

Opinion No. 70-73

September 3, 1970

BY: OPINION OF JAMES A. MALONEY, Attorney General

TO: Senator I.M. Smalley Chairman University Study Committee Room 233, State Capitol Santa Fe, New Mexico 87501

QUESTIONS

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1. May the Legislature constitutionally enact a measure which would require the administration of any of the state's seven institutions of higher education to deduct salary for days not actually taught by a faculty member if such failure to teach was not approved by the president of the university?
2. Assuming such an enactment were valid, what would be the legal responsibility of the president if he should approve payment for days not taught?
3. May the Legislature constitutionally enact legislation requiring the boards of regents to formulate written rules of conduct with appropriate penalties for violation to which all students and faculty must adhere?

CONCLUSIONS

1. No.
2. See Analysis.
3. Yes, but see Analysis.

OPINION

{*123} ANALYSIS

Article XII, Section 13 of the Constitution of New Mexico establishes the basic plan of governance for the state's institutions of higher education. That section vests responsibility for the control and management of the several institutions in a board of regents for each institution:

The legislature shall provide for the control and management of each of said institutions by a board of regents for each institution, consisting of five [5] members, who shall be qualified electors of the state of New Mexico, no more than three [3] of whom at the time of their appointment shall be members of the same political party. The governor shall

nominate and by and with the consent of the senate shall appoint the members of each board of regents for each of said institutions. The terms of said members shall be for six [6] years, provided that of the five [5] first appointed the terms of two [2] shall be for two [2] years, the terms for two [2] shall be for four [4] years, and the term of one [1] shall be for six years.

Members of the board shall not be removed except for incompetence, neglect of duty or malfeasance in office. Provided, however, no removal shall be made without notice of hearing and an opportunity to be heard having first been given such member. The Supreme Court of the state of New Mexico is hereby given exclusive original jurisdiction over proceedings to remove members of the board under such rules as it may promulgate and its decision in connection with such matters shall be final. (As amended September 20, 1949, effective January 1, 1950.)

The implementation of the constitutional provision is accomplished by statute. Though each of the seven institutions of higher education is organized under its own statutory plan, the language concerning the board of regents is relatively consistent in each case. New Mexico State University, for example, is governed according to the terms of Sections 73-26-5 and 73-26-6, N.M.S.A., 1953 Compilation:

The board of regents shall direct the disposition of any moneys belonging to or appropriated to the Agricultural College and experiment station and shall make all rules and regulations necessary for the government and management of the same, adopt plans and specifications for necessary buildings and superintend the construction of said buildings, and fix the salaries of professors, teachers and other employees, and the tuition fees to be charged in said college.

Section 73-26-6.

The board of regents shall have power and it shall be their duty to enact laws for the government of said college and experiment station and the meetings of said board may be called in such manner as the regents may prescribe.

Similar language is to be found in the statutory plan for the governance of the University of New Mexico, at Sections 73-25-3 and 73-25-7, N.M.S.A., 1953 Compilation:

The management and control of said university, the care and preservation of all property of which it shall become possessed, the erection and construction of all buildings necessary for its use, and the disbursement and expenditures of all moneys, shall be vested in a board of five [5] regents.

Section 73-25-7.

The regents shall have power and it shall be their duty to enact laws, rules and regulations for the government of the university.

The corresponding statutes for the New Mexico Institute of Mining and Technology are found at Sections 73-27-4 and 73-27-8, N.M.S.A., 1953 Compilation; for the New Mexico Military Institute at Sections 73-28-3 and 73-28-4, N.M.S.A., 1953 Compilation; for New Mexico Highlands {*124} University, New Mexico Western University, and Eastern New Mexico University, at Sections 73-22-4, 73-22-7, and 73-22-36, N.M.S.A., 1953 Compilation.

The effect of these statutes is to implement the constitutional grant of power to the various boards of regents. Though the specific terms of the regents' authority may differ from one institution to another, it is clear that each board is constitutionally vested with the authority to "control" and "manage" the institution of which it has charge. Similar constitutional provisions in other states have been held to vest regents with plenary authority in regulating university affairs, free from interference from other branches and agencies of government. **Glass v. Dudley Paper Company**, 365 Mich. 227, 112 N.W.2d 489 (1961) and cases cited therein. Other constitutional provisions have been interpreted to allow the Legislature to direct specific regent action only when the matter involved is not limited to campus affairs. **Tilman v. Underhill**, 39 Cal.2d 708, 249 P.2d 280 (1952).

If it be understood that the regents' power to "control" and "manage" the affairs of the universities is constitutionally derived, then it will be seen that an attempt to negate that authority by statute is improper. The Legislature may direct that the regents provide policy determinations and administrative guidelines in various areas, but it may not make the determinations itself and impose them on the regents, nor may it require the regents merely to approve policy which it has itself formulated.

The power of the regents to govern the various university campuses does not, however, absolve them from statutory standards of fiscal responsibility. Section 40A-23-2, N.M.S.A., 1953 Compilation, provides:

Paying or receiving public money for services not rendered consists of knowingly making or receiving payment or causing payment to be made from public funds where such payment purports to be for wages, salary or remuneration for personal services which have not in fact been rendered.

Nothing in this section shall be construed to prevent the payment of public funds where such payments are intended to cover lawful remuneration to public officers or public employees for vacation periods or absences from employment because of sickness, or for other lawfully authorized purposes.

Whoever commits paying or receiving public money for services not rendered is guilty of a fourth degree felony.

The validity of this enactment was affirmed in **State v. Aragon**, 55 N.M. 423, 243 P.2d 358 (1951). Thus, as a matter of general legislative authority, the statute prohibits payments for services which are in fact due but not rendered. It is not limited, however,

to the payment of faculty salaries, and does not automatically take effect simply because a particular faculty member might fail to meet a class on a particular day or days. Unless the contract under which the particular faculty member was employed specified certain definite times and dates of teaching, unless no provision in the contract existed for some latitude and discretion on the teacher's part in his discharge of duties, and unless the failure to meet a class on a particular day could be said as a matter of law to constitute a failure to render the contracted-for services, no violation of the statute would be present. Whether the failure to meet a class amounted to a breach of contract would be subject to interpretation placed on the contract by the regents or ultimately the Courts and not by any other agencies of government.

Such an analysis suggests answers to the first two broad questions posed. If the Legislature may not directly regulate university affairs without trenching on the constitutional authority of the regents, then it may not enact specific measures limiting the payment of salaries. In addition to the constitutional infirmities of such an effort, it might virtually eliminate the traditional academic practices of sabbatical leave and research programs upon which all universities depend. In light of this conclusion, it is not necessary to reach the question of the liability of a university president who approves the {*125} payment of salaries under the circumstances you describe.

It would appear, moreover, that the Legislature has already provided for the adoption of rules of conduct by the various boards of regents. As examples, Sections 73-25-7 and 73-26-6, **supra**, vest power in the regents of the University of New Mexico and New Mexico State University to enact rules for the governance of the campuses in question. Similar powers lie with the remaining boards. In view of the discussion above, it would be plainly beyond the power of the Legislature to prescribe specific codes of conduct for any of the campuses in question.

Finally, it should be observed that any body of rules adopted by a board of regents is subject to full scrutiny under the Constitution of both the State of New Mexico and the United States. **General Order and Memorandum on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Learning**, 45 F.R.D. 133 (W.D. Mo. 1968).

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