



POLICY MEMO

JUNE 28, 2018

To: Arizona State Board of Education Members
From: Timothy Sandefur, Vice President for Litigation
Re: How the Board Can and Should Respond to Unlawful School Closures

The recent wave of unlawful school closures in Arizona was disturbing, not merely because of the financial and educational consequences on parents and teachers, but also because of the legal ramifications. The purpose of this memorandum is to describe these legal concerns and discuss what avenues the Board has for ensuring that such an incident is not repeated.

WHY THE SCHOOL CLOSURES WERE UNLAWFUL

Unlike employees of private businesses, employees of the government have no right to strike except where authorized by statute to engage in acts of protest. The reasons were well explained by President Franklin Roosevelt:

The very nature and purposes of Government make it impossible for administrative officials to represent fully or to bind the employer in mutual discussions with Government employee organizations. The employer is the whole people, who speak by means of laws enacted by their representatives in Congress. Accordingly, administrative officials and employees alike are governed and guided, and in many instances restricted, by laws which establish policies, procedures, or rules in personnel matters.¹

President Ronald Reagan, himself a former union president who had led his union on a strike, agreed.

“A strike is an economic contest between labor and management when negotiations have failed to resolve an issue,” he wrote. “But governments can’t shut down the assembly line. The services provided to the people, who in this case are the employers of all of us in government, must be continued.”²

For government employees to refuse to do their jobs until their demands are met essentially means holding taxpayers hostage—along with those too young to pay taxes and who have no vote—by withholding public services that the government is obligated to provide to all people.

That is particularly true in the education context, given that the Arizona Constitution guarantees a right to an education.³ *How* that education is to be provided is a question for the legislature to resolve. Once it has done so, by establishing, regulating, and funding a school system, then the system it has established must be complied with. People may disagree with the policies and laws the legislature enacts, and may want more funding for schools than the legislature has provided, but the proper recourse is then to petition the legislature, engage in political protests, and vote one’s conscience—not to violate the laws the legislature has enacted.

It is certainly true that school employees have First Amendment rights to express their opinions and to demonstrate on their own time. They have no right, however, to strike, violate their contractual obligations, disable the state’s school system, and engage in political activities on the taxpayer’s dime. In a famous 1892 case, Justice Oliver Wendell Holmes ruled that a police department had the authority to fire a police officer who engaged in political activity while on duty; when the officer argued that he had a First Amendment right to engage in political activism, Holmes replied,

“The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman . . . He takes the employment on the terms which are offered him.”⁴ The same principle applies to Arizona public school employees.

On April 27, 2018, in response to a letter that the Goldwater Institute sent to superintendents of Arizona school districts,⁵ the Arizona Education Association (AEA) sent a letter to the Arizona Attorney General’s Office claiming that state school employees have the right to strike because there is no law forbidding it. This is incorrect. Public school employees, like all government employees, presumptively have no right to strike unless such a right is given to them by statute. That is why in 1972, the Arizona Court of Appeals ruled that the right of public school personnel to strike “does not exist.”⁶ In making that decision, the court cited the Illinois Supreme Court, which referred to “the universal view” that government employees have “no inherent right . . . to strike against their governmental employer, whether Federal, State, or a political subdivision thereof,” and ruled that such a strike “for any purpose is illegal.”⁷

A year before that decision, the Arizona Attorney General issued an opinion stating that public school employees have no right to strike.⁸ Because there was then “no court decision” on the question, the Attorney General examined “common law and [other states’] court decisions,” and concluded that “it has long been held that a strike by public employees [is] an act against the public itself, and [is] therefore unlawful.” The “great majority” of rulings in other states supported that conclusion, because public employees are “agent[s] of the state,” and therefore have “no right to strike or to interfere with the state’s governmental functions.”

The Attorney General also concluded that this Board “has inherent power” to define what constitutes unprofessional conduct, and that it “may discipline holders of teaching certificates accordingly.”

THE ILLEGAL #REDFOR ED STRIKE

The AEA letter cited above sought to downplay this opinion on the grounds that it addressed a situation in which school employees were protesting school districts rather than the state itself. But during the spring 2018 strikes, school employees were “not seeking concessions from school districts,” but were demanding “a remedy from the State Legislature and the Governor,” said the AEA. This argument is unpersuasive, however. Teachers are ultimately employees of the state, their pay is received from the state, their pensions are part of the Arizona State Retirement System, and they discharge duties established by state law. The state Board has authority to “supervise and control the certification of persons engaged in instructional work.”⁹ If there is a difference, therefore, it is irrelevant.

