

Opinion No. 67-06

January 12, 1967

BY: OPINION OF BOSTON E. WITT, Attorney General

TO: Honorable David F. Cargo Governor of New Mexico Legislative-Executive Building
Santa Fe, New Mexico

QUESTION

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Does the Governor have the power to fire or remove members of boards or commissions where the method of removal is not specifically prescribed by the State Constitution?

CONCLUSION

Yes, but see analysis:

OPINION

{*7} ANALYSIS

The question which you pose was dealt with by our State Supreme Court in **State ex rel. Ulrich v. Sanchez**, 32 N.M. 265, 255 Pac. 1077, a 1927 decision.

Involved was the office of associate tax commissioner. The statute provided that the governor would appoint such officials by and with the advice and consent of the State Senate for six-year terms of office. Prior to the expiration of {*8} their terms, two associate commissioners were removed for alleged incompetency. The then governor appointed two other persons to fill these offices. A lawsuit was filed to determine which of these officials were legally entitled to hold these offices -- the ousted officials or the new appointees.

The Court noted that the controlling Constitutional provision was Article 5, Section 5 of our State Constitution. That provision then read, as it still does, as follows:

"The governor shall nominate, and, by and with the consent of the senate, appoint all officers whose appointment or election is not otherwise provided for, and **may remove any officer appointed by him for incompetency, neglect of duty or malfeasance in office.** Should a vacancy occur in any state office, except lieutenant governor and a member of the legislature, the governor shall fill such office by appointment, and such appointee shall hold office until the next general election, when his successor shall be chosen for the unexpired term." (Emphasis added).

The first contention by the ousted officials was that they were not subject to removal by the governor because they were state officers appointed by the governor, by and with the consent of the senate, and could only be removed by impeachment proceedings. The Court disagreed with this contention citing the above-quoted constitutional provision.

The second proposition advanced by the ousted officials was that a public official who, under the law, has a fixed term of office, and who is removable only for specified causes, cannot be removed without notice and hearing upon the charges, specifying the particulars constituting the causes for removal. They also argued that the charges had to be established by competent evidence.

The Court also disagreed with this contention stating that:

"Where no provision of the Constitution or of the **statute law** requires that notice and hearing be given before a removal can be made, neither notice nor hearing is a necessary condition precedent to a valid removal." (Emphasis added).

The underlined portion of the above is important because it definitely states that the legislature could prescribe that notice of removal and a hearing thereon be given members of a particular board or commission. Other portions of the opinion say the same thing. We are not presently aware of such a provision in any of the laws establishing boards and commissions, but the statutes relating to a particular board or commission should be checked prior to a removal of a member.

Further, the order of removal must assign a constitutional ground therefor, i.e., incompetence, neglect of duty or malfeasance in office, or if a particular statute provides other grounds for removal, such a ground could be assigned as the reason for a removal.

While the **Ulrich** decision was issued in 1927, it is still the law in this jurisdiction, and we cannot assume that changing concepts of procedural due process require a hearing when a removal is made.

Accordingly, we answer your question in the affirmative subject to a caveat that the statutes relating to the particular board or commission be examined prior to removal of a member.

By: Oliver E. Payne

Deputy Attorney General