Opinion No. 74-17

May 13, 1974

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Mr. Joe Romero Member State Board of Education

QUESTIONS

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May a member of a local school board resign from such office and thereafter be appointed Superintendent of Schools or be otherwise employed by that school district, during the term for which he or she was elected or appointed?

ANSWER

No.

OPINION

*{*32}* **ANALYSIS**

The answer to your question calls for an interpretation of Section 77-4-3(B), NMSA 1953 Comp., which reads as follows:

"No member of a local school shall be employed in any capacity by a school district governed by that local school board **during the term of office for which the member was elected or appointed.**" (Emphasis added)

There is no guidance in the appellate decisions of the New Mexico courts as to the proper interpretation of the italicized section. Furthermore, we do not have available written "legislative history" as to the intent of the Legislature in adopting this particular language. Therefore, we must use other types of authority to aid in our determination of the meaning of the language in question.

Basically, we are faced with a problem of statutory interpretation or construction, the rules of which are well established.

"In the interpretation of statutes, the legislative will is the all-important or controlling factor. Indeed, it is frequently stated in effect that the intention of the legislature constitutes the law. Accordingly, the primary rule of construction of statutes is to ascertain and declare the intention of the legislature, and to carry such intention into effect to the fullest degree. A construction adopted should not be such as to nullify, destroy, or defeat the intention of the legislature." 73 Am. Jur. 2d STATUTES § 145.

Before the "canons" or rules of construction are resorted to, however, the language in question must be ambiguous. 73 Am. Jur. 2d STATUTES § 194 states:

"A statute is open to construction only where the language used therein requires interpretation or may be reasonably considered ambiguous. Thus, where no ambiguity appears, it has been presumed conclusively that the clear and explicit terms of a statute express the legislative intention. A plain and unambiguous statute is to be applied, *{*33}* and not interpreted, since such a statute speaks for itself, and any attempt to make it clearer is a vain labor and tends only to obscurity."

It is the opinion of the Superintendent of Public Instruction that there is no ambiguity in the language above italicized. The language forbids a school board member from being employed during the entire term to which he or she was elected or appointed. If a board member is elected to a six year term, he or she cannot be employed by the school district during that six year period, regardless of whether the board member resigns prior to the end of the term and prior to being employed by the district. There being no ambiguity, there is no necessity for any construction; a mere literal reading of the language of the statute requires such a result.

But assuming for the sake of argument that the language in question is ambiguous, the same opinion is reached when the canons of construction are applied. The policy of the Legislature is important:

"In construing a law of doubtful meaning or application, the policy which induced its enactment, or which was designed to be promoted thereby, is a proper subject for consideration, where such policy is clearly apparent or can legitimately be ascertained . . ." 73 Am. Jur. 2d STATUTES § 151.

Closely related are discussions concerning the reasons for the statute, with particular emphasis on the mischief sought to be prevented.

"In the construction of an ambiguous statute, it is proper to take into consideration the particular evils at which the legislation is aimed, or the mischief sought to be avoided . . . Where possible, the statute should be given such a construction as, when practically applied, will tend to suppress the evil which the legislature intended to prohibit." 73 Am. Jur. 2d. STATUTES§ 157.

The evil sought to be prohibited by Section 77-4-3, **supra,** is clear. Subsection A prohibits board members from receiving any compensation; i.e. the Legislature did not intend for board members to financially profit from their service as board members. Subsection B is directly related and recognizes the fact that board members have substantial influence over the employment practices of the district and might be able to use that influence to have themselves employed by the school district, unless prohibited from doing so.

There is obviously no danger that a board member could be employed by the district while still a board member. Regardless of Section 77-4-3, **supra,** the two offices are incompatible and holding both is prohibited by Section 5-3-1[8], NMSA 1953. See also **Haymaker v. State ex rel. McCain,** 22 NM 400, 163 P. 248 (1917). In Section 77-4-3, **supra,** the Legislature sought to prohibit board members from exerting the influence of their position to procure employment with the district. If a board member can resign during his or her term, after having influenced the board to select him or her for employment, and then be hired, the intent of the Legislature would be violated. Only after the full term for which the board member was elected or appointed has passed may the ex-board member become eligible for employment with the district. This removal of the "disability" reflects a legislative judgment that when the board member's term is over, he or she is no longer in a position to exert undue influence to his or her advantage. It is the opinion of the Superintendent of Public Instruction that the evil sought to be prevented by the Legislature is the personal benefit of board members from their position. To interpret the statute to allow a currently serving member to resign and be employed would allow the evil to occur which was sought to be avoided.

