

Opinion No. 51-5408

August 29, 1951

BY: JOE L. MARTINEZ, Attorney General

TO: Hon. Edwin L. Mechem Governor, State of New Mexico Santa Fe, New Mexico

{*110} Several days ago you requested an opinion from this office concerning the voting powers of ex officio members of state boards and committees in the meetings of those bodies. You had particular reference to Art. 12, Sec. 6 of the State Constitution which created the the State Board of Education, to consist of seven members, with the Governor and Superintendent of Public Instruction as ex officio members. Surprisingly, there is very little authority on this question, but what I could find indicates that an ex officio officer or member of a board has the power to vote, unless such right is specifically withheld. In my search for authorities, I covered the New Mexico digest, the five Decennial Digests, the A.R.L. Digest, Words and Phrases, Am. Jur., Corpus Juris Secundum, and Robert's Rules of Order. There were no helpful New Mexico cases on this subject.

"Ex Officio" is defined in the Cyclopedic Law Dictionary, 3d Ed., as follows:

(Lat. -- by virtue of his office). Many powers are granted and exercised by public officers which are not expressly delegated, or an office may be an incident to another, and filled by the incumbent thereof. Thus, the mayor may be ex officio a member of the city board of control. A judge, for example, may be ex officio a conservator of the peace and a justice of the peace."

Black's Law Dictionary and the cases cited and quoted in 15-A Words and Phrases, pp. 392-94 give similar definitions. Such definitions are not of themselves too helpful, but they do emphasize the fact that the distinctive characteristic of an ex officio appointment is not the nature of the power that it confers, but the method of, and reason for, the designation. Most of the cases illustrate that a man is designated an ex officio member of a board or committee because of, and by reason of, his holding another office, and that as soon as he ceases to hold the latter office, his ex officio membership on the board ceases.

The great majority of the cases that I found dealing with ex officio officers may be divided into two categories:

1. Those which consider the question of whether an ex officio member of a board is entitled to extra compensation. The authorities are split on this proposition, and the answer in each case seems to turn upon the nature of the office the member already holds, and the nature and extent of his ex officio services.

2. Those cases which consider the question of whether an ex officio membership or office is a "second office", so as to contravene the constitutional and statutory provisions of many jurisdictions forbidding the holding by one individual of two state offices. (See N.M.S.A. § 10-340.) The authorities are almost unanimous in holding that an ex officio membership or office is not to be considered a "second office." Typical of these cases are *People vs. Bowman*, 97 N.E. 304, and *Martin v. Smith*, 1 N.W. 2d 163.

{*111} I did find two cases which are in point. In *Seiler v. O'Malley*, 227 S.W. 141, (Ky. 1921), the mayor was an ex officio member of the City of Covington Board of Health. It was questioned whether the mayor could be counted in determining the presence of a quorum at one of the Boards' meetings. In discussing the powers of the various members of the Board, the Supreme Court of Kentucky said:

"They are each vested with full power and authority to do any and all things necessary and essential to carry out the purpose of the law in creating the board or body, whether they be officio members or selected in the manner provided by law. If, as contended by appellants, an ex officio member cannot be counted in forming a quorum, we fail to see any additional reason why such a member should have the right to vote or should have his vote counted in the transaction of any other business of the body. To our minds the rule contended for, pursued to its only logical conclusion, would result in depriving the ex officio member of all voice in the proceedings of all meetings and render his position on the board void of all effect except perhaps to entitle him to be present at the meeting. Such an absurd consequence was never contemplated. On the contrary, when one is made by the proper authority an ex officio member of a created body or board, it is to be presumed that those responsible for its creation had some purpose in view in designating the ex officio member. Manifestly that purpose was to constitute that individual a member of the board or body because of his holding some office of trust, and that whoever held that office should perform, in addition to his official duties, also those incumbent upon the board of which he was made an ex officio member.

"Our conclusion, therefore, is that the health board of the City of Covington at the time plaintiff was elected consisted of only seven members, of which the mayor was one. and that he and the three others who attended the meeting resulting in a plaintiff's election constituted a quorum of the board, and that plaintiff was legally elected health officer for the city of Covington. The judgment having so held, it is affirmed."

It should be particularly noted in this case that the right of the mayor to vote was unquestioned, even by the appellants. The appellants' argument was merely that the mayor could not be counted for a quorum.

In *Farrell v. Board of Health of the City of Oswego*, 276 N.Y. Suppl. 907, the Supreme Court of New York considered a section of the Oswego City Charter which read:

"The mayor shall be ex officio a member of each department of the said city, **but without a vote.**" (Emphasis supplied.)

The Court subsequently decided that the Board of Health was not a department within the contemplation of the above quoted section, and decided the case upon those grounds. But in examining this section, it should be noted that its draftors obviously deemed it necessary to provide specifically that the mayor, although an ex officio member, should not have a vote.

On p. 210 of Robert's Rules of Order, the leading American work on Parliamentary Law, we read the following, concerning ex officio officers. (It is clear from a reading of p. 206 of Robert's that the term "society", as used below, is equivalent to "assembly"):

"Frequently boards and committees contain some members who are members by virtue of their office, and, therefore, are termed ex-officio members. When such a member ceases {*112} to hold the office his membership of the board terminates automatically. If the ex-officio member is under the control of the society there is no distinction between him and the other members except where the president is ex-officio member of all committees, in which case it is evidently the intention to permit, not to require, him to act as a member of the various committees, and therefore in counting a quorum he should not be counted as a member. The president is not a member of any committee except by virtue of a special rule, unless he is so appointed by the assembly. If the ex-officio member is not under the authority of the society, he has all the privileges, including the right to vote, but none of the obligations of membership; as when the governor of a state is, ex-officio, a manager or a trustee of a private academy."

Robert, then, recognizes two types of ex officio officers and members: those who are under the authority of the "society" and those who are not. It is apparent that both of Robert's two classes of ex officio members have the right to vote.

It is my opinion that ex officio officers and members of the State boards of New Mexico have the right to vote, unless that right is specifically denied them by the Constitution, or statute creating the board. N.M.S.A. § 55-2815 does specifically deny to the Governor and Superintendent of Public Instruction the right to vote, in providing that they shall be ex officio advisory members of the boards of certain educational institutions. However, neither Art. 12, Sec. 6 of the Constitution nor any statutory enactment imposes such a restriction upon the Governor and the Superintendent of Public Instruction **as ex officio members of the State Board of Education.**

In any research on this problem, I have been almost as much impressed with those cases not directly in point as I have with those which do bear on the subject. This is because the former cases emphasize, as I have mentioned above, the fact that what characterizes and differentiates ex officio membership is the method of, and reason for, the appointment, and not the nature and extent of the power conferred. In view of these considerations and in view of the authorities I have discussed which are more directly in point, I believe the law to be as I have stated it.

I hope that this opinion answers adequately your inquiry on this subject.