

human complaint or other condition and thus constitutes the practice of medicine within the meaning of the above quoted section.

FRANK J. KELLEY,
Attorney General.

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TEACHERS: Conviction of felony involving moral turpitude.

LICENSING AND REGULATION: Effect of plea of nolo contendere.

WORDS AND PHRASES: "Moral Turpitude."

The willful making of a false statement for the purpose of influencing actions of the Department of Housing and Urban Development is a felony involving moral turpitude and a conviction thereof can serve as the basis for suspension or revocation of a teacher's certificate. The offense of taking indecent liberties with a child constitutes a felony involving moral turpitude and can serve as the basis for suspension or revocation of a teacher's certificate.

A felony conviction entered on a plea of nolo contendere can be the basis for the suspension or revocation of a teacher's certificate.

Procedures for revoking or suspending a teacher's certificate discussed.

Opinion No. 4861

February 26, 1975.

Dr. John W. Porter
Superintendent of Public Instruction
Department of Education
Lansing, Michigan

You have requested my opinion on several questions concerning Administrative Code 1973 AACCS (Supp No 74), R 390.1151(5). Your questions will be answered seriatim.

1. Does a conviction under 18 USC 1010 constitute a "felony involving moral turpitude"?

MCLA 388.1010; MSA 15.1023(10) gives the State Board of Education the full power of "[d]etermination of the requirements for, and the issuance of, all licenses and certificates for teachers . . . in the public schools. . . ." Pursuant to that authority, the State Board of Education promulgated R 390.1151(5), *supra*, which provides:

"An applicant convicted as an adult of an act of immoral conduct contributing to the delinquency of a child, or a felony involving moral turpitude, as determined by a court, shall be denied issuance of a certificate or license or shall be denied enrollment for student teaching or internship in a public or private school, or shall have his certificate suspended or revoked."

The teacher in question was convicted and sentenced under 62 Stat 751 (1948); 18 USC 1010. That section provides:

"Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Department of Housing and Urban Development for insurance, or for the purpose of obtaining any extension or renewal of any loan, advance of credit, or mortgage insured by such Department, or the acceptance, release, or substitution of any security on such a loan, advance of credit, or for the purpose of influencing in any way the action of such Department, makes, passes, utters, or publishes any statement, knowing the same to be false, or alters, forges, or counterfeits any instrument, paper, or document, or utters, publishes, or passes as true any instrument, paper, or document, knowing it to have been altered, forged, or counterfeited, or willfully over-values any security, asset, or income, shall be fined not more than \$5,000 or imprisoned not more than two years, or both."

The essential element of this offense is the willful making of a false statement for the purpose of influencing the actions of the Department of Housing and Urban Development. See, e.g., *United States v Hibbs*, 356 F. Supp 820 (ED Pa, 1973).

62 Stat 684 (1948); 18 USC 1(1) specifies that any offense punishable by federal law for a term in prison exceeding one year is a felony. Since imprisonment of up to two years may be imposed for a violation of 62 Stat 684 (1948); 18 USC 1010, the offense is a felony.

R 390.1151(5), *supra*, does not expressly define the term "felony involving moral turpitude," nor does there appear to be any Michigan case law as to whether an offense, such as 62 Stat 684 (1948); 18 USC 1010, involves "moral turpitude." However, there is definitive case law elsewhere. The Court in *In re Hallinan*, 43 Cal 2d 243, 247; 272 P2d 768, 771 (1954), stated:

"Although the problem of defining moral turpitude is not without difficulty . . . it is settled that whatever else it may mean, it includes fraud and that a crime in which an intent to defraud is an essential element is a crime involving moral turpitude."

Accord, In re Fumo, 52 Ill 2d 307; 288 NE2d 9 (1972). *Iowa State Bar Association v Kraschel*, 260 Iowa 187; 148 NW2d 621 (1967). *Berardi v Rutter*, 42 NJ Super 39; 125 A2d 877 (App Div, 1956), *aff'd* 23 NJ 485; 129 A2d 705 (1957).

Significantly, for our analysis, the Court in *United States v Butterfield*, 112 F. Supp 324, 326 (ED Mich, 1953), *aff'd* 212 F2d 794 (CA 6, 1954) stated:

". . . the forgery or the utterance of a forged prescription or any other writing with the intent to defraud the Government of the United States involves moral turpitude."

These decision are persuasive and should be followed. It is, therefore, my opinion that a conviction for the willful making of a false statement

prohibited by 62 Stat 684 (1948); 18 USC 1010 constitutes a "felony involving moral turpitude."

2. May a conviction entered after a plea of *nolo contendere* be used as a basis for the suspension or revocation of a teacher's certificate under R 390.1151(5), *supra*?

You inform me that a teacher was convicted and sentenced under MCLA 750.336; MSA 28.568 after he had entered a plea of *nolo contendere* to the charge. The plea of *nolo contendere* has been authorized by MCLA 767.37; MSA 28.977, which, in pertinent part, provides:

" . . . the court may accept a plea of *nolo contendere* and if such a plea is accepted, the court shall proceed as if he had pleaded guilty."

Whether or not a conviction entered after a plea of *nolo contendere* may be used as a basis for a statutory disqualification has been a matter of dispute. However, the issue was settled in Michigan by *State Bar Grievance Administrator v Lewis*, 389 Mich 668; 209 NW2d 203 (1973). There, an attorney was convicted and sentenced for the failure to file an income tax return after he had entered a plea of *nolo contendere*. Based upon the fact of that conviction, the State Bar Grievance Board suspended his license to practice. The Court noted that a plea of *nolo contendere* may not be put into evidence in a subsequent civil action as proof of the fact that the defendant committed the offense to which he pleaded. Nevertheless, the unanimous Court stated:

"The majority position differentiates between allowing the collateral use of the plea as an admission of misconduct and allowing the collateral use of the fact of conviction. This position preserves the benefits of the plea of *nolo contendere* to a defendant who fears subsequent civil liabilities based upon an admission of guilt to a criminal charge. At the same time, however, the majority looks to the conviction and sentence imposed by the court after the plea and finds the conviction as conclusive as a conviction entered after a plea of guilty or entered after a trial and a plea of not guilty. . . .

