Opinion No. 75-21

March 18, 1975

BY: OPINION OF TONEY ANAYA, Attorney General

TO: Representative Bennie J. Aragon House of Representatives Legislative-Executive Building Santa Fe, New Mexico 87503

QUESTIONS

QUESTIONS

Are public school teachers state employees within the meaning of Section 2-1-4, NMSA, 1953 Comp.?

CONCLUSION

See Analysis.

OPINION

*{*68}* **ANALYSIS**

Section 2-1-4, **supra,** provides:

"COMPENSATION AS STATE OFFICER OR EMPLOYEE OTHER THAN THAT RECEIVED AS A LEGISLATOR PROHIBITED. -- From and after January 1, 1945, it shall be unlawful for any member of the legislature, during the term for which he is elected to contract for or receive any compensation for services performed as an officer or employee of the state, except such compensation and expense money as he is entitled to receive as a member of the legislature."

This provision, together with Sections 2-1-5 to 2-1-7, NMSA, *{*69}* 1953 Comp., was enacted into law as Chapter 18, New Mexico Laws of 1943. The statutes provide in sum that it shall be a felony for legislators to receive compensation as state employees for the period of the term for which they are elected; that it shall be a felony for any state officer to pay such compensation; and that jurisdiction is created in the district courts for any citizen to file suit to restrain the payment or receipt of such compensation.

Thus, the statutes expressly prohibit only the payment of compensation to legislators for state employment. The practical implication of the statutes, however, is that a person employed by the state cannot, at the same time, serve in the legislature. In this way, Section 2-1-4 imposes a condition upon membership in the legislature. A determination of what constitutes state employment within the meaning of Section 2-1-4 thus becomes a determination affecting the qualifications for office. To state a conclusion on the

question of whether or not teachers are state employees, within the meaning of Section 2-1-4 would, therefore, require this office to state a conclusion with respect to the qualifications of membership in the legislature. This we cannot do.

Article IV, Section 7 of the Constitution expressly provides that: "Each house shall be the judge of the election and qualifications of its own members." Only the legislature can determine the qualifications of its own members and, hence, only the legislature can determine whether public school teachers are qualified to serve. The Attorney General has been granted no statutory authority to intervene on this question by Section 4-3-2, NMSA, 1953 Comp., and in fact, is barred from doing so by the separation of powers doctrine contained in Article III, Section 1 of the New Mexico Constitution.

Moreover, recognition must be given to the fact that teachers are presently and for some time have been members of the legislature. Courts often find a significant indication of legislative intent in the legislature's acquiescence in interpretations or application of a particular statute. See e.g. **Cammarano v. United States,** 358 U.S. 498, 3 L. Ed. 2d 462, 78 S. Ct. 524 (1959). Not only is it apparently the will of the electorate that they serve, but it is, at least, the **de facto** intent of the legislature in neglecting to challenge the seating of such members -- without loss of compensation -- that they not be included in the category of state employees covered by Sections 2-1-4, **supra.** As it is the intent of the legislature which must ultimately prevail on this issue and as the legislature has by acquiescence stated that intent and resolved any ambiguity with respect to the question of teachers as state employees, we are not even properly presented with a question of statutory interpretation.

Nevertheless, the question has been put to this office and we have in the past responded. See Opinions of the Attorney General, No. 4645, dated January 24, 1945, and No. 57-11, dated January 16, 1957. We feel some responsibility, therefore, to address ourselves to the question, as it has been raised again, but we defer to Article IV, Section 7, **supra** and decline to issue a conclusory opinion. We submit instead a memorandum of law with the understanding that it is neither our duty nor our intention to affect a determination that is properly left to the legislature.

Sections 2-1-4 to 2-1-7 were apparently *{*70}* enacted to prevent the potential for conflict of interest in the situation where legislators who are public employees vote on their compensation for such employment. The plain language of Section 2-1-4 tends to conceive of this conflict only at the state level of government. The language of Section 2-1-4 is notably different from other such constitutional or statutory provisions which refer instead to federal and state and local government office or employment. See for example, N.M. Const., Article IV, Section 3, Section 42-9-7(B), NMSA, 1953 Comp. (2nd Repl. Vol. 6). The language of Section 2-1-5 also suggests that the term "employee of the state" means only employment at the state legal. It forbids "any officer of the state of New Mexico" from compensating any member of the legislature for services rendered to the state. Since the prohibition extends only to officers of the state, state employment is arguably limited only to those positions paid by state officers. Thus,

the plain language of the statutes suggests a narrow interpretation of the term "employee of the state."

