

2991

EDUCATION—TEACHERS, EMPLOYMENT OF IN PUBLIC SCHOOLS—RELIGIOUS GARB, WEARING; DOES NOT CONSTITUTE SECTARIAN TEACHING WHICH IS PROHIBITED—PROPER CERTIFICATION; §3319.22 R.C.

SYLLABUS:

1. A board of education may in its discretion lawfully employ persons of any religious faith or of no faith to teach in the public schools provided they are properly certificated as provided in Section 3319.22 *et seq.*, Revised Code. Paragraph 5 of the syllabus in Opinion No. 1832, Opinions of the Attorney General for 1933, p. 1712, approved and followed.

2. Public schools must be so conducted that the pupils attending them are not subjected to sectarian teaching but the employment as teachers in such schools of members of a religious order who wear a distinctive religious garb in such schools does not amount to such a teaching of religious doctrine which the law forbids. Paragraph six of the syllabus in Opinion No. 1832, Opinions of the Attorney General for 1933, p. 1712, explained and modified.

Columbus, Ohio, October 31, 1958

Hon. Randall Metcalf, Prosecuting Attorney
Washington County, Marietta, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“W Local School District has long been beset by financial problems. Its facilities being inadequate, a few years ago the Catholic Church built a new school building on or near the site of the old school building and have leased the same to the school district at a fair rate.

“This year the Board of Education of W Local School District has employed Catholic Sisters to teach in this school. There is no question so far as my office is concerned on the background or ability of these Sisters. I am, however, frankly concerned over their teaching in the public schools wearing the habit which their Order naturally requires.

“I want to refer you to an Attorney General’s opinion of a predecessor of yours as follows: O.A.G. Vol. 3, 1933, No. 1832, in which, as I read it, he holds as dicta that Ohio would be in that group of states that would prohibit religious garb being worn by instructors in its schools.

“My specific question: ‘Can members of a religious Order teach in the public schools wearing the religious habit required by said Order, and be compensated from public funds?’”

The syllabus in Opinion No. 1832, Opinions of the Attorney General for 1933, p. 1712, to which you refer, is as follows :

“1. It is not within the powers of a city board of education, when leasing rooms for public school purposes, to agree as a condition of said lease, that certain teachers will be employed to teach the schools to be conducted in the said rooms nor that certain pupils will be assigned to the said schools.

“2. In city school districts only such new teachers may be employed by a board of education as are appointed by the superintendent of schools. The power of the board of education in such cases extends only to the confirmation and approval of teachers appointed by the superintendent.

“3. The duty to assign pupils attending public schools is reposed by statute in the superintendent of schools and a board of education is without power to override by contract, the authority so granted by statute.

“4. The leasing by a board of education of rooms or buildings for public school purposes from a church or sectarian institution, and the payment of rent therefor, does not constitute the granting of aid to such sectarian institution or the diversion of school funds for sectarian purposes within constitutional prohibitions upon the use of public school funds for sectarian purposes.

“5. A board of education may in its discretion, lawfully employ persons of any religious faith or of no faith to teach in the public schools, providing they are properly certificated.

“6. Public schools must be so conducted that the pupils attending the said schools are not subjected to sectarian influence. The expenditure of public funds for the maintenance of schools not so conducted is unlawful.”

The tenor of your query indicates that you do not question any feature of the arrangement described except that of the wearing of a distinctive religious garb by a teacher while on duty as such in the public schools. This being so, I limit my consideration of your query to that point, assuming that the arrangement in question is otherwise in harmony with the several rules stated in Opinion No. 1832, *supra*.

The writer of the 1933 opinion noted the provision of Article VI, Section 2, and Article I, Section 7, Ohio Constitution, which reads as follows :

Article VI, Section 2, Ohio Constitution:

“The general assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state; *but no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state.*” (Emphasis added)

Article I, Section 7, Ohio Constitution:

“All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted. No religious test shall be required, as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations. Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the general assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction.”

