

Opinion No. 75-28

April 15, 1975

BY: OPINION OF TONEY ANAYA, Attorney General

TO: Mr. B. J. Dunn Chairman Collection Agency Board Department of Banking Lew Wallace Building Santa Fe, New Mexico 87501

QUESTIONS

FACTS

At a hearing of the Collection Agency Board held on March 4, 1975, an attempt was made to disqualify one of the board members from participating in the decision of the board. Two members of the board were present. The attempt to disqualify the board came at the **conclusion** of the hearing, with the disqualification to be effective at a subsequent meeting of the board at which time a decision would be rendered regarding the subject of the hearing. The oral affidavit, filed by respondent's counsel in this case, was based solely on **privilege**, not on any constitutional ground relating to disqualification of **judges**, Article VI, Section 18, New Mexico Constitution, or on the statutory ground specified in Section 21-5-8, NMSA, 1953 Comp.

QUESTIONS

Under these circumstances, was the attempted disqualification of the board member effective?

CONCLUSION

No.

OPINION

{*88} ANALYSIS

Section 67-26-7, NMSA, 1953 Comp. provides, in part:

. . . Any board member may be disqualified by the filing of an affidavit of disqualification **as in the case of judges**, but the privilege of disqualification may not be exercised in any case in which its exercise would result in the absence of a quorum . . . (Emphasis added.)

There are three members of the Collection Agency Board. Section 67-15-27, NMSA, 1953 Comp. Two members were present at the hearing. It is apparent that an attempt to disqualify one of the two board members at the start of the hearing would not have been

allowed because it would have deprived the board of a quorum. The member who was not present at the hearing may nevertheless participate in the decision, but he ". . . must thoroughly familiarize [himself] with the entire record including all evidence taken at the hearing before participating in the decision." Section 67-26-13, **supra**.

Section 67-26-13, **supra**, allows all board members to participate in the decision regarding the subject of the hearing. If all three Collection Agency Board members are present at this meeting, can a board member who previously was {89} present at the hearing be disqualified from participating in the decision? In our opinion, that question can only be answered in the negative. A board member can only be disqualified by filing an affidavit of disqualification as in the case of judges. Section 67-26-7, **supra**. Section 21-5-8, **supra**, sets forth the procedures for disqualification of judges, based on an affiant's belief that the judges cannot impartially hear the cause. To disqualify a judge, however, the affidavit of disqualification must be filed before the court has acted judicially upon a material issue. **State v. Montoya**, 74 N.M. 743, 348 P.2d 263 (1965). Furthermore, disqualification of a judge may be waived. **State v. Latham**, 83 N.M. 530, 494 P.2d 192 (Ct. App. 1972). In our judgment, the affidavit of disqualification of the board member in this case was not timely filed since it came at the **conclusion** of the hearing. The affidavit of disqualification was based on privilege. Our answer might be different if it came to the attention of respondent during, or after, the hearing that a board member should be disqualified because of one of the constitutional grounds for disqualification of judges. Article VI, Section 18, **supra**. It would subvert the judicial and administrative process, however, to allow disqualification of a judge or board member based on **impartiality**, if a person before a tribunal could file such an affidavit after the judge or board members had heard the case. (Section 21-5-8, **supra**.)

Alternatively, the attempted disqualification was waived in this situation because no attempt was made to disqualify the board member prior to the hearing.

By: Ralph W. Muxlow, II

Assistant Attorney General