On the other hand, statutes should be construed in accordance with the purpose for which they were enacted. See, for example, **State v. Trujillo,** 85 N.M. 208, 510 P.2d 1079 (Ct. App. 1973). As the purpose of these statutes is apparently to prevent a kind of financial conflict of interest in the legislature, it may be questionable whether that purpose is satisfied by a narrow interpretation of "state employee." The purpose of the statute as well as the language must be considered in determining whether or not teachers are state employees.

In **Brown v. Bowling,** 56 N.M. 96, 240 P.2d 846 (1952), for example, it was necessary for the court to determine whether or not a teacher was a "state, county or municipal employee" within the meaning of a statute concerning the State Tax Commission. The court explained:

"This statute plainly states the class of persons affected by its provisions and it is obvious that its purpose is to prevent those persons employed by state, county or municipality from dealing in tax titles or in tax sale certificates because out of such employment by state, county or municipality, some advantage might be gained and used to the detriment of the taxpayer and the public. The state, county and municipality and its officers and employees are directly engaged and concerned with the assessment, levy and collection of taxes.

"Surely it cannot be successfully argued that a rural school teacher because of her employment by a County Board of Education should by construction be said to be a person of a class who might profit unduly or unfairly from the purchase of tax deeds or tax certificates because of such employment. To so hold would be to enlarge the terms of the statute both as to words and meaning." 56 N.M. at 100.

The **Brown** opinion suggests an approach to the question of whether teachers are state employees within the meaning of the statute. Since the purpose of the statute is to prevent members of the legislature from voting on any measure which would result in compensation to them from the state, the class of state employees covered by the statute should include any employee whose compensation is affected by the legislature. *{*71}* In order to discover whether public school teachers are state employees, we must first inquire whether they can, as legislators affect their salaries as teachers.

Applying the reasoning of **Brown v. Bowling, supra** to this question, we may fairly ask whether or not a construction of a statute phrased in terms of compensation paid by the state would be enlarged "as to words and meaning" if applied to public school teachers.

Section 2-1-4, does not state an outright prohibition against state employees serving in the legislature; rather it states that if they do serve, they may not receive compensation for their state employment. The effect, of course, is the same, but the emphasis is relevant to this question. If the language of the statute were not so directed toward

compensation then a prohibition such as the one contained in the State Personnel Act [Sections 5-4-28 to 5-4-46, NMSA, 1953 Comp. (Repl. Vol. 2, Pt. 1)] would have been more to the point. That act provides at Section 5-4-42(B), **supra** that:

"No person in the personnel office, or employee in the service, shall hold political office or by an officer of a political organization during his employment."

The Brown approach would indicate that when source of compensation is the criteria for effectively excluding a class of employees from the legislature, then source of compensation should be a criteria for defining that class. The question of whether or not teachers are state employees should be, therefore, considered to some extent in these terms.

Previous opinions concluding teachers were not state employees within the meaning of Section 2-1-4, were not resolved in terms of compensation. See Opinions No. 4645 and 57-11. This office has used compensation as a factor, however, with respect to whether or not others were covered by Section 2-1-4. On the question of an administrator at a state educational institution serving in the legislature we concluded:

"And, foremost, the State provides by direct appropriation much of the money with which to operate these institutions and pay their personnel, whether 'officers' or 'employees.' This money comes from general State revenues. See Chapter 287, Laws 1955 (General Appropriations Act).

"And

". . . Payment of particular persons by the state is a very strong circumstance showing that they are state employees, . . .' 81 C.J.S. 973." Opinion of the Attorney General No. 57-40, dated March 4, 1957.

And, on the question of whether or not a professor at a state university could serve in the legislature we concluded that he could but the question remained as to whether or not he could be paid for his employment. We explained:

"Hence, although not made a part of this opinion, this office is extremely dubious as to the legality of compensation paid a professor at the university while he is receiving compensation and expenses as a member of the Legislature, or during the term for which he was so elected." Opinion of the Attorney General No. 58-39, dated February 20, 1958.

