

Opinion No. 88-20

March 7, 1988

OPINION OF: HAL STRATTON, Attorney General

BY: Scott D. Spencer, Assistant Attorney General

TO: The Honorable Ken Kamerman, State Senator, 3305 Utah, NE, Albuquerque, NM 87110

QUESTIONS

Whether a public school teacher or administrator may serve in the New Mexico State Legislature while under contract of employment with a local school district.

CONCLUSIONS

No. Local school district employees are state employees, and are therefore prohibited from serving in the legislature. Furthermore, if a contract of employment with a school district was authorized by any law passed during a legislator's term, that legislator is prohibited from entering into such a contract for one year after his term expires.

ANALYSIS

The New Mexico legislature has expressed a strong policy against state employees serving in the legislature. Section 2-1-3 NMSA 1978 provides: "It is unlawful for any member of the legislature to 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." Section 2-1-4 NMSA 1978 states:

It is unlawful for any officer of the state of New Mexico to pay any member of the legislature compensation for services rendered the state of New Mexico as an officer or any employee thereof except such compensation and expense which such member is entitled to receive as a member of the legislature.

In Att'y. Gen. Op. 75-21, Attorney General Toney Anaya considered whether public school teachers were state employees within the meaning of former Section 2-1-4 NMSA 1953 Comp., which contained language similar to that in present Section 2-1-3 NMSA 1978. Although that opinion did not reach a conclusion, it stated that the former section apparently was enacted to avoid the potential for conflicts of interest where legislators who are public employees vote on their compensation for such employment. The Attorney General stated: "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."

I. THE ATTORNEY GENERAL APPROPRIATELY CAN AND SHOULD ANSWER THE QUESTION POSED.

Attorney General Anaya declined to answer whether Sections 2-1-3 and 2-1-4 NMSA 1978 precluded public school teachers from serving in the legislature, citing article IV, section 7 of the New Mexico constitution which provides that "Each house shall be the judge of the election and qualifications of its own members." It is true that, for us to state a conclusion whether instructors or administrators are state employees within the meaning of Section 2-1-3 NMSA 1978, this office is required to comment on the qualifications of membership in the legislature. But we respectfully disagree with Attorney General Anaya's conclusion that article IV, section 7 precludes this office from so opining.

We fully agree with Attorney General Anaya's observation that only the legislature can determine the qualifications of its own members. Hence, only the legislature can determine whether a public school instructor or administrator is qualified to serve. This conclusion may mean that the issue is not justifiable. But it does not mean that the attorney general cannot or should not opine and advise the legislature what is legal in our constitutional system, so that the members of each house may be better informed when exercising its constitutional role of judging the election and qualifications of its members. In this regard, it is important to note that Section 8-5-2D NMSA 1978 imposes on the Attorney General the duty to "give his opinion... upon any question of law submitted to him by the legislature ..., any state official,... on any subject.... under their control with which they have to deal officially or with reference to their duty in office."

Our answer to the question posed also may have as much implication for local school boards as it does for the legislature. While the legislature may disregard our opinion and seat public school instructors or administrators, local school boards may not pay or contract with those individuals. Thus, while constitutional principles may preclude the Attorney General from intervening to bar a public school instructor or administrator from sitting in any particular session, current state law effectively prohibits employment by a local school board while serving in the legislature. Considering the Attorney General's statutory mandate, we disagree with Att'y. Gen. Op. 75-21 and conclude that we are not barred by article IV, section 7 or the doctrine of separation of powers from giving our opinion on this issue.

A letter from this Office to Clay Buchanan, Director of the Legislative Council Service, dated October 30, 1986, also addressed but did not resolve the issue during Attorney General Paul Bardacke's administration. The letter, citing Note, "The New School Formula," 1 N.M.L. Rev. 3 (1974), stated: "It is clear that through the years, state control of public education has increased, particularly through the Public School Finance Act, in which the New Mexico Legislature has indicated that it believes that the quality of a child's education should not be dependent upon the wealth of his or her community but rather is the concern of the entire state." After quoting extensively from the discussion in **Martinez v. Bd. of Education**, 748 F.2d 1393, 1396 (10th Cir. 1984), that letter concluded: "Thus, an argument can be made that school employees are state

employees because of pervasive state control of local school districts. However, legislation specifically addressing this issue would seem advisable."