Another effort at legalistic quibbling lies at the heart of the “#RedforEd” strike. School employees sought to create the impression their actions were lawful because they were using the “paid leave,” or time off, provided under their employment contracts, and therefore not “really” acting in violation of their employment contracts. This argument, too, is unavailing. For employees to coordinate the taking of leave time in a concerted effort to shut down schools qualifies as “unprofessional conduct,” even if teachers are entitled to request leave time for occasional personal needs. Some argue their acts were indirect. But what cannot be done directly cannot be done indirectly, and an effort to subvert the education system even if by indirect means is still unlawful.¹⁰

In their contracts, school employees agree to provide services consistently with the official policies adopted by their district governing boards. These policies require school employees to conduct themselves professionally and to do all they can to keep schools open and to prevent disruption.

For example, the Mesa Public Schools Employee Handbook states: “the district reserves the right to restrict personal leave when the impact [of an absence] would disrupt the educational process.”¹¹ The Phoenix Union High School District’s Professional Agreement manual for support staff states, “The District expects each employee to be at work as much as possible so that the mission of the District can be accomplished. Paid leave is provided to accommodate serious circumstances that prevent an employee from being at work, not to allow work to be missed for routine purposes. Each employee must be aware of the detrimental impact on productivity, morale, and the educational success of our students that results from the disruption to the educational process that occurs when s/he is absent from work.”¹²

Similar wording is to be found in virtually all such employee handbooks, precisely because the misuse of leave time to subvert the operation of schools is unprofessional conduct.

Even more worrisome than the conduct of specific employees, however, has been the conduct of school *districts*. Districts, being government bodies themselves, have additional obligations to comply with state laws governing education policy and to keep schools operating whenever possible. During the recent disruptions, several districts chose to shut down *entirely* even where some of the schools in those districts could have remained open. We were contacted by several teachers who told us their schools voted to remain open, or that enough school employees were willing to report to work that at least some schools could have remained open.

Even after school closures began, employees in some districts (for example, Chandler) voted to return to work, but district officials chose to keep districts closed anyway. Other districts chose to facilitate and encourage the unlawful strike in other ways. In Tempe, for example, district officials changed their leave policies to enable teachers to remain away from work more easily. For districts to encourage the closure of schools is a violation of state law and of the state Constitution.

Many charter schools provided a stark contrast to this by remaining open. Unlike the encouragement or enabling provided by districts, most charter school operators made it clear they expected their teachers to remain at work. Consequently, almost every charter school remained in operation—despite the fact that in some cases, charter school employees do have a legal right to strike.¹³

THE BOARD’S AUTHORITY TO ENFORCE THE LAW

This Board has the authority and the duty to “exercise general supervision over and regulate the conduct of the public school system,” and to “aid in the enforcement of laws relating to schools.”¹⁴ In doing so, it may “adopt *any* rules and policies it deems necessary to accomplish this purpose.”¹⁵ The Board also supervises and controls “the certification of persons engaged in instructional work.”¹⁶ Thus, according to state law and as the Arizona Attorney General opinion cited above, this Board has the inherent authority to act to penalize public school employees who engage in illegal conduct aimed at closing schools in the state.

Specifically, this Board has power to take disciplinary action against teachers or superintendents who engage in unprofessional conduct.¹⁷ This Board’s Discipline Guidelines provide that a “contract break” qualifies as “unprofessional conduct,” subject to penalty.¹⁸ Therefore, the Board can and should take disciplinary action for unprofessional conduct, including especially contract breaks that result in school closures that violate the Arizona Constitution’s guarantee of a public education system.

In its April 27, 2018, letter, the AEA claimed that the Board could not take disciplinary action against employees engaged in an illegal strike because under a *different* statute¹⁹ a school district’s governing board must first request that disciplinary action be taken against employees who resign from their positions without district approval. Be that as it may, this sidebar argument is beside the point. Just because the districts have been granted authority to instigate an investigation for unprofessional conduct does not in any way prevent the board from conducting its own.

Arizona law is clear. Whether a district requests it or not, the Arizona superintendent of Public Instruction and this Board have the power to charge employees with unprofessional conduct and revoke certifications.²⁰

OTHER ARIZONA LAW

Two other Arizona laws are also relevant here. It is unlawful to interfere with or disrupt an educational institution.²¹ Such unlawful interference occurs when a person “intentionally or knowingly enter[s] or remain[s] on the property of any educational institution for the purpose of interfering with the lawful use of the property or in any manner as to deny or interfere with the lawful use of the property by others.”