*{*72}* While both of the above - cited opinions referred to distinguished the employees in question from public school teachers, it may be argued that to continue to make such distinctions is unrealistic. The criteria of compensation must be applied to teachers as well in any analysis of Section 2-1-4.

The statutes apparently provide that teachers' salaries are fixed and paid by the local school boards. See Section 77-4-2, NMSA, 1953 Comp. (Repl. Vol. II, Pt. 1). This suggests that in terms of compensation teachers depend directly on local school boards and not on the state. But this analysis does not take into account certain fundamental realities of public school finance.

First, the bulk of the money going to local school districts, out of which teachers are paid, comes from the state.

Second, under the Public School Finance Act, Sections 77-6-1 through 77-6-46, NMSA, 1953 Comp. (Repl. Vol. II, Pt. 1) (1973 Supp.), New Mexico has adopted a program of equalization which gives the state complete control over the amount of money available to any school district. The New Mexico Property Tax Code, Sections 72-28-1 through 72-31-93, NMSA, 1953 Comp. Special 1974 Supplement, has repealed by implication all provisions which allowed local school districts to raise additional revenues by such means as ceded millage to be used to supplement their operating budgets. Moreover, the local school board's discretion in the allocation of its available resources is subject to state approval. The Chief of the Public School Finance Division of the Department of Finance and Administration is authorized by statute to participate in the preparation of the estimated budget and the final budget must be approved by the Division of Public School Finance. Sections 77-6-11, 77-6-12, NMSA, 1953 Comp. (Repl. Vol. II, Pt. 1).

New Mexico may be characterized, with respect to public school finance as a "fiscally dependent" state. This characterization distinguishes New Mexico from states where local boards are fiscally independent and where the criteria of compensation may be used to support a proposition that teachers are not state employees. As one authority explains:

"Possibly the basic consideration in any review of state or external legal controls over school budgets centers around the discussion of fiscal dependence and fiscal independence. In the fiscally dependent setting the local school officials must submit their estimates of annual expenditures to another governmental agency for approval and/or revision so that the school budget can fit into the total expenditure pattern for all government functions. In the fiscally independent situation local school authorities, either through constitutional or statutory provisions, are granted the power to raise funds and levy taxes without review authority being exercised by other arms of local government."

F. Forbis Jordan, **School Business Administration** (The Ronald Press Company, New York, 1969), p. 126.

In sum, we suggest that the fact that teachers are paid by local school boards, must be weighed against the following facts:

(1) the principal source of funds. going to teachers' salaries *{*73}* is state money; (2) the state has substantial control over the total amount of money available to local school

boards to budget, thereby having some control on the amount budgeted for salaries; and (3) the budget process itself is not left completely within the discretion of the local school board. The balancing process itself is, as we have said, a matter for the legislature.

The 1945 opinion did not use compensation as a factor but resolved the question instead, principally, in terms of contract. We concluded then, that:

"A school teacher, inasmuch as he is hired either by the county board of education (55-807) or municipal school board (55-907) is not, except in the broadest sense, a state employee since his contract is with a political subdivision of the state, and since his duties are purely local in character." Opinion No. 4645, **supra.**

Although the Constitution, in Article XII, Section 6, gives the state board control over the public schools, **i.e.,**

"The state board of education shall determine public school policy and vocational educational policy and shall have control, management and direction of all public schools, pursuant to authority and powers provided by law,"

the Legislature has delegated the authority to employ teachers to the local boards. See Section 77-4-2, NMSA, 1953 Comp. (Repl. Vol. II, Pt. 1).

The New Mexico Supreme Court has ruled that that authority was not to be restricted by the State Board.

"The Legislature having reposed the power in local school boards to employ teachers, and formulated a presumption of renewal of such employment under certain circumstances, we cannot say that Section 6 of Article 12 of the Constitution imposes any restrictions upon the exercise of this power. That the Legislature could clothe the state board of education with supervisory authority over the acts of the local school boards in the matter of the employment of teachers as it has with respect to their discharge from existing employment, we assume, but do not decide. All we say is that the Legislature has not done so." **Bourne v. Board of Educ. of City of Roswell,** 46 N.M. 310, 315, 128 P.2d 733 (1942).

