

## Opinion No. 71-06

January 21, 1971

**BY:** OPINION OF DAVID L. NORVELL, Attorney General

**TO:** Mrs. Dorris F. Coyne Chairman, New Mexico Health and Social Services  
Department 621 Aliso Drive, S.E. Albuquerque, New Mexico

### QUESTIONS

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1. Section 12-1-29, N.M.S.A., 1953 Comp. states that the Health and Social Services Board shall:

"consists of five members appointed by the governor, by and with the advice and consent of the senate, who shall be selected upon the basis of recognized interest in and knowledge of public health and social welfare programs. The governor is an ex officio member of the board. The members of the board shall be appointed for overlapping terms with no term exceeding six years. Members shall be appointed without regard to partisan political affiliation. Members of the existing public health and welfare board shall become the members of the board, and their existing appointments and terms shall continue. Any vacancy occurring in the membership of the board shall be filled by appointment by the governor for the unexpired term."

Under this language can each succeeding governor appoint a separate board?

2. Section 12-1-30(B) provides that the:

"board shall appoint a director who must have demonstrated ability in the administration and direction of public health or social welfare programs as indicated by training and experience. The director's salary shall be determined by the board and he shall serve at the pleasure of the board."

Does the phrase "serve at the pleasure of the board" mean that power of removal is vested in the board?

#### ANSWERS

1. Yes; see analysis.

2. Yes.

### OPINION

## {\*9} ANALYSIS

1. There is no provision in our statutes specifically directed to the manner in which members of the Health and Social Services Board may be removed from office. Neither is such removal specifically mentioned in the New Mexico State Constitution. Opinion of the Attorney General No. 67-6, dated January 12, 1967, relying on the 1927 decision in **State ex rel. Ulrick V. Sanchez**, 32 N.M. 265, 255 P. 1077, concluded that the governor has the power to fire or remove members of boards where the method of removal is not specifically prescribed by the State Constitution.

{\*10} Article V, Section 5 of the Constitution, discussed in the above opinion states that:

"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 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)

Since there is no statutory method of removal for the above offices the method prescribed in Article V, Section 5, **supra**, is the proper method under which the governor may proceed if he alleges "incompetency, neglect of duty or malfeasance in office." Thus, the analysis of **Ulrick, supra**, offered in Opinion No. 67-7, **supra**, is directly in point in the instant case:

"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. (Art. 5, Sec. 5, **supra**.)

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."

There is no provision in the law requiring that notice of removal and a hearing thereon be given members of the Health and Social Services Board. However, the order of

removal must assign a constitutional ground as mentioned above. I assume this has been done.

The Supreme Court in **Ulrick, supra**, after a lengthy discussion of the issue, also noted that it "would have been competent for the framers of the Constitution to provide that officers appointed by the Governor, by and with the consent of the senate, be removed only with the consent of the Senate, but they did not do so, and the **omission may not be ignored.**" (emphasis added) It is clear then that the removal contemplated by Article V, Section 5, **supra**, is sufficient under the law.

It makes no difference that the legislation [Section 12-1-29 (A), N.M.S.A., 1953 Comp.] contained a holdover provision as to members of the "existing public health and welfare boards," because the governor had appointed the members of those boards.

After such removal, the governor is free to fill vacancies. New Mexico Constitution, Article V, Section 5, **supra**. Therefore, the removal of individual members of the board may result in a new and separate board appointed by a succeeding governor.

2. Under the language of Section 12-1-30(B), **supra**, the Health and Social Services Board is vested with the power of removal of the director.