

Opinion No. 59-01

January 2, 1959

BY: OPINION of FRANK ZINN, Attorney General

TO: Honorable John Burroughs Governor State of New Mexico Santa Fe, New Mexico

QUESTION

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"(1) What is the effective date of Constitutional Amendment No. 2?

(2) Do I have the power to immediately appoint ten members to the newly created State Board of Education?

(3) If so, will the Board members then have the power to immediately appoint a State Superintendent of Public Instruction?

(4) Is legislation advisable to transfer the powers and duties of the former State Board of Education and the elected State Superintendent of Public Instruction to the State Board of Education?

5(5) Is legislation advisable to vest the power to expend appropriations heretofore made to the former Board or Superintendent in the new Board and Superintendent.

CONCLUSIONS:

(1) The effective date of Constitutional Amendment No. 2 is January 1, 1959.

(2) As a consequence thereof, you have the power to immediately appoint ten members to the newly created State Board of Education.

(3) The Board, meeting in a proper session, and after the members have qualified, will then have the power to immediately appoint a State Superintendent of Public Instruction.

(4) Legislation is advisable to transfer the powers and duties of the former State Board of Education and the elected State Superintendent of Public Instruction to the State Board of Education.

(5) Legislation is advisable to vest the power to expend appropriations heretofore made to the former Board or Superintendent in the new Board and Superintendent.

OPINION

{*2} ANALYSIS

Senate Joint Resolution No. 3, adopted by the people at the general election in 1958 as Constitutional Amendment No. 2, amends Article XII, Section 6, and Article V, Section 1, Constitution of New Mexico, to provide an elective State Board of Education and a Superintendent of Public Instruction to be appointed by said Board.

Your first question arises by virtue of Section 3 of the Amendment, found at p. 717 of the 1957 Session Laws, and which reads:

"The amendment proposed by this resolution shall be submitted to the people for their approval or rejection at the next general election or at any special election prior to that date which may be called for that purpose **and the effective date of the constitutional amendment proposed by this resolution shall be January 1, 1959; provided that the board members elected hereunder shall be elected at the general election next following the adoption of the constitutional amendment proposed by this resolution.**" (Emphasis supplied).

We perceive no true conflict therein, and believe that all provisions of the Amendment may be reconciled so as to fully effect the electorate's intent. This it is our duty to do, **State ex. rel. Ward v. Romero**, 17 N.M. 88, 125, P. 617, {*3} since a provision in the Constitution must be construed reasonably so as not to defeat the obvious purpose. **Greene v. Esquibel**, 58 N.M. 429, 272 P. 2d 330.

With these rules of constitutional construction before us, it is our opinion that the effective date of the amendment is January 1, 1959, whereas the first **elected** members of the Board are to be chosen at the 1960 general election. Otherwise, an opposite construction would import future effect to the Amendment, something clearly negated by the express language thereof. We believe this construction by us is in accordance with the holding in **McCormick v. Board of Education of Hobbs**, 58 N.M. 648, 274 P. 2d 299, that all provisions of the Constitution possess equal dignity. We now turn to your appointive powers under the Amendment in question.

Sec. 1 B, found at pp. 716-717 of the 1957 Session Laws provides:

"The members of the state board of education shall be elected at the general election next following the adoption of this amendment. One member shall be elected from each of the present ten judicial districts. The initial board shall determine by lot from its membership three members to serve terms of two years and three members to serve terms of four years. The remaining members of the initial board shall serve terms of six years. Thereafter, as the terms of the initial board members expire, their replacements shall be elected from the same districts for terms of six years.

If additional judicial districts are created the legislature may provide by law for the election by the people of a board of not less than seven members nor more than ten members from board of education districts, created by the legislature.

The governor shall fill vacancies in the board by appointment of a resident from the district in which the vacancy occurs. Appointments shall be made within sixty days after the vacancy occurs. The appointed member shall serve until the next general election, at which time a member shall be elected to complete the original unexpired term." (Emphasis ours).

