Opinion No. 04-02

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OPINION OF: PATRICIA A. MADRID, Attorney General

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TO: The Honorable Rod Adair State Senator P.O. Box 96 Roswell, New Mexico

QUESTION

Does Governor Richardson's policy requiring potential appointees to the boards of regents of New Mexico state educational institutions to sign undated letters of resignation prior to their appointment and confirmation by the state senate violate Article XII, Section 13 of the New Mexico Constitution?

CONCLUSION

An undated letter of resignation that the Governor may have secured from a prospective regent as a condition of appointment to the board of regents of a New Mexico state educational institution is not enforceable as matter of law.

DISCUSSION

Under the state constitution, the members of a board of regents of a state educational institution are nominated and appointed by the governor, "by and with the consent of the senate." N.M. Const. art. XII, § 13. Once appointed and confirmed, a regent may not be removed "except for incompetence, neglect of duty or malfeasance in office," and

> no removal shall be made without notice of hearing and an opportunity to be heard having first been given such member. The supreme court of the state of New Mexico is hereby given exclusive original jurisdiction over proceedings to remove members of the board under such rules as it may promulgate, and its decision in connection with such matters shall be final.

Id.

Article XII, Section 13 thus limits the governor's authority to remove members of the boards of regents. As the New Mexico Supreme Court stated in connection with the previous governor's improper attempt to remove regents of a state university:

> The Governor may not remove regents for reasons outside the express bounds of the Constitution. The policies behind this limitation are apparent: the state's educational institutions must be free from the possibility of political manipulation; and the integrity and independence of the regents must be protected.

Denish v. Johnson, 121 N.M. 280, 293, 910 P.2d 914 (1996).

Article XII, Section 13 does not prohibit regents from voluntarily resigning their positions. However, as interpreted by the Supreme Court, the constitutional provision clearly is intended to maintain the independence of the boards of regents and insulate them from political interference. Particularly in light of the constitution's intent, it is doubtful that the Governor's attempt to force a regent to resign by using an undated letter of resignation signed prior to the regent's appointment and confirmation by the senate would survive a court challenge.

Although there are no New Mexico cases directly on point, cases from other jurisdictions addressing the issue uniformly hold that a signed, undated letter of resignation submitted by a prospective appointee as a condition to appointment is void. **See Partain v. Maddox,** 182 S.E.2d 450 (Ga. 1971) (undated letter of resignation obtained at time of appointment by governor was invalid and could not be the basis for a valid resignation); **People ex rel. Dibelka v. Peinberg,** 105 N.E. 715 (Ill. 1914) (undated letters of resignation signed by members of local board of education prior to their appointment were invalid); **Dolphin v. Mayor and Council of Town of Kearny,** 181 A. 644 (N.J. 1935)(town council's acceptance of resignation signed in blank by an officer as a condition to his appointment was ineffective); **Commonwealth v. Schofield,** 2 Pa. D. & C.3d 587, 1975 WL 100 (Pa. Ct. Com. Pl. 1975)(undated resignation signed by member of redevelopment authority was void and ineffective where it was exacted by the mayor before and as a condition to the member's appointment); **Jackson v. White,** 62 S.E.2d 776 (S.C. 1950)(upholding sheriff's widow's repudiation of letter of resignation she was required to submit to governor as condition to appointment to her husband's position). See also 1979-1980 Mich. Att'y Gen. Op. No. 5603 (county executive was prohibited from soliciting a signed, undated letter of resignation from a prospective county department head).

The conclusion reached in these cases is based on the principle that a person cannot resign an office to which he or she has not been appointed. As the South Carolina Supreme Court explained:

> A person elected or appointed to, and in the possession of, any public office, and performing the duties connected therewith, may tender his resignation at pleasure. Before he can resign, however, he must have accepted the office, as acceptance is necessary to the full possession and responsibility of an office.
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> Hence, one who has been elected or appointed to an office cannot resign it until the time has arrived when he is entitled by law to possess it, has taken the oath, given the required bond, and entered upon the discharge of its duties. It is generally held that every attempt to resign an office before the officer has qualified and entered upon the discharge of its duties, is abortive and ineffectual.

Jackson v. White, 62 S.E.2d at 778. **See also Dibelka,** 105 N.E. at 717 ("the only conclusion which could be reached is that a man cannot resign an office to which he has not been elected or appointed").

In addition, the pertinent case law provides that an appointing authority may not use a pre-appointment letter of resignation to evade restrictions on the appointing authority's power to remove an officer. As stated in one of the leading cases:

> It was never contemplated that where the law conferred the power to appoint, but not to remove, the power to remove might be conferred by requiring a person, before appointment, to place his resignation in the hands of the appointing power. Such a paper is invalid when signed, and lapse of time cannot render it valid.

People ex rel. Dibelka, 105 N.E. at 717. Similarly, the Supreme Court of New Jersey held that "[a] resignation given before appointment even though not recalled, if valid, clothed a member of the council with a power of summary removal, a power not granted by the ordinance and not to be sanctioned in a government of law." **Dolphin,** 181 A. at 644. **See also Partain,** 182 S.E.2d at 457 (board member's purported resignation based on letter obtained by governor at time of appointment "was in effect an attempt to remove him contrary to law"); **Schofield,** 2 Pa.D. & C.3d at 592-93 (redevelopment authority member's resignation obtained before he took office was invalid and illegal because its purpose "was to circumvent the intent of the legislature that the authority and its members be independent of and free from domination by the appointing power").

Based on this settled and well-reasoned precedent, Governor Richardson's policy of requiring prospective regents to sign undated letters of resignation as a condition to their appointment is improper. Under the applicable case law, the letters are invalid not only because they are obtained before the regents take office, but also because they effectively give the Governor the power to summarily remove the regents. This is contrary to Article XII, Section 13's provisions governing removal and the independence and integrity of the boards of regents those provisions are intended to protect.