"In light of the purpose of the State Bar Rules, to protect the public, the courts and the legal profession . . . we adopt the majority position on this issue. Rule 16.17 permits the State Bar Grievance Administrator to take expedited action against an attorney convicted of a serious crime. It does not require independent proof of misconduct; the fact of conviction alone establishes the Administrator's case. . . ." *Lewis, supra*, 389 Mich 668, 680-681; 209 NW2d 203, 209.

Clearly, the purpose of R 390.1151(5), *supra*, is to protect students, their parents, the public at large and the teaching profession. It is, therefore, my opinion that a conviction entered after a plea of *nolo contendere* may be used as a basis for the suspension or revocation of a teacher's certificate under R 390.1151(5), *supra*.

3. Does a conviction under MCLA 750.336; MSA 28.568 constitute a "felony involving moral turpitude?"

MCLA 750.336; MSA 28.568 provides:

"Any person or persons over the age of 16 years, who shall assault a child under the age of 16 years, and shall take or attempt to take indecent and improper liberties with the person of such child, without committing or intending to commit the crime of rape or the crime of sodomy or gross indecency upon such child, *shall be guilty of a felony*, punishable by imprisonment in the state prison for not more than 10 years, or by fine of not more than \$5,000.00, or if such person was at the time of the said offense a sexually delinquent person, may be punishable by imprisonment in the state prison for an indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life." (Emphasis added)

The offense of taking indecent liberties has two essential elements:

". . . First, there must be an assault. Second, the liberties taken must be of such a nature as the common sense of society would brand as indecent or improper."

People v Verburg, 44 Mich App 320, 324; 205 NW2d 315, 317 (1973).

In this instance, there is definitive Michigan case law. In *Clark v State Board of Registration in Medicine*, 367 Mich 343; 116 NW2d 797 (1962), the plaintiff psychiatrist was accused of taking indecent liberties with a patient. The board found that Clark "had engaged in conduct of such character as to involve moral turpitude." *Clark, supra*, 367 Mich 343, 346; 116 NW2d 791, 799, and thereupon, revoked his license to practice medicine. A unanimous Supreme Court upheld the board's ruling.

It is, therefore, my opinion that a conviction under MCLA 750.336; MSA 28.568 constitutes a "felony involving moral turpitude."

4. If a teacher's certificate is subject to suspension or revocation under R 390.1151(5), *supra*, what procedures should be followed by the Department of Education and the State Board of Education?

The State Board of Education and the Department of Education are subject to the Administrative Procedures Act, 1969 PA 306; MCLA 24.201 *et seq*; MSA 3.560(101) *et seq*. See, *Irving Parents' and Landowners' Association v State Board of Education*, 45 Mich App 387; 206 NW2d 503, leave to appeal denied, 390 Mich 754 (1973).

When the suspension or revocation of a "license," which as defined includes a teaching certificate, MCLA 24.205(1); MSA 3.560(105)(1), is contemplated, MCLA 24.292; MSA 3.560 (192) provides:

"Before the commencement of proceedings for suspension, revocation, annulment, withdrawal, recall, cancellation or amendment of a license, an agency shall give notice, personally or by mail, to the licensee of facts or conduct which warrant the intended action. The licensee shall be given an opportunity to show compliance with all lawful requirements for retention of the license. If the agency finds that the public health, safety or welfare requires emergency action and incorporates this finding in its order, summary suspension of a

license may be ordered effective on the date specified in the order or on service of a certified copy of the order on the licensee, whichever is later, and effective during the proceedings. The proceedings shall be promptly commenced and determined."

A proceeding to suspend or revoke a license also constitutes a "contested case." MCLA 24.205(2); MSA 3.560(105)(2), MCLA 24.203(3); MSA 3.560(103)(3). Thus, a hearing, with reasonable notice thereof, must be held without undue delay. MCLA 24.271; MSA 3.560(171). Such notice must, at a minimum, include: a statement of the date, hour, place and nature of the hearing; a statement of the legal authority and jurisdiction for such hearing; the particular sections of the statutes and rules involved and a short and plain statement of the matters asserted.

The State Board of Education may hear the matter, or in its discretion, appoint a hearing officer to preside at the hearing. MCLA 24.279; MSA 3.560(179). The hearing must be conducted in accordance with the rules governing the procedures in "contested cases." MCLA 24.271-24.287; MSA 3.560(171)-MSA 3.560(187).

FRANK J. KELLEY,
Attorney General.

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PUBLIC SERVICE COMMISSION: Executive Organization.

EXECUTIVE ORGANIZATION: Public Service Commission.

ADMINISTRATIVE BOARDS: Role of Chairman.

The Chairman of the Public Service Commission is not vested by statute with any greater power, duties and responsibilities than any other member of the Commission.

The Director of the Department of Commerce may not delegate his duties and functions to any individual member of the Public Service Commission.

A majority of the members of the PSC can delegate to an individual member of the Commission administrative duties but may not delegate any of its substantive powers, duties and responsibilities.

Opinion No. 4840

March 18, 1975.

Mr. William R. Ralls
Commissioner
Department of Commerce
Michigan Public Service Commission
Lansing, Michigan 48913

You have asked a number of questions concerning the duties and responsibilities of the Chairman of the Michigan Public Service Commission. These questions will be taken up in the following order: