

## **Opinion No. 91-05**

April 17, 1991

**OPINION OF:** TOM UDALL, Attorney General

**BY:** Elizabeth A. Glenn, Assistant Attorney General

**TO:** Honorable Robert M. Hawk, State Representative, 1005 Washington Street S.E., Albuquerque, NM 87108

### **QUESTIONS**

Does the reasoning of the Court of Appeals in *State ex rel. Stratton v. Roswell Indep. Schools*, Vol. 30, No. 13, SBB 230 (Ct.App. 1991) (hereinafter referred to as "*Roswell Indep. Schools*"), alter the state law prohibition against employment of state legislators by the University of New Mexico and other state educational institutions listed in Article XII, Section 11 of the New Mexico Constitution?

### **CONCLUSIONS**

The *Roswell Indep. Schools* decision does not alter the state law prohibition against a person simultaneously serving in the state legislature and as an employee of a state educational institution.

### **FACTS**

A recently elected member of the state legislature would like to seek employment with the University of New Mexico.

### **ANALYSIS**

By statute, a state legislator is prohibited from receiving "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." NMSA 1978, § 2-1-3 (Repl. Pamp. 1983). See also *id.*, § 2-1-4 (making it unlawful for any state officer to pay legislators any compensation for state service other than what they are entitled to for service in the legislature). Prior opinions issued by this office have concluded that these provisions prohibit persons employed by state educational institutions from concurrently serving as state legislators. AG Op. No. 90-21 (1990); AG Op. No. 57-40 (1957).

Recently, in *Roswell Indep. Schools*, the New Mexico Court of Appeals decided that public school teachers and administrators are not state employees within the meaning of Sections 2-1-3 and 2-1-4. In reaching its decision, the court focused on legislative

intent rather than the amount of control or funding by the state. Roswell Indep. Schools at 232-33.

To ascertain the intent behind Sections 2-1-3 and 2-1-4, the court began by observing that the New Mexico Constitution did not include political subdivisions within the term "state," that school districts were defined as political subdivisions by statute, and that "[p]olitical subdivisions are not synonymous with "state." Roswell Indep. Schools at 233. The court also found it significant that for over forty years the legislature knew of an Attorney General's opinion interpreting Sections 2-1-3 and 2-1-4 which concluded that those laws did not prohibit a local school district from paying or employing a member of the legislature. In addition, the court presumed that the legislature was aware of New Mexico case law holding that a local school district employee was not a state employee. From this, the court reasoned that had the legislature intended to include local school districts within the term "state," it probably would have done so in 1977 when it made other amendments to Sections 2-1-3 and 2-1-4. *Id.* at 234.

The court also reviewed the legislative history of the statutory provisions and determined that "the legislature's overriding concern was legislative independence from potential control by the executive branch of government, mainly the governor...." Roswell Indep. Schools at 234. The court observed that "public school employees were not subject to this type of control by the governor or by state agencies directly under the governor's control." *Id.*

The reasoning used by the Court of Appeals to exclude public school teachers and administrators from Sections 2-1-3 and 2-1-4 does not exclude state university professors and employees. The University of New Mexico and other state colleges and universities are not political subdivisions. They are described in the constitution as "state educational institutions." N.M. Const. art. XII, § 11. While school districts are governed by locally elected boards, the constitution provides that state educational institutions are to be controlled and managed by a board of regents appointed by the governor with the consent of the senate. N.M. Const. art. XII, § 13. Unlike public school districts, state educational institutions typically are included within the term "state" for statutory purposes. See, e.g., NMSA 1978, § 13-1-90 (Repl. Pamp. 1988) (Procurement Code definition of "state agency"); NMSA 1978, § 41-4-3(G) (Repl. Pamp. 1989) (Tort Claims Act definition of "state" or "state agency").

Moreover, just as the Court of Appeals presumed that the legislature was aware of the Attorney General's long-standing opinion concluding that school district employees were not state employees for purposes of Sections 2-1-3 and 2-1-4, it can be presumed that its members have been aware for over thirty years of Attorney General Opinion No. 57-40 (1957), which concludes that employees of a state educational institution are employees of the state for purposes of those provisions. See also AG Op. No. 90-21 (1990); AG Op. No. 58-39 (1958) (strongly suggesting that while professors at a state educational institution do not hold state office, they are state employees under Sections 2-1-3 and 2-1-4). In addition, while judicial opinions have characterized local school districts as part of the state for some purposes but not for others, Roswell Indep.

Schools at 232-33, New Mexico case law consistently has characterized state educational institutions within the term "state." See, e.g., *Korgich v. Regents of the New Mexico School of Mines*, 582 F.2d 549 (10th Cir. 1978) (New Mexico's institutions of higher learning are state agencies and a state function for purposes of Eleventh Amendment immunity from suit); *Clothier v. Lopez*, 103 N.M. 593, 711 P.2d 870 (1985) (discussion of venue for tort claims describing a state educational institution employee as a "state employee" and state educational institutions as "state entities"); *Silver City Consol. School Dist. No. 1 v. Board of Regents of New Mexico Western College*, 75 N.M. 106, 112, 401 P.2d 95 (1965) (state college was "not separate from or independent of the state, and even in the vesting of title in it of public lands and buildings, they nevertheless remain the property of the state"); *Eyring v. Board of Regents of the New Mexico Normal Univ.*, 59 N.M. 3, 277 P.2d 550 (1954) (action against regents sounding in tort was really against the state); *State v. Regents of University of New Mexico*, 32 N.M. 428, 258 P. 571 (1927) (constitution makes the state owner of state educational institutions). See also AG Op. No. 70-27 (1970) (state educational institutions are instrumentalities whose action is necessarily state action). With knowledge of these cases and Attorney General opinions, the legislature thus far has not amended Sections 2-1-3 and 2-1-4 to exclude state educational institution employees from the category "employee of the state."

Accordingly, we believe Roswell Indep. Schools supports, rather than changes, the conclusion reached in previous Attorney General opinions. Absent amendment by the legislature, Sections 2-1-3 and 2-1-4 as they are now drafted prohibit state legislators from receiving compensation for services rendered as professors and employees of state educational institutions.

## **ATTORNEY GENERAL**

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