



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

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Governor Matthew G. Bevin
Commonwealth of Kentucky
700 Capital Avenue, Suite 100
Frankfort, KY 40601

Secretary David A. Dickerson
657 Chamberlin Avenue
Frankfort, KY 40601

VIA HAND DELIVERY

Dear Governor Bevin and Secretary Dickerson:

I am writing to advise you that the recent subpoenas issued by the Labor Cabinet to various school districts are unlawful, and that any attempt to punish teachers that engaged in a “sick-out” would violate their First Amendment rights. Moreover, the recent actions of the Labor Cabinet and other members of the administration towards these teachers may constitute “*intimidation, threats or coercion*” in violation of Kentucky Law. I am therefore requesting that the Labor Cabinet withdraw the subpoenas within the next ten (10) days.

As you are aware, the Labor Cabinet has issued multiple administrative subpoenas to various school districts as part of a supposed inquiry into possible violations of labor law, namely KRS 336.130.¹ The subpoenas command school districts to produce records related to so-called “sick-outs.” The records demanded by the Cabinet include the names of individual teachers/employees who called in sick and other details.

Because the “sick-outs” were not related to the conditions of the teachers’ employment, but instead driven by their objections to legislation that would harm the overall financial and

¹At least six school districts have received subpoenas: Jefferson County; Fayette County; Oldham County; Madison County; Boyd County; and Bullitt County. See Taylor Durden, “*More school districts receive subpoenas from Kentucky Labor Cabinet*” Wave 3 News, Apr. 11, 2019, <http://www.wave3.com/2019/04/12/more-school-districts-receive-subpoenas-kentucky-labor-cabinet/> (last visited Apr. 15, 2019), WSAZ News Staff, Associated Press, *Boyd County Public Schools receives subpoena concerning teacher sickouts*” Wave 3 News, April 12, 2019, <https://www.wsaz.com/content/news/Two-Ky-school-districts-receive-subpoena-from-Bevin-administration-508458611.html> (last visited Apr. 15, 2019).

structural support of the public school system, the “sick-outs” constitute free speech protected by the First Amendment.

Teachers do not surrender their constitutional rights when they become public employees. *See Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968). They retain the rights secured by the First Amendment to the United States Constitution, and Sections 1 and 8 of the Kentucky Constitution, including their rights to speak freely, to peaceably assemble, and to petition the government for redress of grievances. *See* U.S. CONST. amend. I; KY. CONST. §§ 1, 8.

Whether a “sick-out” is an illegal work stoppage, or instead protected free speech was directly litigated in Detroit. *See School Sch. Dist. of the City of Detroit v. Detroit Federation Fed’n of Teachers*, No. 16-000013-MZ (Mich. Ct. Cl. Ingham Cty. Aug. 16, 2016). There, teachers engaged in a “sick-out,” and their employer – the school district – sued the perceived leaders of the movement claiming the “sick out” was an illegal work stoppage or strike.

The court ruled against the district and for the teachers. It found that the “sick-out” was based on “complaints to the state government to rectify educational, financial and structural problems in the Detroit Public School District, ***and not issues concerning the rights, privileges or conditions of their employment.***” In other words, the “sick-out” was not based on objections to the teachers’ pay or work conditions, which might form the legal basis of a “work stoppage,” but instead was focused on issues related to the funding or structure of the public education system itself. As such, the “sick-out” was not an unlawful strike or work stoppage, but instead constitutionally protected free speech.

The same situation exists here. Teachers involved in Kentucky’s “sick-outs” were not engaged in labor negotiations; they were not advocating for higher pay, more generous benefits, or any issue related to their “rights privileges or conditions of their employment.” Instead, they called in sick in order to be present and heard in opposition to legislation that would siphon money away from public education in the form of tax credits to private schools, *i.e.*, “educational, financial and structural” issues. These actions are therefore not covered by labor law, but are instead protected by the First Amendment. That means that if the Labor Cabinet continues, it will lose this fight and – like the Detroit school district – waste thousands of dollars of legal fees.

Moreover, unlike the Detroit situation, the ***employer*** in this situation is not objecting. The school districts in question have not requested this inquiry, and have taken the position that no strike or work stoppage has occurred. Instead, it is the Labor Cabinet trying to step into the shoes of the employers/school districts, which not only raises legal questions, but also presents a significant conflict. Indeed, the teachers’ speech that is at issue was speech ***against*** actions by

the Commonwealth. Now, that same Commonwealth – through the Labor Cabinet – seeks to punish them for speaking.

If the Labor Cabinet believes it can step into the shoes of the employer and chooses to continue with the subpoenas, its actions may further violate labor law, and subject the Commonwealth to potential liability. Pursuant to KRS 336.130(2), an employer cannot “engage or be permitted to engage in unfair practices or resort to violence, intimidation, threats or coercion.” Sufficient facts exist to suggest the Cabinet, in conjunction with the Commissioner of Education, has violated or will violate this statute. Indeed, the Commissioner of Education has already made statements that may constitute intimidation. He has stated he may seek to punish individual teachers if “sick-outs” continue, *i.e.*, if they exercise their free speech rights. The Commissioner even warned that the Labor Cabinet “may” take the exact actions it is taking now. Thus, the Commissioner’s “intimidation” may be turning into threats or actual coercion.

As the chief law officer of the Commonwealth, my primary obligation is to the people of Kentucky, not to the machinery of government, and not to the Executive Branch or any of its officers. *Beshear v. Bevin*, 498 S.W.3d 355, 362-63 (Ky. 2016) (citing *Commonwealth ex rel. Hancock v. Paxton*, 516 S.W.2d 865, 868 (Ky. 1974)). When a state actor threatens the public’s legal or constitutional interests – through any act, whether through legislation or an act of the Executive Branch – I owe the people the duty to take action to vindicate their public rights. *Id.* at 362-66.

I urge the Labor Cabinet to voluntarily withdraw these unlawful subpoenas. If it refuses, I call on the Governor to order the Labor Cabinet to withdraw them. If you will not do your legal duty, I will not hesitate to take appropriate action to protect the public from their own government.

Sincerely,

A handwritten signature in blue ink that reads "Andy Beshear". The signature is written in a cursive, flowing style.

Andy Beshear
Attorney General