The writer noted no Ohio statute relating to the wearing of religious garb by public school teachers, and I know of no present statutory enactment, nor of any regulation promulgated by any public agency, on the subject. In this situation we may note the following statements in Opinion No. 1832, *supra*:

“* * * With respect to the employment of Ursuline Sisters or nuns as teachers in the public schools, there is some conflict of authority among courts that have been called upon to pass upon the question. Under a constitution and a statute such as exists in Ohio which do not prescribe any religious belief as a qualification of a teacher in the public schools, there would be no question but that the school authorities may select a teacher who belongs to any church, or no church, as they think best. (See *Millard vs. Board of Education*, *supra*.) The difficulty arises, and it is this that has occasioned the conflict of opinion among jurists, with respect to the wearing in the school room by teachers of a distinctive religious garb peculiar to their order.

“In *O’Connor vs. Hendrick*, 184 N. Y. 421, it was held that the state superintendent of public instruction had the power to order that a distinctive religious garb should not be worn by teachers in the class-room and that it should be discarded by them on

penalty of dismissal. The court said that the distinctive religious costume of teachers who were members of a religious society connected with the Roman Catholic Church worn at all times in the presence of their pupils, would *tend to inspire respect, if not sympathy*, for the religious denomination to which they so manifestly belonged, and *to that extent the influence was sectarian*, even if it did not amount to the teaching of denominational doctrine. (See also Knowlton vs. Baumhover, *supra*.) The opposite view was taken in the case of Hysong vs. Gallitzin School District, 164 Pa. 629. Following the decision in the Hysong case the legislature of Pennsylvania enacted a statute which provided:

“ ‘No teacher in any public school in this commonwealth shall wear in said school or whilst engaged in the performance of his or her duty as such teacher any dress, mark, emblem or insignia indicating the fact that such teacher is a member or adherent of any religious order, sect or denomination.’

“This statute was held to be constitutional in the case of Commonwealth vs. Herr, 39 Pa. Sup. Ct. 454, which judgment was affirmed in 229 Pa. 132, on the opinion of the lower court.

“While the courts of Ohio have not passed upon this particular question, the above cases, in my judgment, properly express the constitutional and legal restrictions in Ohio.* * *” (Emphasis added)

The import of the final paragraph quoted above is not readily clear, for it is to be seen that the reference to “the above cases” is actually to two cases in which opposite conclusions were reached.

Moreover, the so-called syllabus of this opinion is not included in the body of the opinion and it is not readily apparent whether (1) it states the conclusions of the writer, or (2) it is an editorial addition as an incident of formal publication. Moreover, although it is stated in paragraph six of the syllabus that pupils in public schools must not be “subjected to sectarian influence”, I find no express holding that the wearing of a religious garb by a public school teacher amounts to such subjection.

Bearing in mind therefore, that the then Attorney General concluded that “the above cases”, *O'Connor v. Hendrick*, 194 N. Y. 421, and *Hysong v. Gallitzin School District*, 164 Pa. 629, “properly express the constitutional and legal restrictions in Ohio”, we are bound to inquire just what these cases hold.

In the *O'Connor* case, *supra*, the New York courts held that the State Superintendent of Public Instruction might validly promulgate a “regula-

tion in regard to the management of the common schools" which "in effect prohibited teachers from wearing a distinctive religious garb while engaged in the work of teaching". Although the court observed that the wearing of a religious garb in the presence of pupils "would be to inspire respect if not sympathy for the religious denomination to which they so manifestly belong", and that "to this extent the influence was sectarian, even if it did not amount to the teaching of denominational doctrine", still all that the court actually decided was that the superintendent's regulation was valid as being reasonable and "not in conflict with the laws of the state or public policy".

In the case at hand I am not informed of the existence of any comparable regulation or statute, and I cannot, therefore, regard the *O'Connor* case as applicable to our own problem.

As to the *Hysong* case, *supra*, the court distinguished between (1) "sectarian teaching, which the law prohibits", and (2) the respect and sympathy incited for the publicly professed religion of one who leads an exemplary life. On this point the court said:

"* * * But it is further argued that, if the appointment of these Catholic teachers was lawful, they ought to be enjoined from appearing in the schoolroom in the habit of their order. It may be conceded that the dress and crucifix impart at once knowledge to the pupils of the religious belief and society membership of the wearer. But is this, in any reasonable sense of the word, sectarian teaching, which the law prohibits? The religious belief of many teachers, all over the commonwealth, is indicated by their apparel. Quakers or Friends, Ommish, Dunkards and other sects, wear garments which at once disclose their membership in a religious sect. Ministers or preachers of many protestant denominations wear a distinctively clerical garb. No one has yet thought of excluding them as teachers from the schoolroom on the ground that the peculiarity of their dress would teach to pupils the distinctive doctrines of the sect to which they belong. The dress is but the announcement of a fact, that the wearer holds a particular religious belief. The religious belief of teachers and all others is generally well known to the neighborhood and to pupils, even if not made noticeable in the dress, for that belief is not secret, but is publicly professed. Are the courts to decide that the cut of a man's coat, or the color of a woman's gown, is sectarian teaching, because they indicate sectarian religious belief? If so, then they can be called upon to go further. The religion of the teacher being known, a pure unselfish life, exhibiting itself in tenderness to the young, and helpfulness for the suffering, necessarily tends to promote the religion of the man or woman who lives it. Insensibly, in

both young and old, there is a disposition to reverence such an one, and, at least to some extent, consider the life as the fruit of the particular religion. Therefore, irreproachable conduct, to that degree, is sectarian teaching. But shall the education of the children of the commonwealth be intrusted only to those men and women who are destitute of any religious belief?

“Our recollection extends back almost to the beginning of the common school system of the commonwealth; in many counties there never was a time when ministers of protestant sects were not frequently selected as teachers; some of them wore, in the schoolroom where children of Catholic parents were pupils, a distinctively clerical garb; when the office of county superintendent was first created in 1854, in many counties preachers were chosen to fill the office; the present State Superintendent of Public Instruction is a protestant preacher. It is fair to presume that high moral character, the result of christian sectarian teaching, as well as scholarly attainments, prompted their selection. Ordination vows binding the mto a particular creed, were considered no disqualification; it was not assumed that the fact of membership in a particular church, or consecration to a religious life, or the wearing of a clerical coat or necktie, would turn the schools into sectarian institutions. In the sixty years of existence of our present school system, this is the first time this court has been asked to decide, as matter of law, that it is sectarian teaching for a devout woman to appear in a schoolroom in a dress peculiar to a religious organization of a christian church. We decline to do so; the law does not so say. The legislature may, by statute, enact that all teachers shall wear in the schoolroom a particular style of dress, and that none other shall be worn, and thereby secure the same uniformity of outward appearance as we now see in city police, railroad trainmen, and nurses of some of our large hospitals. But we doubt if even this would repress knowledge of the fact of a particular religious belief; that, if the teacher had any, would still be effectively taught by unselfish devotion to duty; no mere significance or insignificance of garb could conceal it; the daily life would either exalt or make obnoxious the sectarian belief of the teacher.

“After a most careful consideration, we see nothing of merit in any of the assignments of error which have been so earnestly pressed in the argument. The decree is affirmed and appeal dismissed, at costs of appellants.”

We have noted above, following the decision in the *Hysong* case, *supra*, the state legislature enacted a statute expressly forbidding any teacher to wear, in the public schools, a distinctive religious garb, and this statute was held to be a valid enactment. *Commonwealth v. Herr*, 39 Pa. Sup. Ct., 454; 229 Pa., 132. Accordingly, absent a similar statute in Ohio, this case

clearly suggests the view that the wearing of such garb by public school teachers is not improper.

Here, however, we must note the precise test to be applied in this state. We have already noted that Article VI, Section 2, Ohio Constitution, forbids the giving of control of school funds of the state to any religious sect, and that Article I, Section 7, Ohio Constitution, forbids the compulsory attendance or support of any form of worship, or the giving of preference to any religious society. I would agree that these limitations would make unlawful any "sectarian teaching" in the public schools, but I cannot agree that they are such as to forbid the indirect and intangible sectarian influence which may possibly, but not necessarily, flow from the wearing of religious garb by teachers in the public schools.

All that I have said hereinbefore is based upon the assumption that the teachers in question are properly certificated under the applicable statutes, and under the regulations of the state board of education.

In specific answer to your question, therefore, it is my opinion :

1. A board of education may in its discretion lawfully employ persons of any religious faith or of no faith to teach in the public schools provided they are properly certificated as provided in Section 3319.22 *et seq.*, Revised Code. Paragraph 5 of the syllabus in Opinion No. 1832, Opinions of the Attorney General for 1933, p. 1712, approved and followed.

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Respectfully,
WILLIAM SAXBE
Attorney General