II. PUBLIC SCHOOL INSTRUCTORS AND ADMINISTRATORS ARE STATE EMPLOYEES

The following factors lead us to conclude that public school instructors and administrators are "state employees" within the constraints of Sections 2-1-3 and 2-1-4 NMSA 1978:

Article XII, section 3 of the New Mexico Constitution provides that all public schools are under the "exclusive control" of the state. "Control" means authority to decide curriculum, discipline, finances, administration, and, in general, all of the school's affairs. **Prince v. Board of Education**, 88 N.M. 548, 554, 543 P.2d 1176, 1183 (1975). Article XII, section 6 of the Constitution of New Mexico creates a State Board of Education that "shall determine public school policy and vocational educational policy and shall have control, management and direction, including financial direction, distribution of school funds and financial accounting for all public schools, pursuant to authority and powers provided by law." "The State Board controls the public schools as provided by law." **Board of Education v. Abeyta**, 107 N.M. 1, 751 P.2d 685 (1988). It is apparent that our state constitution contemplates state involvement in all aspects of public education.

In 1986, the voters amended article XII, section 6 to provide in part that "all functions relating to the distribution of school funds and financial accounting for the public schools shall be transferred to the state department of public education to be performed as provided by law." As a result of that amendment, the office of education, a state agency, was merged with the department of education. That merger gives the State Board of Education control over most, if not all, financial aspects of public schools. See Att'y. Gen. Op. 87-36. The Department of Education now supervises and controls school district budgets pursuant to the Public School Finance Act, Sections 22-8-1 through 22-8-42 NMSA 1978. Att'y. Gen. Op. 87-36. School districts must submit budgets to the Department annually. Public schools receive state funds from the public school fund, created by section 22-8-14 NMSA 1978 and administered by the Department within limits established by law.

The state has substantial control over the total amount of money available to local school boards to budget for teachers' salaries. For example, in previous legislative sessions, the legislature specifically appropriated funds to increase teachers' salaries. See Laws of 1988, ch. 13, § 34. Those expressly legislated raises indicate legislative involvement in salary decisions. Furthermore, Section 22-5-11 NMSA 1978 requires each local school board to file its salary schedules with the Office of Education. Before the beginning of each subsequent school year, the district also must file a salary schedule, "which salary schedule shall incorporate any salary increases or compensation measures specifically mandated by the legislature." The district may not reduce any such salary schedule without the prior written approval of the director of the Office of Education.

Most funds allocated to public schools are raised through property taxes, severance taxes, federal revenue, and other sources administered or collected by the state. The Department uses the equalization guarantee distribution set forth in Section 22-8-25 NMSA 1978 to allocate revenues to school districts. The substantial legislative involvement in public school budgets leaves very little fiscal discretion to the local school boards. In sum, the Public School Finance Act provides extensive regulation of public school budgets, imposes accounting requirements upon public schools, provides for distributions to school districts from the public school fund, provides a method of calculating program cost and the state equalization guarantee distribution, provides for transportation and supplemental distributions, and provides remedies for mismanagement, improper recording, or improper reporting of public school funds. Att'y. Gen. Op. 87-36. We agree with Att'y. Gen. Op. 75-21, which recognized that New Mexico School Boards are "fiscally dependent" upon the department of education and the legislature and which quoted the following authority:

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.

The legislature has established by law basic qualification requirements for instructors and administrators. See, e.g., Section 22-10-3B NMSA 1978 (requiring instructors to be over the age of eighteen years); Section 22-10-10 NMSA 1978 (requiring health certificates as a condition of employment). Pursuant to Section 22-2-2G NMSA 1978, the State Board of Education generally determines more specific qualifications for instructors and administrators. See SBE Reg. Nos. 86-4, 86-5, 86-6, 86-8, and 87-8, 87-4 (providing requirements for licensure in elementary and secondary education). Section 22-10-3 NMSA 1978 requires the state board to certify those individuals as qualified teachers before a local school board may hire them. Section 22-10-3.1 NMSA 1987 (Supp.) requires the state board to develop minimum statewide performance standards for evaluation of all certified school administrators.

