SCHOOLS:
CONTRACTS:
CONSTITUTIONAL LAW:

Section 38(a) and Section 39(3), Article III, Missouri Constitution, prohibit a school board and the district superintendent from terminating a partially performed three-year contract and executing a new contract providing for the performance of the same duties at a greater compensation when the only reason for doing so is an increase in the number of students attending the school district.

OPINION NO. 157

October 2, 1973

FILED
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Honorable Joseph S. Kenton
Representative, District 32
8553 Holmes
Kansas City, Missouri 64131

Dear Representative Kenton:

This official opinion is issued in response to your request for a ruling on the following questions:

> "1. Does an increase in enrollment in a school district constitute additional duties for a school superintendent as stated in opinion No. 171 which was issued May 4, 1971 to Rep. Gralike.
>
> "2. If this does constitute additional duties, then is a school board justified to give a school superintendent a 10% salary increase in the middle of a three-year contract if the school's enrollment increases by 10%."

The following facts were furnished in the opinion request:

> "It has been the practice of many school districts to hire a superintendent on a three-year contract; then before the school board election in the spring, the superintendent is given a one year extension on his contract with an additional raise. What with the term of a school board member being only three years, this tends to prevent the people from having a voice in the selection and retention of the school superintendent.

> "When challenged on this issue, the members of the school board defend their position by saying that the school's enrollment increases every year so that the superintendent's salary should be increased because he is in charge of a larger school system each year.
>
> "Taking into consideration these factors, does an increase in enrollment constitute the additional duties required in Opinion No. 171; and if so, can the salary increase be calibrated to the amount of enrollment increase."

QUESTION NO. 1

In question No. 1, you refer to Attorney General's Opinion No. 171 to the Honorable Donald J. Gralike issued May 4, 1971. On several occasions in Opinion No. 171, we noted that the school board therein had sought during the term of a three-year contract to increase the superintendent's compensation without altering the nature of his obligation to the district. See, for instance, pages 2, 3, and 5. We concluded that under the circumstances set forth in Attorney General's Opinion No. 171, any attempt to increase the superintendent's compensation for performing duties he was already obligated to perform would violate Sections 38(a) and 39(3) of Article III of the Missouri Constitution.

Your question is whether an increase in enrollment in a school district would constitute different duties so as to justify increasing a superintendent's compensation during the term of a three-year contract. We do not believe it would.

In Attorney General's Opinion No. 171 and Attorney General's Opinion No. 211 dated May 6, 1970, to the Honorable Ronald M. Belt, reliance was placed on the Missouri Supreme Court decision in Kizior v. City of St. Joseph, 329 S.W.2d 605 (Mo. 1959). In this case a sanitation company had agreed with the city of St. Joseph to provide trash removal services for a ten-year period at a fixed compensation without any provision that would protect it from unexpected contingencies or greatly increased costs. The company argued that due to several unforeseen factors the contract had become burdensome and unprofitable. Specifically, it contended that the company's hog feeding operation had been damaged by the 1951 flood, that access to the company's hog feeding plant had become more difficult because of the flood, that Missouri was about ready to prohibit the feeding of raw garbage to hogs and that the cost of repairs, gas, and labor had increased by 11%. For these reasons, the city contended that it was justified in changing certain terms

of the contract to benefit the company. One of the proposed changes was to increase the company's compensation for performing trash collection services.

The court found the city had no power to amend the existing contract stating, in part, as follows:

> "A careful reading of the amendatory contract does not disclose that appellant agreed therein to do anything except 'to continue to collect and dispose of garbage in accordance with the contract [of July 12, 1949] hereinabove referred to.' Obviously, appellant was already bound to do that which it agreed to do in the agreement to amend. The stated purpose of the city in agreeing to the amendment was to make it possible for appellant to continue the garbage collection operation which appellant had found it impossible to do 'by reason of conditions beyond its control.' For doing that which appellant was already obligated to do under the original contract, the city agreed in the amendment to pay appellant at least $19,000 annually in addition to the amount originally agreed upon. That clearly violated the quoted constitutional provision, as it was a 'grant' of 'extra compensation * * * to a * * * contractor after * * * a contract has been entered into and performed * * * in part.' Article III, Section 39(3), supra. . . ." Id. at 609.

The city also argued in Kizior that its contractor was confronted with circumstances which were not contemplated when the contract was entered into. Therefore, separate consideration existed for the amendatory contract. The court rejected this contention also.

> ". . . Certainly the fact that appellant may have entered into an improvident contract would afford no basis for creating an exception to the application of a clear constitutional prohibition. Section 39(3), Article III was adopted by the people as a safeguard against the squandering of public money and to prohibit public officers from giving gratuities to contractors, and it may not be cast aside even though one who has acted in good faith may suffer hardships. The courts

> of this state have adhered to a policy of strictly enforcing the constitutional and statutory safeguards applicable to the contracts of public corporations. . . ." Id. at 610.

The lesson of the Kizior case is that, unless provided for in the contract, increased costs of operation due to unforeseen circumstances will not furnish the basis for entering into an amendatory contract increasing the compensation to be paid a contractor for performing services he is already obligated to perform.

In the instant case, the superintendent agreed to provide certain services to the school district for a three-year period. Both the superintendent and the school board probably foresaw at the time the contract was entered into that the school population might increase over the term of the agreement. However, even if the number of students in the district increased unexpectedly during the term of the contract, no basis would be provided for increasing the superintendent's compensation for performing services he had already agreed to perform. The superintendent has agreed to perform the duties of superintendent for a period of years. Increase in the student population involves, at the most, an increase in duties of the general type he has agreed to perform. As in Kizior, the superintendent may have entered into "an improvident contract" which would not justify raising his salary.

QUESTION NO. 2

In view of our position on question No. 1, it is unnecessary to answer this question.

CONCLUSION

Therefore, it is the conclusion of this office that Section 38(a) and Section 39(3), Article III, Missouri Constitution, prohibit a school board and the district superintendent from terminating a partially performed three-year contract and executing a new contract providing for the performance of the same duties at a greater compensation when the only reason for doing so is an increase in the number of students attending the school district.

The foregoing opinion, which I hereby approve, was prepared by my assistant, D. Brook Bartlett.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 171, 5/4/71, Gralike
Op. No. 211, 5/6/70, Belt