

Opinion No. 76-39

December 10, 1976

BY: OPINION OF TONEY ANAYA, Attorney General Albert L Pitts, Assistant Attorney General

TO: Nell Duke, DeBaca County Clerk, DeBaca County Courthouse, Fort Sumner, New Mexico 88119

QUESTIONS

Question

Whether the DeBaca County Commission may legally appoint one of its own members to a position on the board of trustees of the DeBaca county hospital?

Conclusion

No.

OPINION

{*132} Analysis

In determining whether a county commissioner by accepting and undertaking to discharge the added functions of a county hospital trustee, holds an incompatible office, we must examine the relationship between the offices. Section 15-48-10, NMSA, 1953 Comp., sets out who is authorized to appoint the county hospital trustees, the manner in which said trustees may be removed and outlines their rights and duties. In relevant part Section 15-48-10, **supra**, states:

BOARD OF TRUSTEES FOR {*133} COUNTY HOSPITALS -- MEMBERS --
APPOINTMENT -- TERM -- POWERS

BOND. -- Boards of county commissioners in counties which have or shall hereafter erect county hospitals are hereby authorized to appoint a board . . . said board to be known as the 'Board of Trustees of the ___ County Hospital.' . . . After their appointment none of the members of said board shall be removed except for cause specified in a written charge and after full and public hearing on the charge. Such board of trustees shall have full power and authority to manage and operate the hospital, to receive all funds appropriated therefor or paid from any source on account of patients accommodated in said hospital, to prescribe rules and regulations for admittance of patients under the jurisdiction of the federal government, including Indian patients, and to enter into such contracts with the department of public welfare and other public and charitable agencies and institutions, to employ all personnel engaged in the operation of

said hospital, and to fix their compensation and to discharge them. Notwithstanding the provisions of any other law, said board shall have the power and authority to enter into long-term contracts with the federal government, which contracts shall be binding on the successors in office of the trustees and shall be binding upon the county commissioners and their successors in office. The county commissioners shall cause to be paid over to said trustees all moneys realized through tax levy or otherwise for the operation of said hospital, and said trustees shall account annually for the receipt and expenditures of such funds. . . .

Thus, the statute clearly vests the board of county commissioners with the discretionary authority to appoint hospital trustees once a county hospital has been erected. However, the statute fails to state which public body is authorized to hear publicly written charges made against an incumbent trustee for removal in addition to which public body the trustee must account each year for its receipts and expenditures. Because the statute fails to state which public body is vested with these reviewing powers we turn to the common law for guidance. At common law the general rule is that the power of appointment to an office with a fixed term carries with it the incident power to removal once cause is established for such removal. See **State ex rel. Roskwell v. State Bd. of Educ.**, 213 Minn. 184, 6 N.W.2d 251 (1942). The case of **State ex rel. Nagle v. Sullivan**, 98 Mont. 425, 40 P.2d 995 (1935) presented a similar statutory construction problem to this case wherein the statute failed to expressly state which public body had the legal authority to remove the appointee. In the absence of an express statutory delegation of the power to remove, the Court decided that there was an implied power of removal vested in the appointing authority where the statutory language relating to the appointee's term of office included the phrase "unless sooner removed." Also see **State ex rel. Chapman v. Truder**, 35 N.M. 49, 289 P. 594 (1930). A correlative function of the power to remove is the power to review. Accordingly, the appointing authority also has the duty, *inter alia*, to audit the appointee's financial accounts. See **Tappan v. Helena Fed. Savings & Loan Ass'n of Helena, Arkansas**, 193 Ark. 1023, 104 S.W.2d 458 (1938).

Having established that the county commission has the power to appoint, {**134*} remove and audit the board of trustees' financial accounts, we must decide whether the function of these two offices are compatible or incompatible. Section 5-3-1, NMSA, 1953 Comp. describes specific situations in which a vacancy in a local office occurs:

5-3-1. CIRCUMSTANCES CAUSING VACANCY IN LOCAL OFFICES. -- Any office belonging to the class mentioned in section 3954 [5-3-3] becomes vacant under any of the following circumstances:

* * *

8. By an officer accepting and undertaking to discharge the duties of another **incompatible** office. (Emphasis added.)

The class referred to in Section 5-3-3, NMSA, 1953 Comp. is:

5-3-3. LOCAL OFFICERS SUBJECT TO REMOVAL. -- Any county, precinct, district, city, town or village officer elected by the people, and any officer appointed to fill out the unexpired term of any such officer, may be removed from office on any of the grounds mentioned in this chapter and according to the provisions hereof.

One definition of an incompatible office is set forth in the following sections of the New Mexico Statutes Annotated:

5-3-42. 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.

5-3-40. 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.

This definition of incompatible office addresses only the physical impossibility of devoting one's time to the usual and normal extent during ordinary working hours. Thus, the statutory definition of incompatible office does not apply in this particular case.

In the classic case of **Haymaker v. State ex rel. McCain**, 22 N.M. 400, 168 P. 248 (1917), the court applied the following test in determining whether two offices are incompatible:

The incompatibility between two offices, which upon the acceptance of the one by the incumbent of the other operates to vacate the latter, is not simply a physical impossibility to discharge the duties of both offices {**135*} at the same time, but it is an inconsistency in the functions of the two offices, as where one is subordinate to the other, or where a contrariety and antagonism would result in the attempt by one person to faithfully and impartially discharge the duties of both. At pages 403 and 404.

Thus, an incompatible office is one where there is an inconsistency in the functions of one office with the other or where a contrariety or antagonism would result.

In applying the **Haymaker** test to the functions of the DeBaca County Commission and the Board of Trustees of the DeBaca County Hospital, three examples of inconsistency or contrariety and antagonism appear:

1. The incumbent of one office has the power of appointment as to the other office;
2. The incumbent of one office has the power of removal over the other office; and,
3. The incumbent of one office has the authority to audit the accounts of the other office.

Accordingly, it is our opinion that the offices of DeBaca county commissioner and trustee of the DaBaca county hospital are incompatible.