

Opinion No. 45-4818

November 15, 1945

BY: C. C. McCULLOH, Attorney General

TO: Colonel Rufus Sedillo State Director, Selective Service Santa Fe, New Mexico

Re: No. 11.13-2

OPINION

{*156} In your letter dated November 13, 1945, you enclose copies of an application of a veteran for re-employment in his former job with a county school board as school bus driver, together with an opinion from a private attorney relative to the matter, and a letter of inquiry to you from the county selective service board.

Your question involves the right of the veteran to be re-employed as a school bus driver under the provisions of Section 57-701 of the 1945 Pocket Supplement to the 1941 Compilation which provides in part as follows:

"If such position was in the employ of the State of New Mexico, any political subdivision thereof, state institution, county or municipality, such person shall be restored to such position or to a position of like seniority, status, and pay."

The question arises whether a school bus driver is an employee covered by the act or whether he is an independent contractor. There are several cases on this question regarding school bus drivers in connection with claims under workman's compensation acts and the majority of the cases hold a school bus driver to be an independent contractor, and as such not entitled to workman's compensation. *Arthur v. Marble Rock Consolidated School District*, 238 N. W. 70 (Iowa); *Ludlow v. Industrial Commission*, 65 Utah 168, 235 P. 884; *Daves v. Board of School Commissioners*, 178 S. 63 (Ala.); *Olson v. Cushman*, 276 N. W. 777 (Iowa).

In the case of *Ridgdell v. T.P.S.B.* 17 So. 2d, 55, a Louisiana case, the court held that insofar as a school bus driver contracted to furnish transportation for school pupils, he was an independent contractor, but insofar as he furnished labor and personal services, he was an employee. This case seems to be more in conformity with the problem involved in this case. In New Mexico school bus drivers are required to enter into a uniform contract throughout the state and to contract to furnish a bus according to certain standards and specifications, and to pay the expense of operation of the same. Yet, the contract provides that upon certain conditions the driver will be subject to discharge and it provides that if he refuses to comply with the terms of the contract and is discharged, he shall forfeit any unpaid salary due him.

It is also the uniform practice for school boards to take out P. L. and P. D. insurance on all occupants of a school bus, including the driver when he is engaged upon the transportation of pupils in carrying out his contract. This insurance is in the nature of fleet insurance and the premiums are paid by the school boards.

It has also been the policy of the state director of transportation, in providing for substitutes for school bus drivers who are in the armed forces, insofar as possible, to protect their interest by giving contracts to members of their family or others who are willing to surrender the job upon the return of the veteran.

It is to be noted also that under the retirement act for teachers and school employees, a deduction of 3% of the payroll is made by the State Treasurer, since most of the transportation expense is paid out of the maintenance fund. This deduction applies to funds which eventually are paid to school bus drivers, as well as to teachers and other employees.

It is also noted that after deducting an amount for depreciation of school busses and an amount estimated $\{^*157\}$ to cover operation expenses, a withholding tax is paid to the Collector of Internal Revenue on the balance paid to school bus drivers, which is considered as his salary over and above his expenses.

It is apparent then that to some extent, at least, school bus drivers are considered by the administrative agencies of the state as being employees of the school board, and if such drivers drive the bus personally instead of employing someone else to drive for them, I am of the opinion that to the extent that they furnish labor and personal services, such drivers are employees of the school board within the contemplation of the section above quoted, and are entitled to be re-employed in their former position or a position of like seniority, status and pay.

I realize that while a former school bus driver was in the service, it may have been necessary to let contracts for other bus drivers who now hold them, perhaps for the balance of this year or longer, and that such bus drivers necessarily had to invest large sums of money in a school bus and perhaps it would be an undue hardship in the middle of the school year to cancel his contract and give the contract to the returning veteran. If it is administratively possible, a returning veteran should be given another job of like seniority, status and pay satisfactory to him, but if budget limitations are such that this is not possible, I believe all present contracts to school bus drivers may be construed by the courts as being made in contemplation of and subject to the statute above mentioned, and if the returning veteran can obtain a school bus, meeting the required standards and specifications, he should be given the contract to drive his former school bus route in the absence of any other satisfactory arrangement being possible to be made by the school board.