The nature of the contract must also be weighed against certain factors. While the State board may not impose specific restrictions on the power of the local boards to employ teachers, that employment is, nevertheless, regulated and controlled to some extent by the state. These regulations and controls are clearly not sufficient to determine that the employment is by the state but they do illustrate the argument that the contractual relationship between the local boards and the teachers may not be purely local in nature.

First, teachers generally must be certified by the state board before the local board may hire them. Section 77-8-1, NMSA, 1953 Comp. (Repl. Vol. II, Pt. 1).

Second, the form of the contracts between local boards and certified personnel must be approved by the state. Section 77-8-8, NMSA, 1953 Comp. (Repl. Vol. II, Pt. 1).

Third, although teachers are *{*74}* employed annually by local boards, they obtain tenure pursuant to a state statute. Section 77-8-11, NMSA, 1953 Comp. (Repl. Vol. II, Pt. 1). The purpose of the Tenure Act is to provide security of employment for teachers. See **e.g., Sanchez v. Board of Educ. of Town of Belen,** 80 N.M. 286, 289, 454 P.2d 768 (1969). A local school board has no authority to confer tenure rights except as provided by statute. See Opinion of the Attorney General No. 68-70, dated July 1, 1968.

Fourth, should a local school board choose to refuse to rehire a certified tenured teacher, the local board may exercise such refusal only by the procedure set out by state statutes. Sections 77-8-12 through 77-8-16, NMSA, 1953 Comp. (1973 Supp.).

Fifth, the local school board does not have the final authority with respect to the refusal to rehire. The decision of the local board may be appealed to the state board. Section 77-8-17, NMSA, 1953 Comp. (1973 Supp.). The decision of the state board is essentially final although appeal may be taken to the Court of Appeals. The court, however,

"shall affirm the decision of the state board unless the decision is found to be:

(1) arbitrary, capricious or unreasonable;

(2) not supported by substantial evidence; or

(3) otherwise not in accordance with law." Section 77-8-17(J), **supra.**

Prior to the enactment of this statute, New Mexico courts recognized the plenary powers of the state board to review appeals from the local boards on employment matters. The courts reasoned thus:

"Since, however, the State Board is a constitutional body, N.M. Const. Art. XII, § 6, with authority to control public schools as provided by law, we consider our review is limited to a determination of whether that constitutional body acted arbitrarily, unreasonably, unlawfully or capriciously."

Wickersham v. New Mexico State Bd. of Educ., 81 N.M. 188, 190, 464 P.2d 918 (Ct. App. 1970). See also **McCormick v. Board of Educ. of Hobbs School Dist.,** 58 N.M. 648, 274 P.2d 299 (1954). The State board may overrule the decision of a local board so long as that ruling is not without some rational basis.

Sixth, teachers contract for retirement benefits through a state agency under the Educational Retirement Act [Sections 77-9-1 to 77-9-45, NMSA, 1953 Comp. (1973 Supp.)] Employees of school districts are "regular members" of the state-wide plan (Section 77-9-2(B) (2), **supra)** and "being a regular member shall be a condition of

employment" (Section 77-9-16, **supra)**. Teachers may contract for group insurance under a state-wide plan as employees of "political subdivisions of the state." Section 5-4-12, NMSA, 1953 Comp. (Repl. Vol. II, Pt. 1).

Thus an analysis of the contractual relationship between teachers and local school boards for the purpose of determining whether or not teachers are state employees should also include the factor of state involvement in that relationship.

In your opinion request you express the concern that as teachers *{*75}* receive the greater part of their salaries from state appropriations, the practice of excluding teachers from the sanctions of Section 2-1-4 represents an unconstitutional discrimination against those state employees effectively barred from membership in the legislature by that section. Your concern is an arguable one if the statute is examined in the light of its purpose. As we said earlier, that purpose appears to be the avoidance of any potential for conflict of interest present when a member of a citizen legislature votes on laws which affect his livelihood. When a teacher-legislator votes on education appropriations, he affects his salary as directly as would an employee of the State Corporation Commission voting on that agency's appropriation.

