

Opinion No. 60-115

June 17, 1960

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

TO: Mr. George G. Thompson Superintendent of Schools Magdalena Municipal Schools
P. O. Box 386 Magdalena, New Mexico

QUESTION

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1. A member of the five-man Board of Education of the Magdalena Municipal Schools has resigned. Can the remaining four members of the board continue to transact business as a board?
2. Is it necessary that the remaining members of the board fill the vacancy pursuant to § 73-10-2, N.M.S.A., 1953 Comp.?

CONCLUSIONS

1. Yes.
2. See analysis.

OPINION

{*490} ANALYSIS

Under § 73-10-4, N.M.S.A., 1953 Comp., the Board of Education of a municipal school district is composed of five members elected for terms of six years. Nothing in this section nor other statutory provisions spells out whether such board may act as such if less than all the members are present at a meeting of such board. However, it is generally held that if a quorum is present at board meetings, the board may act provided the meeting is duly called as provided by law.

Landers v. Board of Education of Town of Hot Springs, 45 N.M.-446, 116 P. 2d 690; **State ex rel. Van Patten v. Ellis**, 37 Wyo. 124, 259 Pac. 812; 47 Am. Jur., Schools § 38. A majority is always considered a quorum. Therefore, in your situation, the four remaining members constitute a quorum and may conduct the business of the board at a meeting duly called and held.

We turn now to your second question. Section 73-10-2 provides that a municipal board of education has the power to fill vacancies on the board by a majority vote of the board; the appointee to hold office until the next succeeding election for members of such

board. Therefore, by the vote of 3 of the remaining members of the board, a successor to the member who has resigned may be appointed.

You will note that § 73-10-2 gives the board the power to appoint, but does not specifically require that a successor member "shall be appointed." The question arises as to whether the remaining members must make such an appointment or whether they are merely empowered to do so, if they wish. Our opinion is that the remaining members of the board are empowered but not absolutely directed *{*491}* to appoint another member to the board. The word "power" in this context is generally considered as permissive, not mandatory. 50 Am. Jur., Statutes, § 28, and we see no reason to rule otherwise in this situation. Our view is supported by reference to § 73-10-3 which states that in the event the majority of the board resigns, the State Board of Education 'shall' fill the vacancies by appointment. When this section is read together with § 73-10-2, it is apparent that the local board may fill vacancies of its own membership unless the majority of such board resigns. In that event, the State Board must appoint to fill such vacancies.

By: Philip R. Ashby

Assistant Attorney General