

## **Opinion No. 92-04**

May 26, 1992

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

**BY:** David M. Kaufman, Assistant Attorney General

**TO:** The Honorable Gary D. Robbins, Box 882 Portales, NM 88130

### **QUESTIONS**

1. May an assistant superintendent employed by the Santa Fe school district also serve as an elected member of the State Board of Education?
2. Is the use of school resources and personnel by local school officials running for the State Board of Education or other elected office prohibited?

### **CONCLUSIONS**

1. Yes, so long as the duties of membership on the State Board of Education do not physically interfere with the duties of the assistant superintendent during the ordinary working hours of that position and the two positions are not otherwise incompatible.
2. Yes.

### **FACTS**

An assistant superintendent employed by the Santa Fe school board is a Democratic candidate for the State Board of Education ("State Board").

### **ANALYSIS**

1. Ability to Hold Another Public Office.

In our opinion, there is nothing to prevent the same person from holding the positions of assistant superintendent in a local school district and State Board member, so long as the assistant superintendent's full-time employment with the Santa Fe public schools and the duties as State Board member do not physically interfere with each other during the ordinary working hours of each position and the functions of the two positions do not otherwise conflict.<sup>1</sup> In reaching this conclusion, we have examined the applicable constitutional, statutory and common law standards for determining whether two public positions are compatible so that they may be held contemporaneously.

The State Board was created by N.M. Const. art. XII, § 6, one member to be elected from each judicial district for terms of six years. The constitution requires the State

Board to determine public school policy and to have control, management and direction of all public schools, pursuant to authority and powers provided by law.

No constitutional provision specifically prohibits assistant superintendents from serving on the State Board, provided the constitutional prerequisites for holding that office are met. See N.M. Const. art. XII, § 6(B) (State Board members shall be residents of the board of education district from which they are elected); art. VII, § 2 (to hold public office, a person must be a citizen of the United States, resident of the state and a qualified elector).

Aside from the constitution, potential barriers to a public employee holding a second position are found in statutory provisions which address the compatibility of public offices and employment generally. NMSA 1978, § 10-6-3 (Repl. Pamp. 1990) describes when public employment is deemed permanently abandoned, and provides: 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 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.

For incompatibility to exist between a public office and other employment, NMSA 1978, § 10-6-3 (Repl. Pamp. 1990) first requires that the other position be held for compensation. The second requirement is that, as a result of the subsequent position, the officer fails for thirty days to "devote his time to the usual and normal extent during ordinary working hours to the performance of the duties" of his public office or employment. Under NMSA 1978, § 10-6-3 (Repl. Pamp. 1990), both these factors must be present for the second position to be incompatible with or constitute an abandonment of the first. AG Op. No. 90-14 (1990) 3, citing, AG Op. No. 64-73 (1964) (both criteria must be met for section on incompatibility and abandonment to become operative).

The position of assistant superintendent is a paid position. However, School Board members are only entitled to receive per diem and mileage and "no other compensation, perquisite or allowance." NMSA 1978, § 22-2-3 (Repl. Pamp. 1990). Whether per diem and mileage constitutes "compensation" is debatable. AG Op. No. 91-02 (1991) 5-6, n. 3. Even assuming that State Board membership is a paid office, the positions are not physically incompatible so long as the same person can hold both positions without failing for thirty successive days to devote his time to the usual and normal extent to the duties of both positions. See NMSA 1978, §§ 10-3-1(H), 10-4-1, 10-6-3, 10-6-5 (Repl. Pamp. 1990). The State Board generally convenes approximately six times per year generally for one day per meeting. Thus, the office of State Board

member is not a full-time position and unless the State Board met for thirty consecutive days, State Board membership would not be likely to cause an assistant administrator to fail to perform her duties for thirty consecutive days.<sup>2</sup>

Finally, even if two public offices meet the statutory criteria for physical compatibility, they may be functionally incompatible under common law standards. See AG Op. No. 90-14 (1990), citing, AG Op. No. 89-10 (1989) (both statutory and common law definitions are applied to decide compatibility of two public positions). There is no functional incompatibility so long as the functions of the two offices are not inconsistent, such 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." *Haymaker v. State*, 22 N.M. 400, 403-04, 163 P. 248, 249 (1917). In *Haymaker*, the court held that the same person could not be both a member of a school board and its clerk. In that case, the board had direct supervisory authority over the clerk position. As a board member the clerk had cast the deciding vote on matters pertaining to her interests as clerk, voted herself into the clerk's position, fixed her salary as clerk, and approved warrants for payment of her salary. *Id.* The State Board does not have such authority over assistant administrators. The State Board does not hire or fire assistant administrators or set or approve their salaries.<sup>3</sup> Furthermore, in a recent decision, the court of appeals stated that "[p]ublic school instructors and administrators . . . do not establish policy for the local school districts or for the state department of education." *State ex rel. Stratton v. Roswell Schools*, 111 N.M. 495, 504, 806 P.2d 1085, 1095 (Ct. App. 1991). Our Supreme Court has ruled that the position of school teacher was not incompatible with the office of School Board member under the *Haymaker* standard. *Amador v. Board of Education*, 80 N.M. 336, 455 P.2d 840 (1969). In that case the court stated:

The State Board only has jurisdiction over a school teacher in the instance where the teacher appeals to that Board from an adverse ruling by the local board of education. The fact that a teacher who is also a member of the State Board might appeal from the action of the local board presents no serious problem. The teacher would simply refrain from acting as a member of the Board in his case just as would a member of any other trade or profession who appealed to the board of which he was a member.