Pursuant to Section 22-10-11 NMSA 1978, the state board of Education must approve all contracts between local school boards, and instructors and administrators. The State Board has adopted extensive regulations that local school boards must use. See SBE Reg. No. 88-1, 88-2, 85-3. The Legislature has also adopted conflict-of-interest statutes that regulate contracts for sales of instructional material, furniture, equipment, and

insurance between public schools and their employees. See Section 22-21-1 NMSA 1978.

State law governs a local school board's authority to refuse to rehire a teacher. Section 22-10-12 NMSA 1978 provides specific procedures for written notice of reemployment or termination that the local school boards must give to certified school instructors. Section 22-10-13 NMSA 1978 provides specific procedures for reemployment decisions for the ensuing school year. Section 22-10-14 NMSA 1987 (Supp.) provides the procedure and grounds for refusing to reemploy a certified school instructor. It is therefore evident that the legislature has so involved itself in hiring and discharge proceedings that state law, not local school board discretion, governs those proceedings.

State law also governs a local school board's authority to discharge an instructor or administrator. Section 22-10-17 NMSA 1978 provides that the local school board may discharge a certified school instructor or certified school administrator during the term of his written employment contract "only for good and just cause," and sets forth specific procedures that must be followed. Section 22-10-17.1 NMSA 1978 provides appeal rights to a discharged certified school instructor or certified school administrator. Section 22-10-18 NMSA 1978 even governs payment of compensation to a discharged instructor or administrator.

Section 22-10-21 NMSA 1978 requires the State Board of Education to prescribe, by regulation, procedures that a local school board must follow for supervising and correcting unsatisfactory work performance before certified school personnel may be discharged. SBE Regulation 77-1 defines unsatisfactory work performance and has established procedures that a local school board must follow before unsatisfactory work performance becomes good cause for discharging or refusing to reemploy certified school personnel. For example, that regulation requires that at least two conferences be held before discharge. SBE Regulation 75-10 even governs the conduct of hearings before local boards during discharge proceedings.

Instructors contract for retirement benefits through a state agency known as the Educational Retirement Board. Local school districts do not provide any retirement plan for teachers or administrators. The Educational Retirement Act, Sections 22-11-1 to 22-11-45 NMSA 1978, confers powers upon the Educational Retirement Board and rights upon instructors who participate as members in the state-operated retirement plan. School districts must procure group health insurance, unless waived, for their employees through the Public School Insurance Authority, a state agency created by section 22-2-6.4 NMSA 1978.

The state is involved in almost every facet of the conduct of public schools. For example, the Variable School Calendar Act, Sections 22-22-1 to 22-22-6 NMSA 1978, creates an opportunity for public schools or school districts to operate beyond a nine-month period in any one calendar year. The State Department of Education is responsible for implementing and administering this act. The state also regulates the

curriculum taught in public schools through the Instructional Material Law, Sections 22-15-1 to 22-15-14 NMSA 1978, the Bilingual Multicultural Education Act, Sections 22-23-1 to 22-23-6 NMSA 1978, and extensive regulations adopted by the State Board of Education governing most aspects of program administration. See SBE Reg. No. 86-7 (setting educational standards for New Mexico schools).

The state legislature has dictated the individual class load for elementary school instructors and the daily teaching load per instructor for grades seven through twelve, to be phased in pursuant to a schedule in Section 22-2-8.2 NMSA 1987 (Supp.). Section 22-2-8.1 NMSA 1978 even provides for the length of a school day. The state legislature has also mandated that, effective with the 1987-88 school year, certified school instructors shall not be required to perform noninstructional duties except in emergency situations as defined by the state board. Section 22-2-8.2H NMSA 1987 (Supp.) The state legislature has also implemented graduation requirements for public school students in Section 22-2-8.4 NMSA 1987 (Supp.) and has required the state board to adopt regulations governing the establishment of minimum standards for the conduct of early childhood education programs. Section 22-13-3 NMSA 1987 (Supp.)

