Opinion No. 56-6497

July 18, 1956

BY: RICHARD H. ROBINSON, Attorney General

TO: Col. William Salman, Member, State Board of Finance, Santa Fe, New Mexico

In your letter of June 13, 1956, you state the Mora County Board of Education, in a meeting held on May 14, 1956, took certain action concerning discharge and placement of various school teachers in the county system for the ensuing year. On May 16, 1956, the County Board held another meeting, at which time a different action was taken as to some of the teachers involved. You ask as to those teachers upon whom different action was taken which action would be considered valid and binding. Other facts which you set out necessary to a determination are as follows:

Notice of the action of May 14th was sent to the teachers involved, but none of them, at the time of the action of May 16th, had returned acceptances of employment to the Board of Education. Both meetings were held before the closing day of each school year. Eusebio Arellano was a member of the Mora County Board of Education on May 14th and participated in the meeting held on that date. On May 15th the Superintendent of Public Instruction and the Chairman of the Board of County Commissioners of Mora County held a meeting in Las Vegas, New Mexico, at which time they appointed Santos Melendez to replace Mr. Arellano. The two members constituted a quorum of the appointing body. The third member, the District Judge, was not present and may not have received actual notice of the meeting, although a telegram was sent to him. Other facts were submitted to us but in view of the basis of our decision they are immaterial to the determinative questions and will thus not be related here.

The statute involved is Section 73-12-13, N.M.S.A., 1953 Compilation, Pocket Supplement, the material portions of which are as follows:

"(a) On or before the closing day of each school year the governing board of education, hereinafter referred to as the governing board, of each school district in the state, whether rural, municipal or otherwise, shall serve written notice of reemployment of or dismissal upon each teacher by it then employed, certified as qualified to teach by the state board of education, hereinafter referred to as the state board. Written notice of placement shall also be given to such qualified teachers employed by county boards of education on or before the closing day of school of each year. . . .

"(e) Every teacher who receives a notice of reemployment under (a) of this section shall within fifteen (15) days from the receipt of such notice deliver to the governing board his acceptance or rejection of such reemployment in writing and every teacher who is finally successful on appeal to the state board from a decision of dismissal by the governing board within fifteen (15) days from the receipt of notice thereof shall similarly notify the governing board. The acceptance by the teacher of reemployment as contained in the

notice of reemployment or in the decision of the state board shall stand in lieu of the formal contract until the latter is executed. . . ."

The above quoted provisions of Section 73-12-13, it will be noted, require the Board of Education before a certain date to notify teachers of their reemployment or dismissal and their placement for the ensuing year. The section also requires such teachers to notify the Board of their acceptance or rejection of the employment in writing. It is noted that the statute provides that the acceptance shall stand in lieu of a formal contract until the contract is executed.

This is a question of the application of the law of contracts. In 47 Am. Jur., "Schools" Section 115, it is said:

"The principles governing contract generally are applicable to contracts for the employment of teachers."

Applying the basic law of contracts we find it said in 17 C.J.S. "Contracts" the following:

"Section 34 - Every agreement, whether written or oral is the result of, and springs from, an offer and the acceptance thereof."

"Section 39 - The rule as stated in Corpus Juris, which has been quoted and cited with approval, is that before an offer can become a binding promise and result in a contract it must be accepted, either by word or act, for without this there cannot be agreement, notwithstanding the unaccepted offer purports to be a contract; nor is a promise binding on its maker unless the promisee has assented to it, or unless the offer is supported by an independent consideration."

In this case the offer is the notice of reemployment together with the notice of placement. The question then arises as to whether or not this offer had been accepted at the time of the meeting of the Board on May 16th. The information which we have is that the offer had not been so accepted. In this connection you will note that the statute as above quoted requires the acceptance to be in writing, and delivered to the governing Board.

At the time of the meeting on May 16th the situation was that the Board of Education had made an offer, which offer had not at that time been accepted. Could the Board then withdraw its offer or revoke it?

In 17 C.J.S. "Contracts" Section 50, it is stated:

"An offer cannot be revoked after its acceptance without the acceptor's consent; but it can be revoked at any time before acceptance, even though it allows a specified time for acceptance, . . ."

Later in the same section it is stated:

"In case of such a withdrawal of the offer the matter is left as though no offer had ever been made."

In 12 Am. Jur., "Contracts" Section 32, it is stated:

"A party who gives another a definite time within which to accept or reject a proposal is not bound to wait until the time expires before withdrawing the offer."

