SCHOOLS: Three questions as to validity of proceedings under Section 10631 R. S. Mo., 1939.

February 26, 1943

2-27

FILED
78

Honorable Roy Scantlin
State Superintendent of Schools
Jefferson City, Missouri

Dear Mr. Scantlin:

We have your request for an opinion of recent date which reads as follows:

"I desire an opinion from you relative to a certain matter. The facts in the case seem to be as follows:

"At Houston, Missouri, in Texas County, a teacher was employed sometime last summer. This teacher held a State Certificate, which is in force now and would continue to be in force until July 1, 1944, issued by the State Superintendent of Schools. This teacher taught in the Public Schools of Houston for several weeks and then attempted to resign to take other employment. His resignation was unanimously refused by the Board of Education. He was notified of the fact that his resignation was not accepted the morning after the action was taken. However, the following Monday morning he failed to report for duty. The Board of Education of the Houston, Missouri School District brought charges against him asking that his certificate be revoked under the provisions of Section 10631 of the Missouri Statutes.

They presented these charges to the County Superintendent of Texas County, who then proceeded to set a date for the hearing. Said County Superintendent notified this teacher of the hearing, even notifying him of the exact time and place that the hearing would be held. In like manner, the County Superintendent notified the State Superintendent that charges had been filed against this teacher, and he also notified the State Superintendent the exact time and place of the hearing. The State Superintendent wrote the County Superintendent telling him that he felt that it should have been the duty of the State Superintendent to set the time and place for the hearing, but since the matter had gone so far as it had, perhaps the plans as set up by the County Superintendent should be carried out. The date arrived for the hearing; the State Superintendent was represented at the hearing by a deputy. The teacher against whom the charges were brought was present at the hearing, made no protest as to the method by which he was notified of the hearing, and, in fact, made no protest relative to any of the procedures as followed in the matter. The teacher whose certificate is in question made no denial of any charges which the School Board of Houston, had brought against him. It now becomes my duty to make a decision as to whether or not his state certificate should be revoked.

"I am quite willing to make such decision, if I can be satisfied concerning two or three small points in the case.

1. The County Superintendent set the time and place for the hearing and notified the teacher in question, the School Board of Houston, and the State Superintendent of Schools, telling each when and where the hearing would be held. Would the fact that the State Superintendent did not do this cause the proceedings to be improper?

2. Would the fact that the State Superintendent was represented in the hearing by a deputy rather than in person cause the proceedings to be improper?

3. In case you rule that the notification of time and place and the setting of the time and place should have been made by the State Superintendent of Schools, would the fact that the teacher in question was present at the hearing and made no protest of this matter at all, throw any different light on the matter?

"I am satisfied with regard to all other points in these proceedings, but I do humbly request an opinion on the above three points."

The statute involved in your questions is Section 10631, R. S. Mo., 1939, which reads as follows:

"The county superintendent may revoke, upon satisfactory proof, any county certificate for incompetency, immorality, neglect of duty, or the annulling of written contracts with the board of directors without the consent of the majority of the members of the board which is a party to such contract. All charges must be preferred in writing, signed and sworn to by the party or parties making the accusation, which must be filed with the county superintendent, and the teacher must be given due notice, of not less than ten days, an opportunity to be heard, together with witnesses. In case any person holding a certificate issued by the state superintendent, the board of curators of the state university, or the board of regents of any state teachers college, shall be complained of as herein provided for, then it shall be the duty of the county superintendent in the county where the offense is alleged to have been committed, to notify, in writing, the person or board issuing such certificate, and such person or board shall proceed as herein provided for the revocation of such certificate. The complaint must plainly and fully specify what incompetency, immorality, neglect of duty or other charge is made against the teacher, and if the county superintendent shall, after a hearing, revoke said certificate, the teacher shall have the right to appeal said hearing to the circuit court at any time within ten days thereafter by filing an affidavit and giving bond as is now required before justices of the peace. On any such appeal the judge of the circuit court shall, with or without a jury, at the option of either the teacher or the person making the complaint, hear the whole matter anew and decide the same de novo affirming or denying the action of the county superintendent,

> and he shall tax the cost against the appellant if the judgment of the county superintendent is affirmed, but if he disaffirms such judgment, then he shall assess the costs of the whole proceedings against the person or persons making the complaint. Any teacher having his or her certificate revoked by any other authority than that of county superintendent shall have the right to appeal therefrom to the circuit court and shall have the right to a like hearing and trial as is herein provided for in the appeal from the decision of the county superintendent."

