Opinion No. 75-09

February 3, 1975

BY: OPINION OF TONEY ANAYA, Attorney General

TO: Honorable Jerry Apodaca Governor of New Mexico State Capitol Building Santa Fe, New Mexico 87501

QUESTIONS

FACTS

Section 42-9-7, NMSA, 1953 Comp. of the Corrections Act creates a parole hearing board consisting of five members appointed by the Governor. Subsection B of that section places the following restrictive qualification with respect to eligibility to serve on the board: "No member of the board shall be an official or employee of the federal, state or local government, and his government service shall be exclusive to the board . . . ."

QUESTIONS

1. Is a member of the Albuquerque City Council eligible to serve on the parole hearing board?

2. Is a public school principal, who is employed by the board of education of a school district, eligible to serve on the parole hearing board?

CONCLUSIONS

1. No.

2. No.

OPINION

*{*41}* **ANALYSIS**

In considering the first question, this office believes that the Albuquerque City Charter provides the answer. That charter, adopted at a Special Election on June 29, 1971, provides that its purpose "is to provide for maximum local self-government," Article I, and that a Councillor is a member of the "governing authority" which has "all legislative powers of the City," Article IV, Section 1. A person exercising some portion of the governmental power is an "officer," **Pollack v. Montoya,** 55 N.M. 390, 234 P.2d 336 (1951), and the term "officer" is synonymous with the term "official." See, for example, Section 5-3-37.1, NMSA, 1953 Comp. Further, the governing authority of a city is the local government of that instrumentality. **Mayor and Recorder of City of Nashville v.**

Ray, 86 U.S. 468, 475-477, 19 Wall. 468, 22 L. Ed. 164 (1873). We conclude, therefore, that a Councillor of the City of *{*42}* Albuquerque is a local government officer and is ineligible to serve on the parole hearing board.

Turning to the second question, the issue is whether a public school principal is "an official or employee of the federal, state or local government." The word "government" as used in Section 42-9-7, **supra,** may reasonably be read in its broadest sense, since it is not qualified other than by the words "federal, state or local," and also because other more definitive terms, such as "local public bodies" or "political subdivisions," could have been employed by the legislature had it desired to be more precise with respect to the subject. The statute also requires that a parole board member's "government service shall be exclusive to the board," and this language is extensive in its scope.

The case law, almost without exception, has consistently characterized education as being a "governmental function," and in exercising that function a political entity, such as a school board, acts in a "governmental capacity." See, for example, **Brown v. Bowling,** 56 N.M. 96, 100, 240 P.2d 846 (1952), where it was said that a county board of education is "an entity for specific governmental purposes distinct from the county within which it lies." In **Water Supply Co. of Albuquerque v. City of Albuquerque, New Mexico,** 9 N.M. 441, 450, 54 P. 969 (1898), the Court said that a "school district is a governmental auxiliary of the state, . . . created . . . to aid in the administration of government in carrying out the universal public school system." See also, **Brown v. Board of Education of Topeka, Kansas,** 347 U.S. 483, 493, 74 SCt. 686, 98 L. Ed. 873 (1954). From the definition given in the **Water Supply Co. of Albuquerque case,** our Supreme Court in **McWhorter v. Board of Education,** 63 N.M. 421, 423, 320 P.2d 1025 (1958) found that "a school district is a part of the state government . . . ."

In **Dugas v. Beauregard,** 236 A. 2d 87 (Conn. 1967), the Court outlined those attributes which are generally regarded as being distinctive of a political subdivision which exists for the purpose of discharging some function of local government. Essentially those attributes require that the subdivision have a prescribed area, have a governing body with the authority for subordinate self-government, and have certain fiscal authority -- such as the power to levy taxes or make appropriations. Applying this test to a school district, one needs only to read its statutory definition to determine that it does discharge a function of local government. Section 77-1-2 J., NMSA, 1953 Comp. specifies that a "'school district' means an area of land established as a political subdivision of the state for the administration of public schools and segregated geographically for taxation and bonding purposes . . . ."

Moreover, it follows that a public school principal, as an employee of a school district, must be regarded as a person engaged in the performance of a local governmental function. See, for example, **In re S.,** 71 Misc. 2d 1032, 337 N.Y.S. 2d 774, 777 (1972); Attorney General's Opinion No. 4645, issue January 24, 1945.

For these reasons, we conclude that a public school principal or administrator, by serving in a governmental capacity, is a local government employee and thus is ineligible to serve on the parole hearing board.

We are aware that your questions *{*43}* concern two individuals who are presently serving on the parole hearing board. Accordingly, it is our judgment that it would be in the public interest to make a further observation with respect to this matter, especially in the event that you may have some question as to the validity of board actions taken during the tenure of ineligible members.

Government servants who hold an office or position despite some form of disqualification are usually described as being "de facto" officers if certain requisites are met. Those requisites were described in **State v. Blancett,** 24 N.M. 433, 174 P. 207 (1918), as being that the office held must be one recognized by law, that the person must be in actual possession of the office, and that his holding of the office must be under color of title or authority, i.e., the appointment has issued from a person authorized to make that appointment.

We believe that these two board members meet that test and are, therefore, "de facto" members of the board. Acts taken by "de facto" officers are not to be treated differently than acts of "de jure" or legal and qualified officers in so far as the public and third persons are concerned. **Nofire v. United States,** 164 U.S. 657, 661, 17 S. Ct. 212, 41 L.Ed 588 (1897). The law validates their acts in order to prevent a failure of public justice during their term. **Bull v. Southwick,** 2 N.M. 321 (1882); **Gappert v. Bormer,** 78 N.D. 760, 51 N.W. 2d 866, 871 (1952); **Bradford v. Byrnes,** 221 S.C. 255, 70 S.E. 2d 228 (1952); **Forwood v. Taylor,** 209 S.W. 2d 434 (Tex. Civ. App. 1948); **State v. London, 149 Wash.** 458, 78 P.2d 548 (1938).

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