A person who enters a school building for the purpose of encouraging employees to disrupt the educational process *in any way*, including—but not limited to—organizing them to refuse to report for duty is therefore unlawful. This is

especially true where, as in this situation, a person encourages another to engage in an illegal activity that denies or interferes with the lawful use of school property. #RedforEd leaders who organized “votes” to determine whether or not to engage in actions aimed at shutting down schools were therefore engaged in an illegal act.

While the statute makes interference with an education institution a felony, it also provides that school districts may discipline employees who violate it, and provides that “penalties shall include ... in the case of a ... faculty member or other staff violator ... any other appropriate disciplinary action.”²² This means that this Board may deem violations of this statute to be unprofessional conduct and may take disciplinary action against a teacher in the manner stated above.

This statute also *mandates* that school district governing boards “amend [their] rules as necessary to ensure the maintenance of public order.”²³ This Board may therefore, under its general authority to supervise the educational system in Arizona, require school districts to amend their rules to prevent any repeat of these illegal strikes.

Second, it is unlawful to use school resources for political purposes, or for school employees to pressure subordinates to engage in a political act.²⁴ We received numerous reports of school employees violating this statute, including conducting campaign efforts on school time and with school resources. The statute that forbids the use of school resources for political activities can be enforced only by the attorney general or a county attorney. But this Board does have authority to consider violations of this section when evaluating whether an employee has engaged in unprofessional conduct.

Illegal activity is per se unprofessional conduct, but unprofessional conduct is broader than criminal or civil statutes. When the legislature delegated the authority to this Board to “review and determine whether to renew or not issue a [teaching] certificate ... on a finding that the applicant engaged in conduct that is immoral or unprofessional or engaged in conduct that would warrant disciplinary action if the person had been certified at the time that the alleged conduct occurred,” it authorized enforcement even when the attorney general or county attorney have declined to initiate legal action.²⁵

And this Board has ruled that unprofessional conduct includes using “professional position ... for improper personal gain” or “engag[ing] in conduct which would discredit the teaching profession.”²⁶ Likewise, teachers and superintendents who participate in or facilitate unlawful strikes or who use school resources for political gain are engaged in unprofessional conduct even if no further legal action is taken.

KEEPING DISTRICTS OPEN

It is illegal for school employees or district officials to facilitate the closure of schools in an effort to obtain political concessions. This Board has the inherent authority, and legal obligation, to take steps necessary to ensure that schools remain open. District governing boards are required to “prescribe and enforce policies and procedures for the governance of the schools, *not inconsistent with law or rules prescribed by the state board of education*,”²⁷ and this Board can “exercise general supervision over and regulate the conduct of the public school system” and “adopt any rules and policies it deems necessary to accomplish this purpose.”²⁸

To prevent unlawful school closures in the future, the Board should consider the following:

1. Amend R7-2-1308 to add two new items: “16. Engage in an illegal strike or other activities that disrupt student instruction and schedule. 17. Use of school resources to participate in political activity.” This amendment would make clear that teachers and superintendents who strike or engage in illegal political activity can and will face disciplinary action, up to and including having their certificates revoked.

2. Amend R7-2-614(D)(5) to read: “5. The requirements for initial issuance are: a. High school diploma or equivalent, or associate degree; b. Verification from the school district superintendent that an emergency employment situation exists; and c. A valid fingerprint clearance card issued, or proof that a criminal background check has been completed and proof that an application for a fingerprint clearance card has been submitted.” This amendment would allow districts to fill immediate needs in the event of an illegal strike by recruiting substitutes from the qualified local adult population. The Board should have a process in place to issue these emergency certificates within 48 hours of application, and a follow-up mechanism to review the fingerprint clearance card once processed by DPS.

3. Under the authority of Sections 15-203 and 15-431(A)(32), adopt a new rule in the Arizona Administrative Code titled “School Closure Prevention” including the following requirements:

- A.** Districts shall adopt policies that allow borrowing or sharing teachers within the district to keep as many schools open as possible during an illegal strike.
- B.** Districts shall adopt a policy that prohibits locking out teachers who want to report for work during an illegal strike (to teach or for in-service).
- C.** Districts shall report teachers and superintendents that participate in an illegal strike to the State Board for investigation of unprofessional conduct.
- D.** Districts shall make an exhaustive attempt to staff the school with emergency substitutes in the event of an illegal strike. If there is a school closure, the district will provide evidence that it made an exhaustive search for emergency substitutes.
- E.** Closures of schools pursuant to A.R.S. 15-431(A)(32) shall be made on a school-by-school basis.

This would forbid districts from barring employees from reporting for work when they are willing and able to do so, or from closing entirely when only some of the schools within that district are unable to operate. This Board should also consider recommending amendments to A.R.S. 15-431(A)(32) that would better regulate the authority of local districts from closing schools without following the requirement for open meetings and public comment by parents.

