

## Opinion No. 55-6138

April 7, 1955

**BY:** RICHARD H. ROBINSON, Attorney General

**TO:** Senator Harold M. Agnew, New Mexico State Senator, Los Alamos, New Mexico

You have requested the opinion of this office regarding the legality of a member or officer of an H-Class County Board of Educational Trustees holding a position in the State Legislature, or any other State office while he is a Trustee.

The important statutes relative to Board of Educational Trustees are contained in § 73-9-19 through § 73-9-25, N.M.S.A., 1953 Compilation, and of course, although there is nothing specifically annotated under these sections, interpretations which have been placed with respect to Municipal and County School Boards would apply with equal force to Sixth Class Counties or H-Class County Boards.

Concerning the legality of a member of the Legislature being a Board of Educational Trustee, you, of course, have in mind Article IV, Section 28 of the Constitution of this State, which reads as follows:

"No member of the Legislature shall, during the term for which he was elected, be appointed to any civil office in the state, nor shall he within one year thereafter be appointed to any civil office created, or the emoluments of which were increased during such term; nor shall any member of the legislature during the term for which he was elected nor within one year thereafter, be interested directly or indirectly in any contract with the state or any municipality thereof, which was authorized by any law passed during such term.

The important wording contained therein relative to your question is as follows: "Any civil office in the state."

This office has previously ruled on this problem in Attorney General's Opinion 1912-1913, page 324, saying that a member of a City School Board is a civil officer; however, the opinion states that if a member of the Legislature should serve on a City School Board, his official acts could not be questioned, and probably nobody would question same.

Although reasonable minds might differ in construing whether or not a member of a School Board is a civil officer this office agrees with the above opinion. The following tests for guidance in determining whether or not a position is a civil office were first stated in the case of *State vs. Quinn*, 35 N.M. 62 and reiterated in *State ex rel Gibson vs. Fernandez*, 40 N.M. 288. In abbreviated form the tests are also set forth in 53 A.L.R., at page 595, and there is an additional annotation upon this subject found in 93 A.L.R., 333, as follows:

". . . when it is created by law, with duties cast on the incumbent which involve an exercise of some portion of the sovereign power and in the performance of which the public is concerned, and which are also continuing in their nature and not occasional or intermittent . . ."

We believe that the office of Board of Educational Trustee falls within the four corners of the above quoted standards.

Although this office ruled in Attorney General's Opinion 1929-1930, page 213, that there is nothing incompatible in a member of the Legislature also being a School Board Member, nevertheless the constitutional inhibition is there. We therefore place the same qualification to our opinion as was placed by the Attorney General in his Opinion, 1912-1913, page 324, and state that the official acts of a member of an H-Class County Board of Educational Trustees could not be questioned since he would be a de facto officer, and probably no one would question same if said member was also member of the State Legislature.

In your personal situation we wish to point out that you were **elected** to the County Board of Educational Trustees, and you were **appointed** to the State Senate, therefore your case does not fall within the strict wording of the constitutional inhibition. It is, therefore, our opinion that Article IV, Section 28 of the Constitution would not apply to your particular case.

With respect to other State office holders also being members of a Board of Educational Trustees, we hesitate to make any generalities. If you have a specific State office in mind, we shall be happy to give that problem our attention.

Hoping this opinion has been of service to you, we remain

By J. A. Smith

Assistant Attorney General