It is our opinion that, because instructors and administrators employed in the public schools are state employees within the language of Sections 2-1-3 and 2-1-4 NMSA 1978, those provisions preclude them from receiving any compensation while serving in the New Mexico state legislature. Furthermore, Section 22-10-11A NMSA 1978 requires that a public school teacher's authorized contract of employment specify "the salary to be paid." This statute and state board regulations do not contemplate employment without compensation. See SBE regulations 88-1 and 88-2. Because the authorized contract of employment between certified school personnel and local school boards includes compensation as an essential element, those personnel who are legislators are prohibited from contracting with a local school district during their term in the legislature.

It may be argued that Sections 2-1-3 and 2-1-4 merely prevent a state employee from receiving a salary while in the legislature, thereby precluding certified school personnel from contracting with a district during the thirty or sixty days that he actually is attending a legislative session. There is no such limiting language in those sections. A person may not receive any compensation for services performed as a state officer or employee, or enter into any prohibited contract, during the entire time he is a member of the legislature, and a person is a member at all times during his term of office, not just when he is in Santa Fe.

We also disagree with former Attorney General Anaya that former Section 2-1-5 NMSA 1953 (substantially identical to present section 2-1-4 NMSA 1978) indicates that the employment contemplated by Section 2-1-3 NMSA 1978 is only that paid by state officers. Section 2-1-4 NMSA 1978 is a prohibition against payment of compensation, while Section 2-1-3 NMSA 1978 is a prohibition against receipt of compensation. There is no limitation in that latter section that a receipt be from a "state officer." It is therefore unnecessary for us to determine whether local school board members are state officers as contemplated and undefined in Section 2-1-4 NMSA 1978.

III. STATE AND FEDERAL CASE LAW SUPPORTS THE CONCLUSION THAT PUBLIC SCHOOL INSTRUCTORS AND ADMINISTRATORS ARE STATE EMPLOYEES.

Our opinion is supported by the holdings of three recent decisions by the United States Court of Appeals for the Tenth Circuit: **Garcia v. Bd. of Education**, 777 F.2d 1403 (10th Cir. 1985); **Martinez v. Bd. of Education**, 748 F.2d 1393 (10th Cir. 1984); and **Maestas v. Bd. of Education**, 749 F.2d 591 (10th Cir. 1984). Those three cases analyzed New Mexico's educational system and held that local school boards and districts are, for the purpose of eleventh Amendment immunity, arms of the state and therefore are immune from damage lawsuits in federal court. In **Martinez v. Bd. of Education**, 748 F.2d at 1394, the Court of Appeals stated:

New Mexico from the outset has taken an extreme position on the responsibility of state government for the local school systems both as to administration and finances.

Thus the relation was established by the state constitution. Article XII, § 6 after creating a state department and state board of education and after stating that the state board "shall determine public school policy," provides that the state board:

"shall have control, management and direction of all public schools, pursuant to authority and powers provided by law."

It is difficult to conceive of broader powers in the state board than having "control management and direction" of all public schools. This has to be well beyond the "some guidance" referred to in **Mt. Healthy City Board of Ed. v. Doyle**, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471.

The court in **Martinez** recognized that the state board has the authority to operate districts which do not conform to the Board's regulations and standards. The court further recognized that the State Board or the state superintendent can suspend such a local board and is required to do so. The court also recognized that "the state control over budgets is complete because the budgeting is of state funds distributed to the schools." 748 F.2d at 1395.

The court in **Martinez**, when discussing bonding for capital improvements, recognized that the initial decision to provide for such improvement is with the local school boards. The court nevertheless stated:

This local authority is perhaps related to the fact that the boards are elected, but in any event, these two factors are the most important of a local nature. However, they are overwhelmed by the pervasive state authority over education in the state originating with the state constitution.

The authority of the districts to act must be examined in the overall control exercised by the state. Thus, for example, the districts can acquire and dispose of property, but the

acquisition must be within the fiscal and bonding control. Improvement in most instances must be approved, and if substantial, state approval of plans and specifications must be obtained. The district may dispose of property, but this is subject to state approval...