*Id.* at 338, 455 P.2d at 842.<sup>4</sup> By logical extension, the reasoning would apply to an assistant administrator. Assistant administrators and teachers are in substantially similar positions vis-a-vis the authority of the State Board. Moreover, the State Board voting policy provides that "no member should vote on a question in which he or she has a direct or pecuniary interest not common to other members of the [State] Board." *State Board Policies*, IX(C).<sup>5</sup> Assume that as a State Board member, the assistant superintendent would recuse herself from voting on matters where she has a conflict of interest, we do not believe that there is functional incompatibility between the positions of assistant administrator and State Board member.

## 2. Use of School Resources and Personnel.

Article IX, § 14 of the New Mexico Constitution, commonly known as the "anti-donation clause," prohibits the state, counties, school districts and municipalities except as otherwise provided in the constitution from making "any donation to . . . any persons, associations or public or private corporation." N.M. Const. art. IX, § 14. The anti-donation clause would prohibit the use of school resources and personnel by school officials running for the State Board or other elected office.<sup>6</sup>

## ATTORNEY GENERAL

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## GENERAL FOOTNOTES

[n1](#) Unlike the New Mexico Personnel Act, NMSA 1978, §§ 10-9-1 to -25 (Repl. Pamp. 1990 & Cum. Supp. 1991), which requires employees in the state personnel service to take leave without pay if they are candidates for a partisan political office (NMSA 1978, § 10-9-21(C) (Cum. Supp. 1991); see AG Op. No. 92-01 (1992)), Santa Fe Public Schools policies permit but do not require employees to take leave when they become a candidate for office. Santa Fe Public Schools Policies 4152.1. It should be noted that the Personnel Act does not apply to assistant superintendents of public schools. NMSA 1978, § 10-9-4(E) (Repl. Pamp. 1990).

[n2](#) Also, NMSA 1978, § 10-6-5 (Repl. Pamp. 1990) provides that "[a]ny 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 10-6-3 NMSA 1978 is hereby declared to be incompatible with the tenure of public office or employment." However, as we have concluded that NMSA 1978, § 10-6-3 (Repl. Pamp. 1990) is not a bar to assistant superintendents serving on the State Board, it follows that NMSA 1978, § 10-6-5 (Repl. Pamp. 1990) would not act as a bar either, and it is not necessary to analyze that provision separately.

[n3](#) The State Board does not directly supervise local school board employment decisions. Hiring decisions are made by local school boards upon recommendations made by the local superintendents. Termination decisions generally are also the responsibility of the local school boards. See NMSA 1978, § 22-10-17 (Cum. Supp. 1991). Local school board employment determinations may be subject to binding arbitration, without appeal to the State Board. See NMSA 1978, § 22-17.1 (Cum. Supp. 1991).

[n4](#) Amador also attempted to distinguish Haymaker on the ground that Haymaker discussed a statute, NMSA 1915, § 3956, providing that an office becomes vacant when an officer accepts or undertakes to perform the duties of another incompatible office. Amador, 80 N.M. 336, 338, 455 P.2d at 842. Amador concluded that such a provision was inapplicable because a school teacher is not an officer. *Id.* However, Amador seemed to erroneously conclude that the 1915 provision was identical to what is now codified as NMSA 1978, § 10-6-5 (Repl. Pamp. 1990). The later provision applies to

incompatibility between public office and private employment while the 1915 law addressed incompatibility between two offices.

[n5](#) It would not be useful or practical to set forth each provision of the extensive Public School Code, NMSA 1978, §§ 22-1-1 to 22A-1-5 (except NMSA 1978, §§ 22-4-16, 22-9-7 to -16, 22-13A-1 to -6, and 22-18A-1 to -5) (Repl. Pamp. 1989 & Cum. Supp. 1991) where the State Board and a local school board may have some interaction that could pose a potential conflict of interest for an assistant administrator who also serves as a State Board member. However, examples of areas where such potential conflicts may occur include the following: the State Board has authority to suspend a local school board and to grant a hearing on the matter upon the request of a suspended local school board (NMSA 1978, 22-2-14 and -15 (Repl. Pamp. 1989)); and, the State Board may review and approve a local school board's request to waive provisions of the Public School Code relating to length of school day, staffing patterns or subject areas in order for the district to implement a collaborative school improvement program for an individual school. NMSA 1978, §§ 22-2-1(D), 22-5-4(E) (Cum. Supp. 1991).

[n6](#) In addition, such activity would violate the Santa Fe School Board policy concerning political activities by employees and others. That policy provides as follows:

Employees seeking political office, as well as other candidates, are encouraged to conduct all of their campaign activities outside of regular working hours and away from the school premises. Under no circumstances will a candidate be permitted to use students during school hours in any campaign activity. Similarly, candidates are prohibited from using school machines or materials to produce campaign literature.

Those seeking to promote themselves or another candidate for election are to observe the following rules:

1. Candidates or their supporters may place materials in teacher's lounges, but not in teachers' boxes.
2. Candidates, if invited by the faculty, will be permitted to address the group after school hours. Attendance for faculty members will not be mandatory. Otherwise, no campaigning will be allowed in the buildings. No visits to classrooms or lounges for campaign purposes will be permitted.
3. Students are not to be asked to take home campaign literature for individual candidates.
4. School phones should be left free for school business.
5. Sale of tickets for campaign fund raisers will not be permitted on the premises if it becomes disruptive to the educational process.

Santa Fe Public Schools Policies, 4152.1.