

To: Howard L. Brown

September 15, 2000
Re: Use of Private Contractor to Provide
School District Teachers and
Administrators
I00-021
(R00-045)

Mangum, Wall, Stoops & Warden, P.L.L.C.

Pursuant to Arizona Revised Statutes ("A.R.S.") § 15-253(B), this Opinion revises the opinion you submitted for our review regarding a proposal that Chinle Unified School District is considering to contract with a private business that would provide the district with teachers and administrators.

Question Presented

Does a school district governing board have statutory authority to contract with a private company to select, train, supervise, evaluate, and discipline teachers and administrators?

Summary Answer

School district governing boards do not have express or implied statutory authority to contract with a private company to select, train, supervise, evaluate, and discipline the district's teachers and administrators.⁽¹⁾

Background

The district is considering a private company's proposal to provide the district with administrators and teachers to fill full time, permanent positions within the district.⁽²⁾ According to the opinion submitted for review, instead of hiring teachers and administrators directly, the district would enter into a contract with the company, after an appropriate procurement process, and the company would provide the district with teachers and administrators. Under the proposal, the school district would pay the contractor a fee, and the contractor would pay the employees their salaries or wages and any other employment benefits. Although the district would have the right under the proposed contract to reject a teacher or administrator selected by the contractor, the contractor would be responsible for recruiting, hiring, training, evaluating, replacing, supervising, disciplining, and firing the contractor's teachers and administrators who are placed in a district.

Analysis

"School boards have only the authority granted by statute which must be exercised in the mode and within the limits permitted by the statute." *School Dist. No. 69 v. Altherr*, 10 Ariz. App. 333, 338, 458 P.2d 537, 542 (1969). Title 15, Article 3 of the Arizona Revised Statutes sets forth the powers and duties of school district governing boards. See A.R.S. §§ 15-341 through -350. Those statutes enumerate specific powers of governing boards, such as purchasing school sites, disciplining students, and adopting chemical abuse policies. A.R.S. §§ 15-341(A)(10), (14); -345. Nowhere do the statutes grant governing boards express authority to contract with a private company to provide teachers or administrators.

Accordingly, the only way the proposal would be legal is if the statutes grant school district governing boards the implied authority to delegate these responsibilities to third parties. "[I]f the necessary authority is not expressly provided in the statute, it must be impliedly provided." *Berry v. Foster*, 180 Ariz. 233, 235, 883 P.2d 470, 472 (App. 1994). However, implied authority should not be construed beyond statutory bounds. See, e.g., *id.* (statute authorizing board to "prescribe rules for its own government" did not grant implied authority for the board to impose a procedure to investigate or censure other board members); *Campbell v. Harris*, 131 Ariz. 109, 112, 638 P.2d 1355, 1358 (App. 1981) (statute giving school district right to sue and be sued did not confer implied right to sue regarding non-statutory rights); *Carlson v. School Dist. No. 6*, 12 Ariz. App. 179, 468 P.2d 944 (1970) (statute allowing general salary reduction for teachers did not grant board implied authority to reduce individual teacher's salary).

Generally, the Legislature has authorized governing boards to "at any time employ and fix the salaries and benefits of employees necessary for the succeeding year." A.R.S. § 15-502(A). The Legislature has also charged governing boards to "provide for adequate supervision over pupils in instructional and noninstructional activities by certificated or noncertificated personnel." A.R.S. § 15-341(A)(17).

In addition to these general statutes establishing the governing board's responsibility over school district personnel and the supervision of the students, there are specific provisions governing teachers. The Legislature has established statutory tenure provisions that school district governing boards must honor for teachers employed by a school district for a specified period of time. A.R.S. § 15-538.01. There are also specific procedures that school district governing boards must follow when dismissing or suspending a certificated teacher. A.R.S. §§ 15-539 through -543.