748 F.2d at 1396. The Court of Appeals concluded by stating:

Considering that the New Mexico State Board of Education has the "control," the "management" and "direction" of all public schools; that this authority has been implemented by the legislature in detail; that fiscal budgetary matters for the districts are fully controlled by the state; that the state taxing method for schools is a statewide system of state taxes; that the funds so generated for the schools are applied on a formula to equalize funding among the districts and basically on school attendance, we must hold that the local boards are indeed arms of the state system of education as provided in the state constitution. The local boards, of course, do perform significant functions as an arm of the state government and the members make a very important contribution to the educational system.

Id. at 1396 (emphasis added). We conclude that this state has so centralized public education that there is very little actual local political control over important decisions about public education.

The holding and analysis in those three Tenth Circuit cases is even more significant to the issues presented here when they are compared to similar cases involving other states decided by the same court. For example, the Tenth Circuit Court of Appeals examined the school system in Kansas and held that Kansas school districts are not that state's alter egos. **Unified School District No. 480 v. Epperson**, 583 F.2d 1118 (10th Cir.), vacated on other grounds, 435 U.S. 948 (1978). In *Epperson*, the court stated that the local boards' powers, nature, and characteristics as set forth by state law must be examined critically. The court held that the two primary tests are the extent to which a board, although carrying out a state mission, functions with substantial autonomy from state government, and the extent to which the agency is financed independently of the state treasury. 583 F.2d at 1121-22. After examining Wyoming school districts and their relationship to the state, the Tenth Circuit Court of Appeals also held that that state's school districts are not arms of the state entitled to eleventh amendment immunity. **Stoddard v. School District No. 1**, 590 F.2d 829 (10th Cir. 1979).¹

We are aware that Section 22-1-2J NMSA 1978 defines "school district" as "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." The Tenth Circuit did not give, however, any deference to that section in deciding **Garcia, Martinez, and Maestas**. Moreover, the Supreme Court of New Mexico has elaborated on the phrase "political subdivisions" with respect to school districts in **McWhorter v. Board of Education**, 63 N.M. 421, 423, 320 P.2d 1025, 1027 (1958) (citing **Water**

Supply Company of Albuquerque v. City of Albuquerque, 9 N.M. 441, 450, 54 P. 969, 978 (1898):

"A school district is a governmental auxiliary of the state, and the state incorporates it that it may more effectually discharge its appointed duties; they are termed involuntary political subdivisions of the state or territory, created by the general laws to aid in the administration of government in carrying out the universal public-school system *** 1 Dillon, Secs. 19, 20, 21, 22 and 23."

Under such a definition a school district is a part of the state government incorporated for convenience only and not intended for a separate existence...

We feel the school district is a political subdivision of the state created to aid in the administration of education, and subject, in this case, to the immunities available to the state itself.

63 N.M. at 423-24, 320 P.2d at 1027-28. The Supreme Court held that suit cannot be brought against a school district under the former Workmen's Compensation Act without the state's express consent, because local school districts are in fact arms of the state.

Given the foregoing, school districts are, in our opinion, alter egos of the state that are mechanisms for implementing state education policy. They are not separate and distinct political subdivisions as that term is normally used. Their employees are therefore state employees as opposed to employees of entities distinct from the state.

IV. THE CONSTITUTIONAL DOCTRINE OF SEANALYSISTION OF POWERS PROHIBITS PUBLIC SCHOOL ADMINISTRATORS AND INSTRUCTORS FROM SERVING IN THE LEGISLATURE.

We have reviewed case law from other jurisdictions which has applied a constitutional analysis to this issue. In **Monaghan v. School District No. 1**, 211 Ore. 360, 315 P.2d 797 (1957), the Oregon Supreme Court determined that public school teachers are employees hired by a state agency whose function it is to serve the state in the exercise of its sovereign power and duty. The court stated:

A school district, as a legislatively created entity, enjoys closer proximation to the state than to the community it serves. It is a civil division of the state and has been referred to as a corporation having the most limited powers known to law. It is a quasi-municipal corporation separate and distinct from pure municipal corporations such as cities and towns... When it so acts, it acts wholly as a governmental agency when performing duties imposed by statute.

