

November 21, 2011 Advisory Letter---School Board Member and Employment

Honorable Stuart Ingle
New Mexico State Senator
2106 West University Drive
Portales, NM 88130

Re: Opinion Request--School Board Member and Employment

Dear Senator Ingle:

You have asked our opinion whether a school board member can resign his or her position from the school board and apply for a job in the school district governed by the board, a job that he or she is qualified to obtain. You ask whether the amendments made by 2003 N.M. Laws, Ch. 153 ("Chapter 153") may have altered the conclusion reached in New Mexico Attorney General Opinion No. 74-17 (1974), which opined that NMSA 1978, Section 22-5-5(B) (1967) (formerly NMSA 1953, Section 77-4-3(B)) disallowed a school board member's resignation and subsequent employment by the school district during the member's elected term.

As discussed below, we conclude that Section 22-5-5(B) does not permit a school board member, irrespective of his or her employment qualifications, to resign his or her position as a school board member and become employed with the same school district if such employment occurs during the term of office for which the member was elected or appointed. The amendments made by Chapter 153 do not affect our conclusion in this regard.

Section 22-5-5(B) provides:

No member of a local school board shall be employed in any capacity by a school district governed by that local school board during the term of office for which the member was elected or appointed.

In construing a statute, the court's charge is to determine legislative intent. The court first looks to the "plain language" of the statute, giving the words their ordinary meaning, unless the legislature indicates that a different meaning was intended. See, e.g., Delfino v. Griffo, 2011-NMSC-15, ¶ 12, 2011 N.M. LEXIS 207 (filed April 8, 2011). A resignation by a school board member during his or her term and subsequent employment by the same school district, if made before that resigning member's term of office has expired, is not permitted under the plain language of the statute.

Section 22-5-5(B) was enacted in 1967 and was formerly codified as NMSA 1953, Section 77-4-3(B). Attorney General Opinion No. 74-17 opined that the subsequent employment by a school district of a school board member, following his or her resignation from the school board for that district, was forbidden by Section 77-4-3(B) (now Section 22-5-5(B)) "during the term for which the member was elected or

appointed.” The Opinion concluded that, regardless of a member’s resignation before the end of his or her term, the prohibited employment period extended until the member’s elective or appointive term had concluded.

Section 22-5-5(B) is similar to Article IV, Section 28 of the New Mexico Constitution, which provides, in part: “No member of the legislature shall, during the term for which he was elected, be appointed to any civil office in the state....” This office has consistently construed this constitutional provision to mean that a legislator cannot resign and then be appointed to a civil office during the term for which he or she was elected. See N.M. Att’y Gen. Advisory Letter issued November 22, 2010, 2010 N.M. AG LEXIS 19; N.M. Att’y Gen. Op. No. 77-25 (1977); N.M. Att’y Gen. Op. No. 72-10 (1972); N.M. Att’y Gen. Op. No. 63-23 (1963); N.M. Att’y Gen. Op. No. 60-139 (1960).

Relying on Section 22-5-5(B)’s similarity to Article IV, Section 28, in that the prohibited employment extends throughout an elective member’s term of office, Attorney General Opinion No. 74-17 concluded that a mid-term resignation did not permit a school district to employ a resigning board member before that member’s elective term had concluded. We agree with that reasoning.

According to Attorney General Opinion No. 74-17, a purpose of Section 22-5-5 is to prevent board members from exerting the influence of their positions to procure employment with a district. If a board member resigned during his or her term after having influenced the board to select him or her for employment and was then hired, the intent of the legislature would be violated. The Attorney General Opinion stated that Section 22-5-5(B) “recognizes the fact that board members have substantial influence over the employment practices of the district and might be able to use that influence to have themselves employed by the school district unless prohibited from doing so.”

Chapter 153 amended NMSA 1978, Section 22-5-4 (2005) to delete that provision’s requirement that a school board approve or disapprove the employment of all employees and certified school personnel of the school district upon recommendation of the school superintendent. The amendment did not affect a school board’s power to hire the superintendent. See NMSA 1978, § 22-5-4(B) (2005). Chapter 153 enacted a new provision authorizing the school superintendent to employ all employees of the school district. See Chapter 153, § 25, codified at NMSA 1978, § 22-5-14 (2003).

Notwithstanding this realignment of the hiring structure, the clear statutory prohibition on a local school board member becoming employed by the school district governed by that board remains. Also, while a school board no longer has any direct role in the employment of school district personnel, it remains the hiring authority of the superintendent who, in turn, has authority to hire all employees of the district. Thus, the policy concern voiced in Attorney General Opinion No. 74-17, namely, the possibility of a board member improperly exerting influence to procure employment with the district, is not necessarily vitiated by the realignment in hiring structure.

For the foregoing reasons, we agree with the interpretation of Section 22-5-5(B) and the conclusion reached in Attorney General Opinion No. 74-17. We advise, therefore, that Section 22-5-5(B) does not permit a school board member to resign his or her position as a school board member and apply for and be employed to perform a job at the same school district, if such employment occurs during that member's term of office for which he or she was elected or appointed, irrespective of his or her employment qualifications. The amendments made by 2003 N.M. Laws, Ch. 153 do not change our conclusion.

Your request to us was for a formal Attorney General Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Sincerely,

ANDREA R. BUZZARD
Assistant Attorney General