4. Request for the county attorney or the attorney general to investigate illegal activities involved with the strike, including unlawful use of property and the illegal political activity.

If you have any questions about these recommendations, or if you would like to discuss them in greater detail, please feel free to contact me at any time:

Timothy Sandefur

tsandefur@goldwaterinstitute.org

(602) 462-5000



ENDNOTES

- ¹ Letter on the Resolution of Federation and Federal Employees against Strikes in Federal Service, August 16, 1937, <http://www.presidency.ucsb.edu/ws/index.php?pid=15445>.
- ² Kiron K. Skinner, et al., eds., “Letter to Mrs. Browning,” in *Reagan: A Life in Letters* (New York: Free Press, 2004), 328.
- ³ *Craven v. Huppenthal*, 236 Ariz. 217, 219, 338 P.3d 324, 326 (Ct. App. 2014).
- ⁴ *McAuliffe v. City of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517, 517–18 (1892).
<https://goldwaterinstitute.org/wp-content/uploads/2018/04/Letter-to-Schools180426-1.pdf>.
- ⁶ *Comm’ns Workers of Am. v. Arizona Bd. of Regents*, 17 Ariz. App. 398, 400, 498 P.2d 472, 474 (1972).
See also *Local Union No. 370, Int’l Union of Operating Engineers v. Detrick*, 592 F.2d 1045, 1046 (9th Cir. 1979).
- ⁷ *Board of Education of Community Unit School District No. 2 v. Redding*, 32 Ill.2d 567, 571, 207 N.E.2d 427, 430 (1965).
- ⁸ *Ariz. Att’y Gen. Op. No. 71-12 (R40)* (April 5, 1971). This opinion has never been withdrawn. In fact, it has been reaffirmed. *Ariz. Att’y Gen. Op. No. 180-039 (R80-12)* (March 18, 1980).
- ⁹ A.R.S. §15-203(A)(14).
- ¹⁰ See also *State v. Delaware State Educational Ass’n*, 326 A.2d 868, 871 (Del. Ch. 1974). (“One argument has been raised throughout to rebut the conclusion that an illegal strike occurred. It has been contended ... that, since teachers are entitled to take a personal day during the course of the year, those teachers who left their work in support of the planned action ... did not violate the law ... It seems ridiculous to say the section permitting a personal day is broad enough to permit a teacher to participate in a concerted action the necessary result of which is to close the schools ... The personal day was not intended by the Legislature to permit a bootstrap rationalization to legalize a strike.”)
- ¹¹ http://www.mpsaz.org/hr/resources/staff-resources/documents/files/employee_handbook_17-18_-_web.pdf
- ¹² <http://www.phoenixunion.org/cms/lib6/AZ01001825/Centricity/ModuleInstance/5341/SUPPORT%20STAFF%20%20PROF%20AGREEMENT%202011-2012.pdf>. The 2017 version of the Professional Agreement specifies the reasons for which personal leave may be granted; strikes are, of course, not included. Teachers may request leave on the basis of illness, maternity leave, to campaign (on his or her own behalf) for public office, to serve in the Peace Corps, to serve as an overseas teacher, or for “other requests...considered on their own merit.” <http://www.phxhs.k12.az.us/site/handlers/filedownload.ashx?moduleinstanceid=5249&dataid=43493&FileName=2017-2018%20CTA%20PROF%20AGREEMENT%20final.pdf>
- ¹³ National Right to Work Foundation, “Charter School Teachers and Employees: Know Your Workplace Rights!” <http://www.nrtw.org/your-rights-charter/>.
- ¹⁴ A.R.S. §15-203(A)(11).
- ¹⁵ A.R.S. §15-203(A)(1) (emphasis added).
- ¹⁶ A.R.S. §15-203(A)(14).
- ¹⁷ A.R.S. §§ 15-203(A)(20), 15-534(C), (D).
- ¹⁸ https://azsbe.az.gov/sites/default/files/media/Discipline%20Guidelines%20Adtoped%20February%202017_1.pdf.
- ¹⁹ A.R.S. §15-545.
- ²⁰ A.R.S. §15-539.
- ²¹ A.R.S. §13-2911.
- ²² A.R.S. §13-2911(D).
- ²³ *Id.*
- ²⁴ A.R.S. §15-511.
- ²⁵ A.R.S. §15-534(C).
- ²⁶ A.A.C. R7-2-1308(B)(5)(14)(15).
- ²⁷ A.R.S. §15-341(A)(1) (emphasis added).
- ²⁸ *Id.* (emphasis added).