211 Ore. at 366, 315 P.2d at 804.

The Court in **Monaghan** interpreted provisions in the Oregon Constitution similar to article III, section 1 of the Constitution of New Mexico and held that, because a teacher

in the public schools exercised the functions of the state's executive department, that person was not eligible for employment as a public school teacher as long as he held his position as a member of the house of representatives. See also **Stolberg v. Caldwell**, 175 Conn. 586, 402 A.2d 763 (1978) (because education is the function of the executive, member of the general assembly was prohibited from teaching at State University); **State ex rel. Black v. Burch**, 226 Ind. 445, 80 N.E.2d 294 (1948) (legislators could not serve as secretary or director of state agency, or superintendent or inspector of commission); **Saint v. Allen**, 169 La. 1046, 126 So. 548 (1930) (legislator could not serve as attorney for state highway commission).

Article III, section 1 of the New Mexico Constitution provides:

The powers of the government of this state are divided into three distinct departments, legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others except as in this constitution otherwise expressly directed or permitted.

New Mexico has a long tradition of keeping the branches of government separate in their exercise of constitutionally mandated powers and duties. **State v. McCulloh**, 63 N.M. 436, 321 P.2d 207 (1957); **State v. Roy**, 40 N.M. 397, 60 P.2d 646 (1936). See **State ex rel. Chapman v. Truder**, 35 N.M. 49, 289 P. 594 (1930). This state vigorously has used the separation-of-powers doctrine to separate the functions of its branches' as our state constitution envisions. See **State v. Fifth Judicial District Court**, 36 N.M. 151, 9 P.2d 691 (1915). Considering that tradition, it is our opinion that in addition to the statutory prohibitions discussed above, New Mexico's strong constitutional separation-of-powers doctrine precludes instructors and administrators from serving in the legislature.²

As was discussed by the Louisiana Supreme Court in **Saint v. Allen**, 169 La 1046, 126 So. 548 (1930), the clause prohibiting the exercise by one department of powers properly belonging to another goes beyond the separation of powers clause contained in Article 1 Section 1 of the United States Constitution. The court discussed the history of a similar provision in the Kentucky constitution, drafted by Thomas Jefferson and stated:

Having returned from France, and having been appointed Secretary of State on being informed that the state of Virginia was about to permit Kentucky to become a separate state, and that Kentucky was about to adopt a Constitution, he [Jefferson] advised that the first safeguard to be put into the Kentucky Constitution should be to confine absolutely and exclusively to each one of the three departments of government the powers belonging to it alone. He went so far as to say that there was danger in the Federal Constitution in that the clauses defining the powers of each department of the government were not a sufficient safeguard against an exercise by one department of powers properly belonging to another; and so he wrote the provision which he

recommended. And which became article 1 of the Constitution of Kentucky, and sent it to the Convention, in session at Danville...

169 La. at 1058, 126 So. at 552.

In sum, an employee of a local school district, part of the executive branch of government, may not exercise powers delegated to the legislative branch by serving in the legislature.

V. THE CONSTITUTION PREVENTS INSTRUCTORS AND ADMINISTRATORS FROM ENTERING INTO CONTRACTS WITH SCHOOL DISTRICTS FOR ONE YEAR AFTER THEIR TERM, IF THE CONTRACT WAS AUTHORIZED BY ANY LAW PASSED DURING THEIR TERM.

In **Frazier v. State**, 504 So.2d 675 (Miss. 1987), the Mississippi Supreme Court held that school teachers are prohibited from serving in the legislature, because they could not have received payment under their contracts with local school districts without appropriations upon which they voted. The Mississippi Supreme Court construed article 4, section 109 of the Mississippi Constitution, a provision almost identical to article IV, section 28 of the New Mexico Constitution, which reads in part as follows: "Nor shall any member of the legislature during the term for which he was elected nor within one year thereafter be interested directly or indirectly in any contract with the state or any municipality thereof which was authorized by any law passed during such term." The Mississippi Supreme Court in construing that provision of the Mississippi Constitution stated: "It prohibits an individual having an interest in a contract when he as a public officer served on the official body which enabled the contract to come into being. It is that simple." 504 So.2d at 694.

Although the defendants in **Frazier** argued that appropriation bills did not authorize their contracts, the Mississippi Supreme Court rejected that argument:

The governmental bodies contracting with those defendants could not have made payment under the contracts without those appropriations. Those appropriations bills were laws... They were laws passed while these gentlemen served in the legislature. Their contracts were made while they were in the legislature. Thus, they squarely fit the prohibition of section 109.

