiff upon request, defendant enjoyed a qualified privilege that would protect him from a libel action unless actual malice were shown. Again, this qualified privilege was not provided by statute.

In both Finley and Williams, the party charged with defamation made the questioned statements in the course of fulfilling an obligation placed upon it by statute. In both cases the court held that in such a situation there was a privilege to make statements which, if untrue, would be defamatory unless the statements were not made in good faith.

The situation about which you inquire is similar to both Finley and Williams in that a school board is given the power by Section 168.114 to terminate an indefinite contract with a teacher for certain enumerated causes. Section 168.126 gives a board the power to terminate a probationary teacher's contract. In both instances, the board is required to communicate its charges to the teacher. Even without Section 168.129, a school board would be protected by a qualified privilege in carrying out its statutory duty under these sections. See Finley, supra, and Williams, supra. Therefore, we conclude that Section 168.129 is a codification of a qualified privilege already existing in Missouri.

It is our view that the immunity provision of the Teacher Tenure Law, Section 168.129, RSMo 1969, is not a special law within the meaning of Section 40(28) of Article III of the Constitution of Missouri. No member of a board of education or a duly designated administrative officer of a board of education shall be liable in a civil action based on a statement of charges against a school teacher so long as the statement of charges is within the statutory authority conferred on the board and the charges are made in good faith, without actual malice.

Yours very truly,

JOHN C. DANFORTH
Attorney General