It will be seen by the foregoing section that where the certificate of the teacher complained against has been issued by the State Superintendent of Schools, that official should conduct the hearing on the complaint. The statute says that upon complaint being made against a teacher holding a certificate issued by the State Superintendent of Schools, the State Superintendent of Schools should proceed as provided in said section, that is, should proceed in the same manner that the county superintendent would proceed were the complaint lodged against a teacher holding a certificate issued by him. Such procedure would include the setting of a date for hearing and the furnishing of notice to the teacher complained against. These steps should be taken by the State Superintendent of Schools when he is to conduct the hearing. However, the facts in the present case show that although the county superintendent set the date of the hearing, the state superintendent ratified and approved of said date so that in reality the state superintendent did set the date on which the hearing was to be held. We think that the ratification or adoption by the state superintendent of the date set by the county superintendent was just as effective as if the state superintendent had originally set the date.

Likewise, although the state superintendent should have notified the teacher complained against, yet the teacher did receive a notice of the charges and of the time and place of hearing and actually attended said hearing without making any protest as to the manner in which he was notified. We believe that the teacher thereby waived any defect of notice since the purpose of the notice was to advise him as to the fact that charges had been lodged against him, as to what said charges were and that on a day certain a hearing would be held upon said charges, at which hearing he could be present and be heard. By being present at the hearing after he had received notice of the nature of the charges we think he could not then complain that he had not been properly notified.

The foregoing disposes of questions one and three of your request. Question two presents a different situation, however, Your statement of facts shows that the state superintendent did not attend the hearing on the complaint, but that he sent someone else in his place to the hearing. Your statement of facts says that "the State Superintendent was represented at the hearing by a deputy".

There is no deputy state superintendent of schools. The question, therefore, resolves itself to a question of whether the state superintendent can deputize someone to attend to certain of his duties. The general rule as to when a public officer can delegate his powers to someone else is stated in 46 C. J. 1033, Section 291, as follows:

> "An officer, to whom a discretion is intrusted, cannot delegate the exercise thereof, but ministerial duties, except where there is a statutory prohibition, may be delegated."

The foregoing rule has been followed in Missouri as will be seen by the case of State ex rel. v. Reber, 226 Mo. 229, 237, wherein the Court said:

> " * * * * * * * An officer to whom a discretion is entrusted by law cannot delegate to another the exercise of that discretion, but after he has himself exercised the discretion he may, under proper conditions, delegate to another the performance of a ministerial act to evidence the result of his own exercise of the discretion. * * * * * * "

To answer your question, therefore, we must determine whether or not the powers vested in the State Superintendent of Schools under Section 10631 of the statutes require the exercise by that official of discretion and judgment or whether such powers merely call for an exercise of ministerial duties by such officer.

The distinction between duties requiring the exercise of discretion and judgment and those requiring the performance of mere ministerial functions has been well established by the courts of this State. In the case of State ex rel. v. Cook, 174 Mo. 100, 107, the Supreme Court with approval quoted the following statement as to the distinction between powers requiring the exercise of discretion and those which merely require the exercise of ministerial duties, which statement reads as follows:

> " * * * * * * * In Ex parte Thompson, 52 Ala. 98, the rule is stated thus: 'When the power is clearly defined and enjoined, does not involve the exercise of discretion or judgment, and no alternative is left to the officer charged with its execution; when he must act

> without enquiry, and without evidence, and the mode of action is expressly declared, the power is purely ministerial. When, however, the power involves the exercise of judgment and discretion; when it is to be exercised only in an ascertained event, and on the occurrence and existence of particular facts, and the officer charged with the execution of the power must determine whether the event has arisen, or the facts exist requiring its exercise, then the power is judicial, or in its nature judicial.'
> * * * * * * * "

The rule as to such distinction is stated in the case of State ex rel. v. Meier, 143 Mo. 439, 447, in the following language:

> " * * * * * * * * 'A ministerial act is one which a public officer is required to perform upon a given state of facts in a prescribed manner in obedience to the mandate of legal authority, and without regard to his own judgment or opinion concerning the propriety or impropriety of the act to be performed.' Merrill on Mandamus, sec. 30; Marcum v. Com'rs, 42 W. Va. 263, and cases cited."

