

Opinion No. 46-4909

June 14, 1946

BY: C. C. McCULLOH, Attorney General

TO: Mr. R. H. Grissom Educational Budget Auditor Office of State Comptroller Santa Fe, New Mexico

{*237} In your letter dated June 13, 1946, you refer to removal proceedings against a certain Board of Education, which was later dismissed, and inquire whether the cost of suit and attorney's fees in connection with the action may be paid by the School Board out of school funds.

Although I have not seen the pleadings in the removal proceedings, I assume that the same were brought under the provisions of Section 10-508 of the N.M. 1941 Compilation, which provides as follows:

"The failure of any board or commission to comply with the provisions of this act (Secs. 10-505 -- 10-508) shall be ground for the removal from office of any member of any such board or commission who shall have participated in such failure, and neglect on the part of any such member to comply with the provisions of this act (Secs. 10-505 -- 10-508) shall be ground for removal as well as wilful violation of the provisions hereof."

The question does not involve the right of a municipal board to employ an attorney to represent the board when such legal counsel is considered necessary. This office has previously held that the employment of an attorney by such a board, when necessary, can legally be done. See Opinion No. 12, dated January 15, 1931.

In the case entitled *State v. Medler*, 17 N.M. 644, the Supreme Court held that removal proceedings, under the general law, constituted a civil action, rather than a criminal action, and quoted with approval an excerpt from an Oklahoma case, holding that removal proceedings are in the same classification as quo warranto proceedings, which are civil actions.

However, in such proceedings, the action is against the person individually, rather than in his official capacity, and in view of the language in Section 10-508, it would seem that the removal proceedings are also against the individual members of the board personally, rather than in their official capacity, and is not an action against the board itself.

It is therefore my opinion that the Board cannot legally pay out of school funds, costs of such a suit and attorney's fees in connection with defending individual members against the charges. I believe the same rule would apply as would apply in case of criminal charges brought against an individual board member.