

Answer by letter-Bartlett

February 3, 1970

OPINION LETTER NO. 45

Mr. J. Warren Head, President  
Missouri State Board of Education  
Jefferson State Office Building  
Jefferson City, Missouri 65101



Dear Mr. Head:

This letter is in response to your request for an opinion on two questions pertaining to the selection of a new Commissioner of Education by the State Board of Education. Specifically, your questions were as follows:

"We would like your advice and legal opinion as to whether or not the State Board of Education can, on the retirement of the present commissioner, employ an acting commissioner of education who has not resided in Missouri for at least one year immediately preceding his appointment, make him an acting commissioner, for a year, or until he meets that requirement, and later, if his services are satisfactory, make him the commissioner.

"We also wish your opinion as to whether or not the Board can contract with a commissioner of education to establish a definite term of employment."

I.

As you point out in your opinion request, Article IX, Section 2(b), Constitution of the State of Missouri provides in part that the State Board of Education:

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" . . . shall select and appoint a commissioner of education as its chief administrative officer, who shall be a citizen and resident of the state, and removable at its discretion. . . ."

This provision does not require residence in the State of Missouri for any length of time. However, residency in the state for one year is added by Section 161.112, RSMo Supp. 1967:

"The state board of education shall appoint a commissioner of education as its chief administrative officer. The commissioner shall be a citizen who has resided in the state for at least one year immediately preceding his appointment and who possesses educational attainment and breadth of experience in the administration of public education. The board shall prescribe the duties of the commissioner and fix his compensation, and may remove him at its discretion."

Taking into consideration Article IX, Section 2(b) and Section 161.112, we believe that the State Board of Education could employ as Acting Commissioner of Education a man who has not resided in Missouri for at least one year immediately preceding his appointment. This conclusion is based on our Opinion No. 293 dated June 25, 1969, to the Honorable Robert A. Young. In this opinion we conclude that the Governor of the State of Missouri can designate a person to perform the duties of the office of the head of an executive department, such person not being appointed to the office or claiming title to the office. Furthermore, such person can perform the duties of the office until such time as the office is properly filled by a qualified person duly appointed. We see no meaningful distinction between the situation dealt with in Opinion No. 293 and the situation outlined in your opinion request. Therefore, insofar as Article IX, Section 2(b) and Section 161.112 are concerned, we believe that the State Board of Education could select a person to fill the position of Acting Commissioner of Education who had not resided in the state for at least one year immediately preceding his appointment.

Having reached this conclusion, we must now consider Article VII, Section 8 of the Constitution of Missouri which states as follows:

"No person shall be elected or appointed to any civil or military office in this state who is not a citizen of the United States, and who shall not have resided in this state one year next

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preceding his election or appointment, except that the residence in this state shall not be necessary in cases of appointment to administrative positions requiring technical or specialized skill or knowledge."

It is not necessary for us to determine whether an Acting Commissioner of Education would be subject to the one year residency requirement in the first part of Section 8. If we assume that he would not be a public officer, then the provisions of Section 8 of Article VII would not apply to him. However, if it is assumed that he would be a public officer and therefore subject to Section 8, the exception contained in that section would apply, i.e., that residence in the state is not necessary in case of appointment to administrative positions requiring technical or specialized skill or knowledge. In Opinion No. 139 dated May 24, 1965, to Governor Hearnese, we held that the exception to Section 8 "was intended to include persons who might be chosen to administer and conduct the affairs of departments, agencies and institutions." The Acting Commissioner of Education would be a person chosen on a temporary basis to administer and conduct the affairs of the Department of Education. Therefore, he would be appointed to an administrative position which we believe requires technical or specialized skill or knowledge.

From the foregoing, we conclude that the State Board of Education could appoint a man as Acting Commissioner of Education even though this man had not resided in the State of Missouri for one year and, by so doing, would not violate the requirements of Section 2(b), Article IX, Section 161.112, RSMo Supp. 1967., or Section 8, Article VII of the Missouri Constitution.

## II.

Article IX, Section 2(b) and Section 161.112, RSMo Supp. 1967, both state that the Commissioner of Education may be removed at the discretion of the State Board of Education.

"Discretion" as defined in Webster's International Dictionary (2nd Ed. 1950) is the "Power of free decision, individual judgment; undirected choice; . . ."

Freedom of decision based on one's ideas of what is proper under the circumstances appears to be an essential ingredient of discretion. See 27 C.J.S., Discretion, pp. 289-300 and State ex rel. and to Use of Kersey v. Pemiscot Land & Copperage Co., 317 Mo. 41, 295 S.W. 78, 80 (en banc 1927).

In Paquette v. City of Fall River, 278 Mass. 172, 179 N.E. 588 (1932), the court stated:

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". . . The plaintiffs were elected teachers under the terms of G. L. c. 71, § 41. It is there provided with respect to teachers in the positions of the plaintiffs that the 'school committee \* \* \* in electing a teacher \* \* \* who has served in its public schools for the three previous consecutive school years \* \* \* shall employ him to serve at its discretion. \* \* \*' The terms of this section are mandatory. The school committee has no option to elect the teachers there described except 'to serve at its discretion.' The meaning of this statutory language is that such discretion includes every essential element in the service thus established save as otherwise specified by statute. In this connection the discretion of the school committee denotes freedom to act according to honest judgment. *Corrigan v. School Committee of New Bedford*, 250 Mass. 334, 339, 145 N. E. 530. 'The term "discretion" implies the absence of a hard-and-fast rule. The establishment of a clearly defined rule of action would be the end of discretion, and yet discretion should not be a word for arbitrary will or inconsiderate action. "Discretion means the equitable decision of what is just and proper under the circumstances."' *The Styria v. Morgan*, 186 U. S. 1, 9, 22 S. Ct. 731, 734, 46 L. Ed. 1027. . . ." Id. at 590.

In view of the foregoing definitions of "discretion," we believe that the State Board of Education cannot make a decision under today's circumstances which will prevent it from taking different action under changed circumstances. The State Board of Education must retain the freedom of action expressly granted to it by the Missouri Constitution and Section 161.112 to have the Commissioner "removable at its discretion."

Yours very truly,

JOHN C. DANFORTH  
Attorney General

Enclosures: Op. No. 293  
6-25-69, Young  
  
Op. No. 139  
5-24-65, Hearnese