While it may seem difficult to rationalize the distinction between public school teachers and state employees in light of Section 2-1-4's purpose, it is also difficult to rationalize a distinction between state employment and other occupations. Two facts make this so. First, in a citizen legislature all legislators depend upon some other occupation for their livelihood. Second, there are few, if any, occupations which are not regulated by the state or whose income is not affected by state tax laws at least. The list of legislator's occupations prepared by the legislative council service reveals these examples: contractor, real estate, insurance, liquor, banking, insurance. In addition the legislature could consider bills affecting previously unregulated occupations some of whose members might be legislators. Thus, most legislators may occasionally vote on legislation which directly affects their income.

Although these considerations have merit, it is not at all certain that the courts would find them persuasive. The fact that the legislature has for thirty years acquiesced in Opinion of the Attorney General No. 4645 and in the seating of teachers would have great influence on the court. See **Commarano v. United States, supra.** The court might well conclude that while there may be a conflict of interest inherent in the position of any member of a citizen legislature, the legislature still has the power to dsitignuish degrees of conflict and to effectively exclude members whose occupations would create a more acute conflict than others.

Our Supreme Court has recently indicated that it will give considerable deference to legislative classifications in this area. In **State ex rel. Gonzales v. Manzagol,** Sup. Ct. No. 10038, decided January 31, 1975, the court refused to hold that as a matter of law Section 5-4-42(B), **supra,** violated equal protection because it prohibited nonexempt state employees from holding political office but did not prohibit exempt state employees from doing so. The court recognized that avoidance of potential conflicts of interest was

one of the statute's purposes, but it did not discuss the basis for distinguishing between exempt and nonexempt employees in relation to this purpose. It merely said the statute was not "patently arbitrary or discriminatory." It did, however, leave the door open to challenges based upon factual proof of unreasonable discrimination. This opinion shows that the courts is inclined to let the legislature judge which conflicts of interest are unacceptable and that it will not disturb those judgments absent proof of actual discrimination. We can only conclude that, as in the case of the question of Section 2-1-4's meaning, the question of the section's constitutionality *{*76}* has arguments on both sides.

The difficulties in defining state employment within the meaning of Section 2-1-4 may perhaps be more equitably resolved by abandoning those statutes altogether. This proposition is not so extreme as it may appear. Article IV, Section 3 of the Constitution prohibits officers of the "state, county or national governments" from serving in the legislature. The statutes legislate against incompatibility of office or employment by providing that:

"PERMANENT ABANDONMENT OF OFFICE, WHAT CONSTITUTES. -- Any incumbent of any public office or employment of the state of New Mexico, or of any of its departments, agencies, counties, municipalities or political subdivisions whatsoever, who shall accept any public office or employment, whether within or without the state, other than service in the armed forces of the United States of America, for which a salary or compensation is authorized, or who shall accept private employment for compensation and who by reason of such other public office or employment or private employment shall fail for a period of thirty [30] successive days or more to devote his time to the usual and normal extent during ordinary working hours to the performance of the duties of such public office and employment, shall be deemed to have resigned from and to have permanently abandoned his public office and employment."

Section 5-3-40, NMSA, 1953 Comp. (Repl. Vol. II, Pt. 1) and

"DEFINITION OF INCOMPATIBLE OFFICE, SERVICE AND EMPLOYMENT. -- Any public office or service, other than service in the armed forces of the United States of America, and any private employment of the nature and extent designated in section 3 [5-3-40] hereof is hereby declared to be incompatible with the tenure of public office or employment."

Section 5-3-42, NMSA, 1953 Comp. (Repl. Vol. II, Pt. 1).

Furthermore, there is the provision of the Personnel Act prohibiting employees covered by the act from holding political office. Section 5-4-42(B), **supra.** Thus, the real effect of repealing Sections 2-1-4 and 2-1-5, **supra,** would be simply the elimination of a means of excluding candidates from the legislature solely on a basis which is arguably arbitrary and possibly violative of the constitutional right of equal protection.

We have tried to present the arguments on each question as fairly as possible so that you will have an idea of the complexity of the questions you raise. Should the legislature decide to consider these questions, we stand ready to help it in any way we can short of interfering with its constitutional prerogative.

By: Jill Z. Cooper

Assistant Attorney General