

## Opinion No. 60-154

August 31, 1960

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

**TO:** Mr. Walter R. Kegel District Attorney First Judicial District Santa Fe, New Mexico

### QUESTION

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May a county school superintendent accept employment as a full-time teacher in a municipal school district while retaining his position as county school superintendent, if he does not accept a salary for his services as a teacher?

#### CONCLUSION

While the two positions are legally compatible, the duties of an active, full-time teacher would so interfere with the duties of a county school superintendent that he would be rendered subject to removal from the office of superintendent.

### OPINION

#### {\*541} ANALYSIS

Your question poses three legal issues. Is the office of county school superintendent legally incompatible with employment as a municipal school teacher? Does the acceptance of employment as a municipal school teacher have the effect of a resignation of the office of county school superintendent? And, finally, do the duties of an active, full-time teacher so interfere with the duties of a county school superintendent that the superintendent would be subject to removal from office upon performing the duties of a teacher? We answer the first two questions in the negative and the last in the affirmative.

Firstly, we will deal with the question whether the office of county school superintendent is compatible with employment as a municipal school teacher, for, if not, then a vacancy occurs in the office of county school superintendent immediately upon such person's accepting employment as a teacher. See N.M.S.A., 1953 Compilation, § 5-3-1 (8). Any such vacancy may be filled by the Board of County Commissioners under the provisions of N.M.S.A., 1953 Comp. § 5-3-2.

A leading case defining incompatibility of office in New Mexico is **Haymaker v. State ex rel McCain**, 22 N.M. 400 (1917). The court said:

"In legal contemplation, incompatibility between two offices is an inconsistency between the functions of the two. The offices must subordinate, one to the other, and they must, per se, have the right to interfere with the other before they are incompatible."

{\*542} and,

"The incompatibility between two offices, which upon the acceptance of the one by the incumbent of the other operates to vacate the latter, is not simply a physical impossibility to discharge the duties of both offices at the same time, but it is an inconsistency in the functions of the two offices, as where one is subordinate to the other, or where a conthariety and antagonism would result in the attempt by one person to faithfully and impartially discharge the duties of both."

In Opinion of the Attorney General No. 2739, November 27, 1920, it was held that the office of county superintendent of schools was incompatible with a position as teacher in the public schools of the county in which the superintendent was elected. The basis of that ruling was that the county superintendent of schools was a member of the county board of education, and, as such, would be empowered to pass on his own teaching contract.

Municipal school districts are autonomous bodies, independent from county school districts, and have all the powers of county school districts, including the power to employ teachers. See N.M.S.A., 1953 Compilation, § 73-10-2. Thus, a contract to teach for a municipal school district does not come within the rule of Opinion of the Attorney General No. 2739, supra, because the county school superintendent has no power over the contracts of municipal school districts. The office of county school superintendent and the position of municipal school teacher, then, are not contrary to each other, are not subordinate, one to the other, nor does either have power to interfere with the other. It follows that they are not incompatible.

Holding the two positions compatible does not mean that the same person may perform both functions. It is possible that the acceptance of employment as a municipal school teacher will result in a resignation of the office of county school superintendent. If a resignation results, a vacancy in the office occurs under N.M.S.A., 1953 Compilation, § 5-3-1 (7). The resignation may be express, or it may result by operation of law. Your facts disclose that there has been no express resignation of the office of county school superintendent. But, N.M.S.A., 1953 Compilation, § 5-3-40 provides for resignation by operation of law where the incumbent of a public office accepts another public office of public employment, or private employment, for which a salary or compensation is authorized, and, by reason of accepting such office or employment, the incumbent fails for a period of thirty (30) successive days or more to devote his time to the usual and normal extent during normal working hours to the performance of the duties of such public office. It seems, necessarily, that employment as an active school teacher would prevent the discharge of the duties of county school superintendent during normal working hours, for, by § 73-5-2, N.M.S.A., 1953 Compilation the employed and elected county school superintendent must devote all their time to the performance of their

official duties. While this physical impossibility to perform both functions does not result in incompatibility between the two, the performance of the duties of an active school teacher would so interfere with the duties of a county school superintendent that a resignation by operation of law is likely. But note that this resignation will only occur after thirty (30) successive days of failure to perform the duties of superintendent. Performance of those duties once in each thirty days would prevent the resignation. Note also that if the county school superintendent is employed as a school teacher in name only, but performs no teaching duties and spends full time performing the duties of superintendent, no resignation at all will occur.

{\*543} If a resignation by operation of law has occurred, or occurs in the future, it will be well to bear in mind the provisions of Article XX, § 2 of the Constitution of New Mexico, and the decision of the Supreme Court of New Mexico in **Haymaker v. State ex rel. McCain**, supra. The creation of a vacancy in an office does not, ipso facto, terminate the right of the incumbent to hold the office. Under the constitutional provision cited, every officer, unless removed, holds his office until his successor qualifies. In the **Haymaker** case, supra, the court held that quo warranto would not lie to oust the holder of a public office who had accepted employment that was held to be incompatible with the office she held. The court ruled that it had no power to oust her from office until her successor qualified. In our case, if a resignation by operation of law occurs, or has occurred, the incumbent superintendent is still entitled to hold office until such time as his resignation is accepted by the Board of County Commissioners and a successor is appointed and qualifies.

Having held that the positions in controversy are compatible, and do not necessarily result in a resignation by operation of law, we turn to the question whether a county school superintendent, by accepting employment as a municipal school teacher, thereby renders himself subject to removal from office. If so, by virtue of N.M.S.A., 1953 Compilation § 5-3-1 (2), a vacancy occurs in that office upon removal.

Removal of local public officers is governed by the provisions of N.M.S.A., 1953 Compilation, §§ 5-3-1 through 5-3-3, and include county officers. Causes for removal from office are set forth in § 5-3-4, and include, among others, the following cause appearing in subsection (2).

"2. Failure, neglect or refusal to discharge the duties of the office, or failure, neglect or refusal to discharge any duty devolving upon the officer by virtue of his office."

The foregoing is the only cause among those listed that applies to the facts as presented to us. No particular period of time of failure, neglect, or refusal to perform is required for removal, as there is under the provision for resignation by operation of law. Under this section, the failure, neglect, or refusal to perform even a single duty devolving upon the holder of the office may be grounds for removal. Thus, if accepting employment as a municipal school teacher results in the failure, neglect, or refusal of the county school superintendent to perform any or all of the duties of his office, he is subject to removal. That this will result seems clear. By law the county school

superintendent is required to spend his full time in the duties of that office. See § 73-5-2, supra. By teaching, even for one day, he is not fulfilling his duty to devote full time to the office of superintendent, and would be subject to removal. Again, however, if the superintendent is employed as a teacher in name only, performs no teaching duties, and spends full time performing the duties of superintendent, he is not subject to removal.

In conclusion, the office of county school superintendent is compatible with employment as a municipal school teacher. Such employment will result in a resignation by operation of law of the office of county school superintendent if it causes the superintendent to fail for thirty successive days to devote full time to his office. Employment as a teacher may also render the superintendent subject to removal from office if it results in the failure, neglect, or refusal of the superintendent to discharge any or all of the duties devolving on him by virtue of his office.

By: Norman S. Thayer

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