The statute above quoted adds two other conditions to the action of the Board and the teachers in this matter. It provides, first that the offer must be made on or before the closing day of the school year, and gives the teacher fifteen days within which to accept. The meetings involved were both held and notices sent on or before the closing day of the school year. The question boils down to whether or not the Board of Education, acting within the time prescribed by statute and before the teacher has made any acceptance, may change its mind. From the above quotations it appears that a teacher's contract is no different than any other contract and that it is a basic principle of the law of contracts that an offer, in this case one of employment, may be revoked at any time before it is accepted, even though a specified time is given for acceptance and that time has not expired.

The case of McCormick vs. Board of Education, 58 N.M. 648, 657, 274 P. 2d 299, holds that acceptance is necessary. In addition, such clearly appears from the wording of subsection (e) of the statute above quoted, particularly where it provides that the acceptance shall constitute the contract. It is noted also that this subsection provides that the teacher **shall** deliver his acceptance to the Board of Education.

Based upon the foregoing authority we hold therefore that the action of the Board of Education of Mora County on May 16th, where it contradicted the action of the Board in its meeting of May 14th, is the binding action of the Board. It being within the powers of the Board to revoke the offers of employment which the Board made two days previously.

We then pass on to a consideration of whether the method of change in personnel of the Mora County Board of Education has any validity upon the acts taken at the meeting of May 16th.

It is our understanding that there is no question as to the expiration of the term of the Board member Eusebio Arellano, it having been decided in a court action, that he held his office as a holdover member from a previous term, no valid appointment of a successor having been made. Therefore, upon the appointment of a new member his term would automatically cease.

The only matter which is brought to our attention bearing upon the invalidity of the appointment of the new member is the fact that the meeting was not attended by the District Judge, and the possibility that he did not receive notice thereof, although such notice was properly sent.

Section 73-9-4, N.M.S.A., 1953 Compilation, reads in part as follows:

"For the purpose of appointing members of the county boards of education in each county in this state, the appointing power shall be the state superintendent of public instruction, the chairman of the board of county commissioners, and the district judge in and for the county affected, or the majority thereof. . . ."

The statute prescribes no method for the meeting of the appointing Board. In fact it does not specifically provide that they shall meet, although it has been held in several district court cases that a meeting of at least the majority of the Board must be held. It has also been held, however, that inasmuch as the statute does not provide for a meeting of the three members that none is necessary and that a valid appointment is made as soon as it is signed by a majority of the appointing power. It, of course, cannot be that the nonattendance of a minority precludes valid action by a Board. To thus hold would be to hold that a minority constitutes a majority. If notice is given and an opportunity presented to attend and the meeting is attended by a majority of the appointing power, the majority of the Board, then we can see no question as to the validity of the acts taken by it. It may also be contended that no notice is necessary, inasmuch as the statute does not prescribe notice or a time for giving it.

However, it is our belief that the question of the validity of the appointment based upon the question of the attendance of one member cannot be questioned in a collateral proceeding such as this. In State vs. Blancett, 24 N.M. 433, 174 P. 207, error dismissed, 252 U.S. 574, 40 S. Ct. 395, 64 L. Ed. 723, it was held that three requisites are necessary to constitute a de facto officer. They are as follows:

1. The office held by him must have a de jure existence, or at least one recognized by law.

2. He must be in actual possession thereof.

3. His holding must be under color of title or authority.

It is obvious that these requisites are met by Mr. Melendez in this case. The office is prescribed by statute; he was in possession thereof or would not have acted in the meeting; his holding was under color of title, i.e., an appointment signed by a majority of the appointing authority. Mr. Melendez being a de facto officer, it is impossible to test the validity of his acts in a collateral proceeding which is not instituted to determine their validity. State vs. Blancett, supra, and Wilkerson vs. City of Albuquerque, 25 N.M. 599, 185 P. 547.

As to this question, we hold that in our opinion, there is no substantial question presented as to the validity of the appointing of Board member Santos Melendez, and that any question which might arise would be as to whether Mr. Melendez is a de jure or de facto and that he being a de facto officer, his actions cannot be questioned

collaterally in a proceeding to determine the validity of a contract between the Board of Education and one of its employees.

In view of our holdings we do not deem it necessary to discuss the validity of the meeting of May 14th which is open to question as to the manner in which it was called. Whether or not it was a valid meeting has no bearing upon the action taken two days later.

We trust the foregoing will answer your inquiry.

By: Walter R. Kegel

Assistant Attorney General