

FORMAL OPINION

in person solicitation in the legal profession is limited to those aspects of solicitation that involve fraud, undue influence, intimidation, over reaching and other forms of vexatious conduct. The valid objectives of the Legislature in the case of the profession of optometry under N.J.S.A. 45:12-11(p) would essentially be the same. The statute, therefore, cannot be interpreted to allow for a regulatory prohibition on the truthful advertising or communication of routine information concerning the provision of ophthalmologic materials and optometric services. For these reasons, it is our opinion that N.J.A.C. 13:38-1.4 and 13:38-1.7 are not consistent with N.J.S.A. 45:12-11(p) and are, therefore, invalid.

Very truly yours,
JOHN J. DEGNAN
Attorney General

By: DOUGLAS J. HARPER
Deputy Attorney General

October 6, 1980

DR. FRED PRICE, *Secretary*
Board of Examiners
Department of Education
225 West State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 18—1980

Dear Dr. Price:

On September 23, 1974 this office advised the Commissioner of Education in *Formal Opinion No. 10—1974* that statutory citizenship requirements on the employment or tenure of teachers who are aliens were constitutionally invalid. On June 13, 1979 in *Formal Opinion No. 12—1979*, we advised the Commissioner that as a result of a decision of the United States Supreme Court in *Ambach v. Norwick*, 441 U.S. 68 (1979), New Jersey statutes, which require a teaching staff member to either demonstrate that he is a citizen of the United States or has declared his intent of becoming a citizen, are supported by a legitimate governmental purpose and are valid. It is clear, therefore, that at the present time a noncitizen may not be certified by the Board of Examiners in the Department of Education to teach in the public schools unless he or she has satisfied the requirements of the governing statute dealing with United States citizenship.¹

A question has now arisen as to the status of those noncitizens who have been certified by the Board of Examiners at some point in time between the issuance of *Formal Opinion No. 10—1974* and our most recent advice to the Commissioner on June 13, 1979 in *Formal Opinion No. 12—1979* that those statutes requiring citizenship are constitutional and fully operative. From a cursory examination of those statutes, it is apparent

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to have been the underlying legislative policy to require all persons teaching in the public schools and certified by the Board to be citizens of the United States. It would be inconsistent with this overall legislative purpose to allow noncitizens to continue to teach and be certified in the public schools of this State. It is therefore our opinion that those noncitizens who are the subject of this inquiry are required to become United States citizens as a condition to continuing to teach in the public schools and to hold their certificates. In order to implement the statutory mandate, the Board should require those persons to either produce valid proof of citizenship or to declare a present intent to become a United States citizen.

An additional issue posed concerns the responsibility of the Board towards those noncitizens who fail to acquire United States citizenship within five years of the filing of a declaration of intent. N.J.S.A. 18A:6-39 in pertinent part provides that a teacher's certificate issued to a noncitizen *shall be cancelled* by the Board if the holder has not become a citizen within five years of its date of issuance. N.J.S.A. 18A:26-8.1 provides that any such certificate *may be* revoked by the Board in its discretion if the holder shall not have become a United States citizen within five years. These two statutory sections therefore are inconsistent on their face with regard to the Board's discretion to revoke certification (N.J.S.A. 18A:26-8.1) on the one hand, and its obligation to cancel a certificate (N.J.S.A. 18A:6-39) on the other hand, where the holder thereof shall not have become a United States citizen within five years.

In order to resolve this inconsistency, it is necessary to briefly review the pertinent legislative history. Both of these statutory sections were adopted by the legislature in a single piece of omnibus legislation which

1. There are two statutory sections which deal with United States citizenship requirements for teachers in the public schools. N.J.S.A. 18A:6-39 provides as follows:

The board may, with the approval of the commissioner, issue a teacher's certificate to any citizen of any other country, who has declared his intention of becoming a United States citizen and who is otherwise qualified but any such certificate shall be void, and shall be canceled by the board, if the holder thereof shall not become a United States citizen within five years of the date of its issuance, and it may be revoked within said period by the board, if the board is satisfied that the holder thereof has abandoned his efforts to become a United States citizen or has become disqualified for such citizenship but no teacher certified, pursuant to this section, shall acquire tenure unless and until United States citizenship shall have been granted to him.

N.J.S.A. 18A:26-8.1 provides as follows:

The state board of examiners may, with the approval of the commissioner, issue a teacher's certificate to teach in the public schools to any citizen of any other country who has declared his intention of becoming a United States citizen and who is otherwise qualified, but any such certificate may be revoked by the state board of examiners if the board is satisfied that the holder thereof has abandoned his efforts to become a United States citizen, or has become disqualified for citizenship, or shall not have become a United States citizen, within five years of the date of its issuance.

See *infra* for a discussion of the controlling statutory section.

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recodified Title 18 into Title 18A. Laws of 1967, c. 271. N.J.S.A. 18A:6-39 is substantially the same as an earlier statutory section in N.J.S.A. 18:13-4.2 enacted as Laws of 1956, c. 158. N.J.S.A. 18A:26-8.1, however, in pertinent part, appears for the first time in the recodification of Title 18 by Laws of 1967, c. 271. In the absence of a legislative indication as to which of these two conflicting statutory sections should govern the revocation of a certificate of a noncitizen, it is necessary to resort to the rule of statutory construction that the legislature should not be deemed to have enacted repetitious or surplus legislation. *Peper v. Princeton University Board of Trustees*, 77 N.J. 55, 68 (1978). Rather, it is reasonable to assume that the legislature intended its latest and newest expression of legislative policy on the subject to govern. For these reasons, the provisions of N.J.S.A. 18A:26-8.1 are applicable. A certificate may be revoked in the discretion of the Board of Examiners on a case by case basis if the holder shall not have become a citizen of the United States within five years.²

In summary, you are advised that those noncitizens who have been certified by the Board of Examiners at some point in time between the issuance of *Formal Opinion No. 10—1974* on September 23, 1974 and the issuance of *Formal Opinion No. 12—1979* on June 13, 1979 are now required to conform with the provisions of N.J.S.A. 18A:26-8.1. They should either produce proof of citizenship or declare a present intent to become a United States citizen. You are further advised that the Board of Examiners has the discretion whether or not to revoke the certificate issued to a noncitizen under the facts of an individual case where the holder either has abandoned his efforts to become a citizen or has become disqualified or shall not have become a citizen within five years of a declaration of intent to do so.

Very truly yours,
JOHN J. DEGNAN
Attorney General

By: THEODORE A. WINARD
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2. It should be noted, however, that notwithstanding a decision by the Board of Examiners not to revoke the certificate of a noncitizen in an individual case, no person shall be deemed to have acquired tenure in the public schools unless he shall become a United States citizen. N.J.S.A. 18A:38-3.