

Opinion No. 60-152

August 15, 1960

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

TO: Mr. Tom Wiley Superintendent of Public Instruction Department of Education Santa Fe, New Mexico

QUESTION

QUESTIONS

A member of a municipal board of education, elected pursuant to § 73-10-4, N.M.S.A., 1953 Compilation, has not resided in the United States for the past three years. He did not leave the United States due to illness or other known unavoidable cause nor is he a member of the armed forces of the United States.

1. Is the Office purportedly held by this board member now vacant?
2. If so, who declares the vacancy and how is it filled?

CONCLUSIONS

1. Yes.
2. The vacancy is declared and filled by a majority of the municipal board.

OPINION

{*538} ANALYSIS

Assuming the facts you have presented to be correct, our opinion is that the office of member of a municipal school board, where the purported incumbent has not resided in the United States for the past three years, is now vacant.

The statute defining vacancy of public office is § 5-3-1, N.M.S.A., 1953 Compilation, which reads as pertinent here, as follows:

"Any office belonging to the class mentioned in Section 3954 (5-3-3) becomes vacant under any of the following circumstances: * * *

"6. Absence from the county for six (6) consecutive months, and in cases of municipal officers, absence for such length of time from the village, town or city for which he is elected; but this provision does not apply to those officers wherein the law provides that

the duties may be discharged by a deputy, when such absence is due to illness or other unavoidable cause."

* * *

This section obviously applies to a school district board member elected pursuant to § 73-10-4, since he is not such an officer "wherein the law provides that the duties may be discharged by a deputy." Further, § 5-3-3 includes "district" officers within those officers listed therein and the New Mexico Supreme Court in *State ex rel Hannah v. Armijo*, 37 N.M. 423, 24 P. 2d 274, held that "district" in such statute included school districts, so that a school district officer is subject to its provisions and any statutes referring thereto. Therefore, our answer to your first question is that the office of member of a municipal board of education is vacant, since the incumbent has been absent from the county for longer than six consecutive months without such absence being due to illness or other unavoidable cause.

{*539} We turn now to your second question. § 7-3-1 is not a statute authorizing the removal of public officers, but merely sets forth causes for the existence of a vacancy in a public office. The sections relating to removals are §§ 5-3-4 et seq. See our recent Opinion No. 60-132 in connection with such removals. Therefore, the question is whether a court procedure similar to that procedure used to remove officials from office must be used to declare a vacancy of such public offices, or whether the vacancy may merely be declared by some officer, agency or board having the power to so declare.

There is no New Mexico Statute prescribing a court or administrative proceeding for the declaration of such a vacancy. Nor do we know of any New Mexico cases which answer the question as to whether such a procedure is necessary. However, the courts in other jurisdictions have generally held that, absent a governing statute, a vacancy may be declared by a competent board, agency or officer if, prima facie, facts showing such a vacancy to exist, are present. **Wells v. State**, 175 Ind. 38, 94 N.E. 321, Ann. Cas. 1913 C. 86; **State ex rel La Nasa v. Hickey**, 222 La. 17, 62 So. 2d 86; **State ex rel Fares v. Krager**, 226 Ind. 48, 77 N.E. 2d 746; 42 Am. Jur., Public Officers. § 129 et seq. In view of these authorities, our opinion is that such a vacancy may merely be declared.

We are also of the opinion that the majority of the remaining members of the municipal school board has the sole power to declare and fill such a vacancy. Section 73-10-2 provides that a municipal board of education has the power to fill vacancies in their membership, the appointee to hold office until the next succeeding election for members of such board. The State Board of Education's power to fill such vacancies is, under Section 73-10-3, limited to cases where a majority of the municipal board has resigned. Further, we know of no other board, agency or officer given, by statute, the power to fill such a vacancy. Thus, we must conclude that only the majority of the municipal board (three of the remaining four members) may declare and fill such a vacancy.

By: Philip R. Ashby

Assistant Attorney General