

Opinion No. 54-5963

June 1, 1954

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. Arthur T. Noble, Jr. District Attorney Eighth Judicial District Taos, New Mexico

{*422} In your letter dated May 25, 1954, you state that a certain County School Superintendent since her election in 1952, has married and that her husband is teaching outside the county, and that said Superintendent spends most of her time with her husband outside the county although she does make periodic appearances at her office, but most of the work is handled by her deputy.

You are wondering whether this is a proper case for removal by the Board of County Commissioners, and refer us to Sections 10-301 and 10-302, also Sections 55-402 and 55-406 of the 1941 Compilation.

Section 55-406 was originally passed as Section 407, Chapter 148, Laws of 1923 and authorized the State Board of Education to remove County School Superintendent appointed under the provisions of Section 401 of said Chapter. Under Section 401 of the 1923 Law, provision was made for the abolition of the elective office of County School Superintendent and the appointment of such Superintendent by the County Board of Education. However in 1925 Section 55-401 was amended in Section 1, Chapter 64 of the Laws of 1925 to provide for the election of the County School Superintendent and no amendment was made of Section 55-406. Since Section 55-406 only applies to the Superintendents appointed under the provisions of the 1923 Law, and such appointment was abolished and election of the Superintendent was provided for in the 1925 law, it follows that Section 55-406 no longer is applicable in connection with removal of County School Superintendents.

Section 10-301 of the 1941 Compilation, provides in part as follows:

"Any office belonging to the class mentioned in Section 10-303 becomes vacant under any of the following circumstances: * * *

5. When the officer removes from the county in which he is elected and in case of municipal officers, when he removes from the town or city for which he is elected;
6. Absence from the county for six (6) consecutive months, and in cases of municipal officers, absence for such length of time from the village, town, or city {*423} for which he is elected; but this provision does not apply to those officers wherein the law provides that the duties may be discharged by a deputy, when such absence is due to illness or other unavoidable cause;"

Section 10-304 provides the causes for removal of local officers as follows:

"The following shall be causes for removal of any officer belonging to the class mentioned in the preceding section:

1. Conviction of any felony or of any misdemeanor involving moral turpitude;
2. Failure, neglect or refusal to discharge the duties of the office, or failure, neglect or refusal to discharge any duty devolving upon the officer by virtue of his office;
3. Knowingly demanding or receiving illegal fees as such officer;
4. Failure to account for money coming into his hands as such officer;
5. Gross incompetency or gross negligence in discharging the duties of the office;
6. Any other act or acts, which in the opinion of the court or jury amount to corruption in office or gross immorality rendering the incumbent unfit to fill the office."

Section 10-331 provides as follows:

"No officer belonging to the class mentioned in Section 10-303 can be removed from office in any manner except according to the provisions of this chapter."

Unless the Superintendent has removed from the county and is absent for six consecutive months, it is doubtful whether a vacancy may be considered as existing under the provisions of Section 10-301.

If it is considered that the officer is guilty of any of the causes for removal under Section 10-304, then the accusation may be brought by a Grand Jury or the District Attorney and the procedure for removal is set forth in the following sections.

Section 10-340 of the 1941 Compilation, pocket supplement, applies only to an officer who accepts other employment and by reason of such other employment fails for a period of thirty successive days or more to devote his time to the usual and normal extent, during ordinary working hours, to the performance of the duties of such office. If the Superintendent has not accepted other employment this section would not be applicable.

By: C. C. McCulloh

Assist. Attorney General