

Opinion No. 64-20

March 5, 1964

BY: OPINION OF EARL E. HARTLEY, Attorney General Thomas A Donnelly, Assistant Attorney General

TO: Mr. H. L. Shippet, President, Logan Board of Education, Logan, New Mexico 88426

QUESTION

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If a municipal school board member is absent from the community for more than six months and misses two monthly meetings, is there automatically a vacancy in such office? If a vacancy in fact occurs, should the school board then proceed to fill the vacancy?

CONCLUSION

See Analysis.

OPINION

ANALYSIS

The question posed was recently dealt with in part in Attorney General's Opinion No. 64-6, dated January 21, 1964, and a copy of this opinion is included herewith.

Initial consideration must be focused upon the legal factor that mere physical absence of a school board member from a municipal school district does not automatically in and of itself result in the creation of a vacancy. Dependent upon the actual circumstances surrounding the absence, a vacancy may or may not occur when the person holding a position on the municipal school board absents himself from the municipal school district.

Residence in legal contemplation may be maintained in a locality despite actual physical absence. To a large degree, the mental intent of a person is an important factor in determining residence. As stated in the case of **Allen v. Allen**, 52 N.M. 174, 194 P.2d 270, "once domicile has been acquired it is presumed to continue until it is shown to have been changed." Also such decision states that "to show the change, two things are indispensable, first, residence in the new locality; and, second, the intention to remain there."

Article V, Section 13 of the New Mexico State Constitution requires that a school board member must be a resident of the school district which he represents.

Section 5-3-1 N.M.S.A., 1953 Compilation specifies that "six consecutive months absence does not effect a vacancy where the duties of an individual can be discharged by a deputy, when the absence is due to illness or other unavoidable cause."

As may be seen from the above authorities, mere six months or longer absence from a school district does not per se result in the creation of a vacancy in a municipal school board position. In our opinion under Article V, Section 13 of the State Constitution, the municipal board member must be a resident of the municipal school district in fact. If this bona fide residency is terminated at any time, even prior to the expiration of a six month period, then a vacancy occurs in such office. If, however, the mental intent of the board member is to remain a resident of the municipal school area, and the person is physically absent from the school district for those causes specified in Section 5-3-1, supra, and which constitute an exception to the rule that absence works a vacancy in such office, then no vacancy in fact occurs.

It is an indispensable prerequisite to determining whether or not a vacancy has in fact occurred by reason of absence from the school district for a period of six months or longer, that the board itself determine the reasons for such absence. As a general rule, if an individual wishes to contest the determination of an administrative body concerning pertinent facts relating to such individual, he must proceed to exhaust available administrative remedies. **Smith v. Southern Union Gas Co.**, 58 N.M. 197, 269 P.2d 745; **General Tel. Co. of the Southwest v. State Tax Commission**, 69 N.M. 403, 367 P.2d 711; **McCormick v. Bd. of Ed.**, 58 N.M. 648, 274 P.2d 299.

Where a school board is desirous of determining whether in fact a vacancy has occurred by reason of change of residence or by reason of absence for six months or longer without justifiable cause, it is our opinion that the school board should have a hearing, after due and proper notice to the board member concerned, specifying the purpose of such hearing and the date set therefor. At such hearing, evidence should be adduced from the school board member or from other material sources, to ascertain the basis for the school board member's absence or whether or not his actual legal residence has changed to a location outside the municipal school district. Where the issue is absence from the district for a period of six months or more, evidence should be obtained as to the reason for the absence, the actual period of absence, and the intent of the party. Following receipt of this information, the board may then properly evaluate the question of such board member's status. Fair and due process dictates that the individual concerned be afforded advance notice of such meeting, the purpose of such meeting, and notice that such individual is entitled to legal representation at such hearing and the right to produce witnesses on his behalf.

At the conclusion of such hearing, the local school board may make a determination as to whether or not the individual in question was absent without valid cause from the school district for a period exceeding six months, and whether residence was removed from such district contrary to Article V, Section 13 of the State Constitution.

If such board makes a determination that a vacancy has occurred by operation of law, then the municipal board of education may fill such vacancy under the authority invested in such board by Section 73-10-2 N.M.S.A., 1953 Compilation, which provides in part:

". . . In addition, the municipal boards of education shall have power to fill vacancies in their membership by majority vote of the members of the board, the appointee to hold office until the next succeeding election for members of such board. In the event that the remaining members of the board cannot reach agreement on a replacement to fill any vacancy, or vacancies, for a period of sixty days after said vacancy, or vacancies, has occurred, a special election shall be called within thirty days in the same manner as provided for the election of regular school boards."

The above quoted statute specifies in part the authority of a municipal school board to fill a vacancy which is determined to exist under the facts as developed and in accordance with the above cited statutes.