

Opinion No. 59-196

December 10, 1959

BY: OPINION of HILTON A. DICKSON, JR., Attorney General

TO: Hon. Fred Cole State Representative 410 South Roselawn Avenue Artesia, New Mexico

QUESTION

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1. Is it legal for a member of the New Mexico Legislature to serve on a city council or be a member of the municipal Board of Education and, if not on such a board now, may he be a candidate for election to such a municipal Board of Education?
2. If the Attorney General makes a ruling regarding any matter does that ruling or opinion become law, without a decision from the Supreme Court?
3. Are decisions or rulings made by State boards or commissions on which legislators are serving in force and effective?

CONCLUSIONS

1. Yes.
2. See Opinion
3. See Opinion

OPINION

{*303} ANALYSIS

In considering your first question it is necessary to interpret Section 28, Article IV, New Mexico Constitution, which reads in part as follows:

"No member of the legislature shall, during the term for which he was elected, be appointed {*304} 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; . . ."

In construing the above section we are of the opinion that it is necessary to place emphasis on the word "appointed" as used therein. It appears that the necessity for a provision of this nature arises through a desire to limit the executive branch from

obtaining control over the legislative branch through its power of appointment. Therefore, it would appear that it would be restricted to those positions to which appointments are made and for which the incumbents are not elected.

The California courts have had occasion to consider the distinction between the terms "appointed" and "elected" on numerous occasions and have quoted with approval the distinctions drawn in the case of **Wickershan v. Brittan**, 28 Pac. 792. The Court in that case had occasion to speak as follows:

"There is a marked distinction of meaning between the words "election" and "appointment," which is recognized in legal as well as in political nomenclature. Each of the words, indeed, signifies choice or designation of some person to fill an office or discharge a duty, but the manner in which the selection or designation is to be made determines the word which should be used;

. . . .

The term "election" carries with it the idea of a choice in which all who are to be affected with the choice participate; whereas, from the word "appointment" we understand that the duties of the appointee are for others than those by whom he is appointed. As distinguished from an election, an appointment is generally made by one person, or by a limited number, acting with delegated powers, while an election is the direct choice of all the members of the body from whom the choice can be made."

We subscribe to the distinction hereinbefore elicited and that the prohibition applies only to an appointed position c.f. **Territory v. Armijo**, 14 N.M. 205. Therefore, in view of the fact that the officers you have described in your first question, to wit, a municipal school board member and a city councilman, are elected, we are of the opinion that the prohibition of Section 28, Article IV is not applicable.

In response to your second question, our Supreme Court has, on at least two occasions, made reference to the weight to be given to an opinion by the Attorney General. In **Hanagan v. Board of County Commissioners**, 64 N.M. 103, the Court had this to say:

". . . opinions of the attorney general are entitled to great weight . . ."

Further, in **First Thrift and Loan Association v. State**, 62 N.M. 61, the Court said it would give Attorney General's Opinions "such weight only as we deem they merit and no more." Therefore, we may conclude that attorney general's opinions are to be given weight but our Supreme Court feels itself in nowise bound to follow them. However, we quote from 7 C.J.S. Attorney General, Section 6 as follows:

"An officer who has sought an opinion from the attorney general should, it would seem, even though not compelled to do so by statute, follow the advice which is given to him,

and when he does so in good faith, he is not, according to some authorities personally liable to the state and the sureties upon his official bond are also absolved."

{*305} The answer to your third question depends in large part upon a question of whether the particular officer (whose membership on the board or commission is illegal because of his being a legislator) has acted as a de facto officer.

"In so far as third persons are concerned de facto officers may act officially in all respects as though they were de jure officers.

. . . .

The acts of an officer de facto are as valid and effectual where they concern the public or the rights of third persons, until his title to the office is judged insufficient, as though he were an officer de jure, . . ." 67 C.J.S. Officers, § 146

To determine whether a particular legislator sitting as a board or commission member is in fact a de facto officer would require an independent determination in each individual case. Further, it would become necessary to ascertain through examination of each particular decision or ruling whether the illegally constituted officers' presence was necessary to constitute a quorum of the board, or whether his vote was decisive in the decision. If these two facts are answered in the negative, it, of course, would be unnecessary to further investigate the action of the board.

I am sure you will recognize that because of the breath of your question, this office is illequipped personnel wise to make a determination as to what, if any, decisions or rulings were illegal because of a legislator's participation. Therefore this office cannot give a definitive answer to your third question but merely advises that under some circumstances the decisions or rulings are undoubtedly illegal but under other, and we think perhaps most, circumstances the decisions and rulings will be effective and stand.

By: Thomas O. Olson

Assistant Attorney General