True, the first paragraph calls for election of the board members at the next general election, but like language was found in Section 3 and discussed above. The power of appointment, found in paragraph 3 of Section 1 B, grants you authority to fill vacancies by appointment. This, of course, begs the questions of whether vacancies exist as of January 1, 1959, the effective date of the Amendment, and if so, whether your appointive power permits you to fill them. We believe ten vacancies in the membership exist January 1, 1959, and further, that you may fill them immediately.

While we have found no New Mexico case in point, we believe **People ex rel. Snyder v. Hylan**, 212 N.Y. 236, 106 N.E. 89, supplies the answer and controls this issue. There, the New York Constitution was amended effective January 1, 1914, to provide for additional county judges to ". . . be chosen at the general election held in the first odd-numbered year after the adoption of this amendment." The power of the Governor of New York to immediately appoint the additional judges was challenged on the ground that although the judgeships came into existence on January 1, 1914, they could not lawfully be filled until incumbents were elected in the general election of 1915. The New York Court of Appeals rejected this contention, saying at 106 N.E. 89:

"The general rule is that when a law establishing an office takes effect, a vacancy in the office at once exists, unless the language of the law imports futurity of selection. Authorities to this effect are to be {*4} found in the decisions of the courts of last resort in Pennsylvania, New Hampshire, Indiana, Arkansas, Missouri, Oregon, Nevada, Georgia, Wyoming, and West Virginia. Some of these cases will be considered presently. So far as I have been able to ascertain the doctrine has been questioned only in Wisconsin and Mississippi."

An annotation in connection with **People ex rel. Snyder v. Hylan**, supra, appears at Ann. Cas. 1915 D, 127, wherein authorities from many jurisdictions are collected. It would serve no useful purpose to review them in this opinion. Suffice it to say the great majority of states follow New York on this issue. A few do not. We believe **People ex rel. Snyder v. Hylan** takes the correct view and we adhere to it here.

Of course, the foregoing reasoning applies equally to the new appointive office of Superintendent of Public Instruction, i.e., that office will likewise be vacant on January 1, 1959. This is further substantiated by Section 2 of the Amendment, deleting all reference in Constitution of New Mexico, Article V, Section 1, to a Superintendent of Public Instruction. Taken with Section 1 of the Amendment creating the office of Superintendent of Public Instruction, in the light of the above New York decision, it is clear a new office is created, notwithstanding the name of the new one and the old one are the same. Likewise, the Amendment creates new offices as to board members.

Consequently, as soon as the new board members are appointed by you and are otherwise qualified, they may immediately appoint the new Superintendent of Public Instruction in accordance with Section 1A of the Amendment. We suggest this action be taken by the Board itself, as a body, in a duly called and convened session.

The word vacancy, as applied to an office, has no technical meaning. An office is vacant whenever it is unoccupied by a legally qualified incumbent who has a lawful right to continue therein until the happening of some future event. **Territory ex rel. Klock v. Mann**, 16 N.M. 744, 120 P. 313; **Mayes v. Bassett**, 17 N.M. 193, 125 P. 609.

Of course, we are cognizant of such cases as **The Bowman Bank and Trust Co. v. The First National Bank**, 18 N.M. 589, 139 P 148, and **State ex rel. Rives v. Herring**, 57 N.M. 600, 261 P. 2d 442, holding that pursuant to Constitution of New Mexico, Article XX, Section 2, an officer holds office until his successor qualifies, and that a vacancy is not created by **expiration of the term of office**. Here, the vacancies are created not by expiration of the term of any office, but rather by the amendment **establishing the offices**. We do not believe these decisions conflict in any way with the views herein expressed.

In answer to your fourth question, it might be the courts would construe powers previously granted by statute to the former State Board of Education and the former State Superintendent of Public Instruction as being now vested in the new State Board of Education. However, a properly worded statute transferring and vesting such powers in the new Board is deemed advisable in order to prevent future question.

We suggest that properly worded legislation be drawn vesting the power in the new Board and new Superintendent to expend funds heretofore appropriated to either the former Board or the former Superintendent. This would avoid the necessity of additional appropriation acts.

By: Robert F. Pyatt

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