504 S.2d at 696. The Mississippi Supreme Court relied on the Oklahoma Supreme Court holding in **State ex rel. Settles Bd. of Education**, 389 P.2d 356 (Okla. 1964), which interpreted an identical provision in the Oklahoma Constitution. The Oklahoma Supreme Court also held that, because the appropriations bill was necessary to make teacher-legislator school contracts legal and binding, such contracts therefore violated the Oklahoma State Constitution. The Mississippi Supreme Court stated:

We must agree that it is relentlessly severe to conclude section 109 means no employed public school teacher can serve in the legislature. Yet section 109 is just as

plain in its restriction as the Oklahoma constitution. We cannot hold that applying section 109 to employee public school teachers goes beyond any rational purpose or intent of its authors.

504 So.2d at 697.

Those decisions are based upon interpretations of constitutional provisions identical to those found in the New Mexico Constitution. The purpose behind article IV, section 28 is to prevent conflicts and the possibility of self-aggrandizement if a legislator is given the opportunity to vote on and receive the benefits of a law authorizing a contract in which the legislator has a direct or indirect benefit. See **United States v. Mississippi Valley Generating Company**, 364 U.S. 520, (1961). Because we have determined that instructors and administrators in the public schools are state employees, their employment contracts are contracts "with the state" as the term is used in article IV, section 28. It is therefore our opinion that a legislator is prohibited from entering into a contract of employment with a school district for one year after his term, if said contract was "authorized" by any law passed during his term.

The Supreme Court of New Mexico in **State ex rel. Baca v. Otero**, 33 N.M. 310, 267 P. 68 (1928), gave article IV, section 28 a more narrow construction than the Oklahoma and Mississippi supreme courts gave their states' provisions. The Baca court held that a general appropriations bill alone does not "authorize" a contract of employment with the state. This case indicates that we must look at more substantive statutory provisions:

The test would be whether the contract could have been entered into by the state if the act in question had not been passed. If the answer is "yes," the act had no bearing on the contract and did not authorize it. If the answer is "no," the act made the formation of the contract possible. It permitted and therefore authorized the contract within the meaning of the provision.

Note, "Legislative bodies-conflict of interest," 7 N.M. L. Rev. 296 (1967).

For example, Section 22-10-11B(5) NMSA 1978, amended during the 1986 legislative session, provides that "contracts not to exceed three years are permitted at the discretion of the local school board for certified school instructors in public schools who have been employed in the school district for three consecutive school years." Laws 1986, chapter 33, section 19. Before this amendment, employment contracts between local school boards and certified school instructors could not exceed one year duration. See Laws 1975, chapter 306, section 7. Article IV, section 28 therefore would prohibit any legislator who served in the legislature when that amendment was passed from entering into a contract exceeding one year in duration with a school district as an instructor for one year after his term.

VI. POLICY CONSIDERATIONS SUPPORT OUR LEGAL ANALYSIS AND CONCLUSIONS.

In **Jenkins v. Bishop**, 589 P.2d 770 (Utah 1978), the Utah Supreme Court held in a brief, one-sentence opinion that school administrators and teachers are not disqualified from becoming candidates for the Utah legislature. In a lengthy dissent, however, Chief Justice Ellett discussed policy considerations that support our interpretation of New Mexico's statutes and constitution. He first pointed out that a potential for abuse exists when teachers are allowed to act as legislators because it is doubtful whether they can exercise complete independence of judgment when faced with the repercussions of disagreeing with their superiors on bills affecting the educational system. Chief Justice Ellett also suggested that a conflict of interest exists where educators and administrators in the public school system are asked to consider legislation dealing with appropriations or other matters within the educational system. The Chief Justice further noted that it would be bad public policy to allow a teacher to begin teaching a class and then leave for the one or two months necessary to serve in the legislature. This would compel the school district to hire substitutes, in which case the effectiveness of the educational system may suffer.