The Legislature recently enacted legislation that, like those other statutes, support the conclusion that teachers work *for* the school districts and are accountable to the governing board of the district. The recent legislation exempted from the tenure statutes retired teachers who meet certain criteria and return to work for the district. A.R.S. § 38-766.01. This legislation was an effort to address the problem of a shortage of certified teachers by allowing school districts to hire retired teachers without jeopardizing the teachers' retirement benefits. See 2000 Ariz. Sess. Laws ch. 132 (codified, in part, as A.R.S. § 38-766.01); ARIZONA STATE SENATE STAFF, 44TH Legis. 2d Reg. Sess., FACT SHEET FOR SB 1463 (May 22, 2000) (discussing current and projected shortages of teachers); MINUTES OF SENATE COMMITTEE ON FINANCIAL INSTITUTIONS AND RETIREMENT, 44th Legis., 2nd Reg. Sess. 9-12 (Ariz. 2000). Unlike the proposed business arrangement in your opinion letter, this recent legislation contemplated a direct contractual relationship between the retired teachers who are returning to work and the district. Thus, nothing in the statutes implies districts may bypass the statutory tenure provisions and other statutes governing the supervision and discipline of teachers by contracting with a private company.

There are also specific statutory provisions regarding the employment and

supervision of administrators. Governing boards may hire a superintendent or a principal and the term of employment "may be for any period not exceeding three years." A.R.S. § 15-503(B). The board must also "[p]rescribe and enforce policies and procedures for disciplinary action" for administrators. A.R.S. § 15-341(24). As is true of teachers, nothing in these statutes suggests that administrators may work for a private company rather than the school district.

Contrary to the conclusion in the district's opinion submitted for review, A.R.S. § 15-343 does not apply to teachers and administrators. Section 15-343 allows a governing board to "employ professional personnel deemed necessary *for making surveys and recommendations* relating to the curricula, physical plant and other requirements of the district." A.R.S. § 15-343(A) (emphasis added). On its face, this statute does not apply to teachers. Nor does it apply to administrators who are specifically addressed elsewhere in the statutes. *See School Dist. No. One v. Lohr*, 17 Ariz. App. 438, 439-40, 498 P.2d 512, 513-14 (1972) (finding that then-existing statute allowing boards to employ professional personnel for "for making surveys and recommendations relating to the curricula, physical plant and other requirements of the district" did not provide implied authority for schools to employ legal counsel).

In sum, the relevant statutes distinguish teachers and administrators from other positions within the district and do not support interpretations that would permit school district governing boards to delegate the responsibility for selecting, supervising, and disciplining these educators to a private third party. *Cf. Godbey v. Roosevelt Sch. Dist. No. 66*, 131 Ariz. 13, 20, 638 P.2d 235, 242 (App. 1981) (school boards should not delegate 'legislative or judicial' decisions); *Tucson Unified Sch. Dist. No. 1 v. Tucson Educ. Ass'n*, 155 Ariz. 441, 747 P.2d 602 (App. 1987) (school board cannot delegate its power to prescribe and enforce rules to an arbitrator). Teachers and administrators work for the district, not a private company hired by the district. A legislative change is necessary if a different result is desired, and such a policy decision should address other issues discussed in the opinion submitted for review such as retirement benefits, tort liability, and responsibility for employee background checks.

Conclusion

A school district governing board does not have the express or implied statutory authority to contract with a private contractor to provide the district's teachers and administrators.

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1. The opinion submitted for review discussed a number of other issues such as the impact of such an employment arrangement on retirement benefits, the tort liability of the district for injuries sustained by an employee of the contractor working at the district, and the responsibility for

background checks of employees of the contractor. Because schools do not have statutory authority to use a private service to supply teachers and administrators, this Opinion does not reach those issues.

2. The district's opinion submitted for review focused on teachers and administrators provided by the company, rather than other employees. Likewise, this Opinion addresses only contracting with a company that would provide a district with teachers and administrators.

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