

## **Opinion No. 71-17**

February 9, 1971

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

**TO:** Honorable Jose Benito Chavez State Representative New Mexico House of Representatives Legislative-Executive Building Santa Fe, N.M. 87501

### **QUESTIONS**

#### QUESTIONS

1. What are the proper procedures to be followed if a local school board wishes to increase its membership from five members to seven members?
2. Can an incumbent school board member who was defeated in the recent school board election vote on a board proposed resolution to increase the board membership?
3. Is publication required of a school board meeting to consider the increase in board membership?
4. Upon appointment do the two new members immediately have full voting rights or is there a waiting period?
5. If the present school board fails to receive and verify a petition for an election on the issue of increasing board membership, what recourse is there for those who seek such an election?
6. May a court injunction be obtained to prevent the present board from adopting a resolution increasing the board membership so that such a resolution can only be adopted when the newly-elected members to the five-man board have taken office?

#### CONCLUSIONS

1. See analysis.
2. Yes.
3. No.
4. There is a waiting period.
5. Writ of mandamus.
6. It is not likely.

## OPINION

### {\*27} ANALYSIS

Involved in your questions is a 1969 legislative addition to the Public School Code. Sections 77-4-1.2 and 77-4-1.3, NMSA, 1953 Comp.

If any local school board in this state desires to increase its membership to seven members, it may do so by resolution. The resolution shall provide designation for seven numbered positions. If the resolution is adopted, the existing board votes separately on each of two new members.

In answer to your second question, yes, the defeated incumbent who is still a member of the existing five-man board may vote on the resolution to increase the board membership to seven. While he is what is commonly referred to as a "lame duck," a defeated one at that, he still exercises the full powers of his office for his term of office the same as officials from the President and Governor on down do. Section 77-4-5, NMSA, 1953 Comp.

Nothing contained in Section 77-4-1.2, **supra**, requires any publication of a school board meeting to consider a resolution increasing board membership to seven. Nor do we find elsewhere in the Public School Code any requirement for publication of notice of a school board meeting. See Section 77-4-7, NMSA, 1953 Comp.

Paragraph C of Section 77-4-1.3, **supra**, says the membership-increase resolution and appointments pursuant thereto "shall go into effect **within** thirty days after its adoption . . ." Clearly the word "within" is superfluous. That could mean a minute after adoption and would be in conflict with {\*28} the later provision in the same section that permits up to thirty days after the resolution is adopted for a petition to be filed with the existing five-man board asking for an election on the membership-increase action. So the answer to your fourth question is that there is a waiting period before the newly "appointed" members become bona fide members. If no petition is filed, the new appointments are effective when the thirty day period for such filing has expired. If a petition is filed and contains the necessary number of valid signatures, and if the increase resolution is approved by the voters, the new appointments are effective when the election results are duly certified. If, of course, the increased-membership resolution is defeated, the appointments are nullified.

We feel sure that a local school board would perform its statutory duty and receive and verify a petition asking for an election on the increased-membership resolution, as well as calling the election if the election petition contains the necessary number of valid signatures. However, should it fail to do so for some reason, the proper legal recourse is to proceed by way of a court-obtained order requiring the board to perform the duty placed on it by legislative mandate.

In answer to your question relative to an injunction to prevent the existing school board from adopting an increased-membership resolution, we see no legal ground therefor. We wish to make it clear however that it would be presumptuous of this office to advise you how a court will definitely rule on a particular matter.

By: Oliver E. Payne

Deputy Attorney General