Again in the case of State ex rel. v. Welsch, 124 S. W. (2d) 636, l.c. 639, the Court defined a ministerial act in the following language:

> " * * * * * * * * A ministerial act, as applied to a public officer, is an act or thing which he is required to perform by direction of legal authority upon a given state of facts be-

> ing shown to exist, regardless of his own opinion as to the propriety or impropriety of doing the act in the particular case. State ex rel. Jones et al. v. Cook, 174 Mo. 100, 118, 119, 120, 73 S. W. 489."

See also the case of State ex rel. v. Brown, 72 S. W. (2d) l. c. 862.

With these rules in mind let us examine Section 10831, supra, to see what is the nature of the duties of the state superintendent with respect to revocation of certificates. It should be noticed in the first instance that the statute says that the official vested with the power to revoke "may revoke, upon satisfactory proof, any county certificate for incompetency, immorality, neglect of duty, or the annulling of written contracts with the board of directors without the consent of the majority of the members of the board which is a party to such contract." The statute also specifically requires that the teacher complained against must be given an opportunity to be heard and to present witnesses in his behalf. It will be seen, therefore, that the superintendent hearing the complaint does not have to revoke a certificate but he "may revoke" the certificate. He not only must exercise his judgment in ascertaining the existence of particular facts, but he must also exercise his discretion as to whether the certificate should be revoked even if certain facts are found to exist. He necessarily must exercise his judgment as to the credibility of witnesses and as to the weight and value which should be given to their testimony. He, therefore, exercises powers which are in their nature judicial, as was said in the case of State ex rel. v. Cook.

It cannot be said, therefore, that the powers of

of the superintendent, under Section 10631, merely require the exercise of ministerial duties. Such official is not bound by law to revoke a teacher's certificate regardless of his own opinion as to the propriety or impropriety of such revocation in a particular case. It is quite possible, perhaps probable, that in some cases the superintendent might revoke a certificate upon a showing of facts but might not revoke a certificate upon a showing of the same facts in another case. There might be extenuating circumstances in one case which would not be present in another case. In any event, the superintendent would be the judge as to whether he should revoke the certificate in each particular case.

The state superintendent could not exercise his judgment and discretion as to whether a teacher's certificate should be revoked without hearing the evidence and personally acquainting himself with the facts upon which the determination is to be made. To allow someone else to conduct the hearing, view the witnesses, hear the evidence and make a finding as to what the facts were would be a clear delegation of the duties which the law requires the state superintendent himself to perform. A deputy might conclude that some witness had sworn falsely whereas the superintendent, if he should hear the same witness, might conclude that the witness was telling the truth. Likewise, a deputy might conclude that a teacher was guilty of incompetency, immorality or neglect of duty, or vice versa, whereas the superintendent himself might arrive at a different conclusion should he hear the same evidence. The law has placed upon the superintendent the responsibility for a determination of the facts and of the question as to whether a certificate should be revoked under the facts as determined. Under the rules as laid down by the courts in the cases above quoted from, such official cannot delegate that responsibility.

Furthermore, the law requires that an officer perform his duties in the manner prescribed by law. The rule has been stated as follows in 46 C. J. 1033, Section 290:

> "Powers conferred upon a public officer can be exercised only in the manner, and under the circumstances, prescribed by law, and any attempted exercise thereof in any other manner or under different circumstances is a nullity. * * * * * * * "

Under the facts set out in your letter the state superintendent attempted to exercise his powers in a manner different from that prescribed by law in that he undertook to delegate to someone else (a deputy) the power and responsibility of exercising judgment and discretion which was required of the superintendent himself. Since the teacher in question has not been accorded a hearing by the State Superintendent of Schools, the State Superintendent of Schools is without authority now to revoke the license of such teacher. Nothing said herein should be construed to mean that the state superintendent cannot yet conduct the hearing as required by law and take such action as in his judgment the facts warrant.

## CONCLUSION

It is, therefore, the opinion of this office that under the facts and circumstances set out in your letter of the fifteenth (1) the setting of the date of the hearing by the county superintendent and the approval

or ratification of said date by the state superintendent was a substantial compliance with Section 10831 R. S. Mo., 1939, and (2) that the fact that the State Superintendent of Schools did not personally conduct the hearing but undertook to be represented at said hearing by another person rendered the proceeding void and of no effect and (3) that the fact that the teacher in question was present at the hearing and had been notified of the nature of the charges against him and of the date said hearing would be held and did not protest as to any deficiency of notification amounted to a waiver by the teacher of any defect in the time and place of the hearing and of the fact that he had not been notified by the proper official.

Respectfully submitted,

HARRY H. KAY
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

HHK:FS