If school boards are to provide educational leadership, the members must be dedicated and unselfish.

"It is generally regarded as permissible *{*34}* to consider the consequences of a proposed interpretation of a statute, where the act is ambiguous in terms and fairly susceptible of two constructions. Under such circumstances, it is presumed that undesirable consequences were not intended; to the contrary, it is presumed that the statute was intended to have the most beneficial operation that the language permits. It is accordingly a reasonable and safe rule of construction to resolve any ambiguity in a statute in favor of a beneficial operation of the law, and a construction of which the statute is fairly susceptible is favored, which will avoid all objectionable, mischievous, indefensible, wrongful, evil and injurious consequences." 73 Am. Jur. 2d STATUTES § 258.

The most beneficial interpretation of Section 77-4-3-(B) **supra,** is to prohibit board members from being employed by the district until after their terms have expired, regardless of whether they resigned prior to the end of such terms.

Interpretations of similar language, although used in different statutes is also useful as guidance in interpreting ambiguous language. NM Const. Art. IV, § 28, contains language quite similar to Section 77-4-3, **supra.** In a pertinent part, it reads:

"No member of the legislature shall **during the term for which he was elected,** be appointed to any civil office in the state, . . . (Emphasis added)

No New Mexico cases have interpreted the italicized words, but several Opinions of the Attorney General have specifically dealt with their interpretation. In a consistent series of Opinions, the Attorney General has concluded that this language creates a disability which lasts throughout the term for which the legislator is elected, regardless of whether

the legislator resigns. In Opinion of the Attorney General No. 63-23, issued March 27, 1963, the following appears:

"At the outset, we would point out that in Opinion of the Attorney General 60-139, August 1960, it was held that the prohibition of Article IV § 28 is applicable during the term for which the legislator was elected regardless of whether he resigns his office prior to the expiration of the term. A legislator may not, therefore, become eligible for an appointive civil office merely by resigning his position in the Legislature."

The current Attorney General has taken the same position, as reflected in the following quotation from Opinion of the Attorney General No. 72-10, issued March 7, 1972:

"We need also mention that a legislator cannot, by resigning his office, remove himself from the ban of Article IV, Section 28, **supra,** since the Constitution phrased the restriction in the term for which he was elected . . ."

The language in Section 77-4-3, **supra,** is effectively identical to that used in NM Const. Art. IV, § 28. The same reasoning and interpretation should be applied to both, not only for the sake of consistency, but because the obvious legislative intent of both sections is the same.

The citation of cases which have construed the phrase "term of office" is useless interpreting Section 77-4-3(B), **supra,** because such cases do not involve the qualifying phrase "for which he was elected." See eg., **In re Barnun,** 27 Minn. 466, 8 NW 375; **Board of Freeholders v. Lee,** 76 NJ Rptr. 327. The addition of that phrase makes it, even more clear that the Legislature intended to extend the disability provided by Section 77-4-3(B), **supra,** through the entire term, even if the board member resigned before the end of the term.

There is no problem of denial of equal protection of the laws by setting up a system of classification which treats board members (present or resigned) from board members whose terms have been completed or the rest of the *{*35}* populace. Classifications of this nature are allowable so long as there is a rational basis for the discriminatory classification. The rational basis is clear in this case: the Legislature sought to avoid the abuse of power by school board members. The method chosen bears a rational relationship to the legitimate legislative purpose. See **San Antonio Independent School District v. Rodriguez,** U.S. , 93 S. Ct. 1278, (1973). Therefore, there is no equal protection problem.

We have spoken of Section 77-4-3(B), **supra,** as imposing a "disability" upon school board members. Those who freely choose to seek and attain the office of school board member pay a price for being elected to that position. The public has a right to demand this sacrifice on the part of school board members, in order to insure that the decisions of school boards will be in the public interest. The public interest demands this position.

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