

## **Opinion No. 57-02**

January 8, 1957

**BY:** OPINION OF FRED M. STANDLEY, Attorney General Fred M. Standley, Attorney General

**TO:** Senator Gordon Melody, State Senator, Las Vegas, New Mexico

### **QUESTIONS**

#### QUESTIONS

1. Does the adoption of Amendment No. 4 at the 1955 Special Election, which provision amends Article 14, Section 3 of the New Mexico Constitution abrogate the appointive power of the Governor, and permit the existing board members to hold over until a provision is made for their appointment by the Legislature?

#### CONCLUSION

1. No. The existing statutes are in full force and effect.

### **OPINION**

#### ANALYSIS

In September, 1955, Amendment No. 4, was submitted to the people and was adopted. The Amendment provides as follows:

"Each of said institutions shall be under such control and management as may be provided by law." (Referring to the Penitentiary at Santa Fe, The Miners Hospital at Raton, the New Mexico State Hospital at Las Vegas and the New Mexico Boys School at Springer, New Mexico.)

This clearly directs the Legislature to do an act, to-wit; provide the management and control of those institutions by law. There are in existence statutes and a constitutional provision which provide for the appointment of those persons. (§ 34-1-2 in reference to the Insane Asylum and § 42-1-1 applying to the Penitentiary together with Article 5, Section 5 of the New Mexico Constitution. § 13-3-1, applying to the Miners Hospital and the New Mexico Boys School.) Thus, the question becomes whether or not the statutes last referred to are in effect at this time.

In the case of Lesser vs. Lowenstein, 129 Md. 244, 98 Atl., 712, the court held that a statute in existence prior to the passage of non-self executing amendatory constitutional provision and not in conflict with that constitutional provision, remains in full force and effect. See also Holly vs. Anderson, 99 Oregon 191, 190 Pac. 1097, 195 Pac. 358;

Newport News vs. Woodward, 104 Va. 58, 51 S.E. 193. The test of whether or not an amendatory provision is self executing is whether the direction is to the court to do the act and enforce the provision, in which case it would be self executing, or to the Legislature to provide for the enforcement of the act and for the compliance with the amendatory provision. In which case it would not be self executing. 11 Am. Jur. 690. And some courts have even held that the provision is not effective until the Legislature acts. Tuttle vs. National Bank, 161 Ill., 797, 44 N.E. 984. Russell vs. County Board of Education, 247 Ky. 703, 57 S. W. 2d 681.

Thus the existing statutes and constitutional provisions which provide for the appointment of board members to fill the board on each of the institutions named is under a nonself executing provision is still effective and the Governor under those statutes may appoint the board members with the advice and confirmation of the Senate.