A conflict also might be considered to exist where educators are called to pass upon their own salary increases when the legislature expressly appropriates them, as it did in 1986. The Supreme Court of New Mexico in **Brown v. Bowling**, 56 N.M. 96, 240 P.2d 846 (1952), as explained in former Attorney General Anaya's Opinion 75-21, suggests a test based upon legislative policy to answer the question whether teachers or administrators are included within the meaning of "officer or employee of the state" found in Section 2-1-3 NMSA 1978. In holding that a school teacher was not a county employee prohibited by statute from purchasing land from the state tax commission sold to the state for delinquent taxes, the court stated:

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 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, 240 P.2d at 849. As stated in Op. Atty. Gen. 75-21:

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.

It is obvious that administrators and teachers serving in the legislature profit from being able to vote on legislation providing for their own contracts and regulating their own salaries.³

To the extent that any prior Attorney Generals opinions are inconsistent with this opinion, they are overruled.

In conclusion, it is our opinion that public school teachers and administrators are prohibited by state statutory and constitutional law from serving in the legislature.

ATTORNEY GENERAL

HAL STRATTON Attorney General

GENERAL FOOTNOTES

[n1](#) We have reviewed the case of **Mt. Healthy City Board of Ed. v. Doyle**, 429 U.S. 274 (1977), in which the Supreme Court of the United States held that a local Ohio school district was not an arm of the state for eleventh amendment immunity purposes. In that case, however, the Court found that under Ohio state law the "state" does not include "political subdivisions," and the Court did not conduct an extensive review of state involvement with local school districts in Ohio. Moreover, **Mt. Healthy** was decided before the three Tenth Circuit cases, which based their decisions upon a more detailed factual analysis, and expressly distinguished **Mt. Healthy**. Language in those court of appeals decisions suggests a factual analysis for determining whether local school districts are arms of the state, or are separate and distinct "political subdivisions" whose employees are not state employees.

[n2](#) Our state constitution contains two specific provisions that limit the qualifications of members of the legislature. Article IV, section 3 provides that "No person shall be eligible to serve in the legislature who, at the time of qualifying, holds any office of trust or profit with the state, county or national governments, except notaries public and officials of the militia who receive no salary." Article IV, section 28 also provides in part that "No member of the legislature shall, during the term for which he was elected, be appointed to any civil office created, or the emoluments of which were increased during such term." Both of those provisions use the term "office," which has been distinguished from the term "employment." In **State ex rel. Gibson v. Fernandez**, 40 N.M. 288, 58 P.2d 1197 (1936), the Supreme Court quoted favorably from **State v. Page**, 98 Mont. 14, 37 P.2d 575, 576 (1934):

"Five elements are indispensable in any position of public employment, in order to make it a public office of a civil nature: (1) it must be created by the Constitution or by the Legislature or created by a municipality or other body through authority conferred by the

Legislature; (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers conferred, and the duties to be discharged, must be defined, directly or impliedly, by the Legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power, other than the law, unless they be those of an inferior or subordinate office, created or authorized by the Legislature, and by it placed under the general control of superior officer or body; (5) it must have some permanency and continuity, and not be only temporary or occasional.

40 N.M. at 292, 58 P.2d at 1200. Applying those criteria to employment in the public schools, it appears that instructors and administrators do not hold "office" with the state as that term is used in the constitution. Therefore, those provisions do not by themselves prohibit instructors and administrators from serving in the legislature. The applicability of the second clause of article IV, section 28 is discussed infra.

[n3](#) We have reviewed the Supreme Court's decision in **Amador v. New Mexico State Bd. Education**, 80 N.M. 336, 455 P.2d 840 (1969), which held that the position of public school teacher is not incompatible with that of the office of a member of the State Board of Education. The Supreme Court reviewed the incompatibility statute, now codified at Section 10-6-5 NMSA 1978, and stated, without explanation, that "the position of school teacher is not an office within the meaning of the statute." This case is not dispositive of the issues raised by the question presented here, however, for two reasons. First, we assume that the Supreme Court decided that the position of school teacher is not one of "public office," a conclusion with which we agree, see note 2, infra, but did not decide whether the position of school teacher was one of state employment. Furthermore, we believe that the state's educational system has become considerably more centralized since 1969, as reflected in the Martinez case, so as to counsel against reading the extension of that decision beyond its narrow holding.