

Opinion No. 13-1037

May 10, 1913

BY: FRANK W. CLANCY, Attorney General

TO: Alvan N. White, Superintendent of Public Instruction, Santa Fe, New Mexico.

STATE BOARD OF EDUCATION.

In regard to contract with Dr. F. H. H. Roberts to prepare a work on civil government and history of New Mexico.

OPINION

{*201} I have before me from your office a typewritten copy of Senate Bill No. 173, as amended, which became a law March 15, 1913, and {*202} which is now printed as Chapter 70 of the Laws of 1913, with a memorandum thereon indicating your desire for an opinion from me as to the effect of this statute upon the contract with Dr. Roberts as to which I wrote you a letter on March 12, 1913.

It is perhaps not strictly accurate to speak of the arrangement with Dr. Roberts as a contract, as the action taken by the State Board of Education was in the nature of an instruction or direction to Dr. Roberts to prepare in manuscript form a work of civil government and history of New Mexico and to submit proofs thereof to your department and, if the proofs met with your approval, the publication should proceed and the Governor, State Superintendent and the Attorney General would then be authorized to make a contract with the publishers.

Even if the arrangement with Dr. Roberts can be considered a contract and it is something approaching a contract at least, I am clearly of opinion that it is not affected by this new act. The only portion of the act that could be construed as touching this matter at all is as follows:

"and all persons identified in an official capacity with the public schools or with the higher educational institutions supported in whole or in part by the public funds of this **State** are hereby prohibited from being a party directly or indirectly to any contract, **or interested in any contract**, in connection with the operation or maintenance of such public schools or higher educational institutions; **and any contract in which they are so interested shall be void, and the members of any educational board voting for the same shall be guilty of a misdemeanor and liable to punishment accordingly.**"

You will notice that the prohibition relates only to "persons identified in an official capacity with the public schools or with the higher educational institutions." Dr. Roberts is not identified in an official capacity with the schools or with any higher educational institution. It is true that, ordinarily, we think of the head of the faculty of a university or

school as an officer, but this is incorrect. His relation to the institution which he serves is that of an employe only and he serves under a contract of hiring just as any other employe might. If we should consider that he is identified with the institution in an official capacity, a literal reading of the quotation hereinbefore made would prevent him from making a contract for his services and his compensation for those services.

Authority is not lacking for this opinion. In the case of *Butler vs. University*, reported in 32 Wis. at page 131, the court distinctly holds that a professor in a university is not a public officer and that he stands in the same relation to the Board of Regents that a teacher in a public school occupies with respect to the school district by which he is employed, that being purely a contract relation.

In the case of *Union County vs. James*, reported in 21 Penna., beginning on page 525, the court held that a professor in a college is not an officer of the corporation but a person in its employment.