Opinion No. 57-179

July 23, 1957

BY: OPINION OF FRED M. STANDLEY, Attorney General Hilton A. Dickson, Jr., Assistant Attorney General

TO: Senator Harold M. Agnew, 2488 45th Street, Los Alamos, New Mexico

QUESTIONS

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"Does a member of the (Economic Development) Commission serve for his appointed term or at the pleasure of the Governor?"

CONCLUSION

At the pleasure of the Governor.

OPINION

ANALYSIS

As indicated in your letter wherein is submitted the above question, a member of the Economic Development Commission was appointed to said Commission for a specified term as provided under the statutes. Subsequently and prior to the running of the appointed term, a removal was effected by the Governor.

Section 4-7-1, N.M.S.A., 1953 Compilation, 1957 Pocket Parts, provides as follows:

"There is hereby created and established 'the New Mexico Economic Development Commission,' hereinafter referred to as 'the commission,' consisting of one member from each of the judicial districts, all of whom shall be appointed by the governor. Of the original commission, the governor shall appoint four members whose terms shall expire at the end of 1956 and three whose terms shall expire at the end of 1958, and three whose terms shall expire at the end of 1960; thereafter commission members shall be appointed for a term of six years, except those appointments made to fill vacancies which shall be for the unexpired term. Changes in the number of judicial districts shall change the number of commission members accordingly.

The commission shall be non-partisan and the members shall be appointed without reference to their political affiliations. The governor shall appoint one of its members as chairman, and one as vice-chairman. The members of the commission shall serve without compensation, except that they shall be reimbursed for their actual and necessary expenses actually incurred in performing their duties as members."

The aforequoted section as brought into existence by amendment in 1955 revised generally the earlier 1949 law. The provision regarding appointments on a nonpartisan basis was, however, not changed.

The question of the Governor's authority to terminate appointments prior to the running of stated terms has been, at least on two occasions, earlier considered by this office. In Attorney General's Opinion No. 4333, dated July 9, 1943, Mr. Harry L. Bigbee, writing the opinion, stated that:

". . . the various officers referred to, owe their office at the will of the appointing official, unless a term is fixed by statute, in which case, however, under certain circumstances they may also be removed at will."

In Opinion No. 5746, dated May 1, 1953, Mr. Richard H. Robinson pointed out:

"The only requirement apparently in an order of removal of an officer appointed by the Governor is that the order must allege one of the constitutional grounds for removal, that is, incompetency, neglect of duty or malfeasance in office. Failure to allege one of these grounds would result in the order of removal being a nullity, although a subsequent order could immediately be issued alleging one of the necessary grounds."

The basic law establishing the Governor's authority to remove persons from office is found in Article V, § 5, New Mexico Constitution, which provides, in part, as follows:

"The governor shall nominate, and, by and with the consent of the senate, appoint all officers whose appointment or election is not otherwise provided for, and may remove any officer appointed by him for incompetency, neglect of duty or malfeasance in office."

The New Mexico Supreme Court in State ex rel. Ulrick v. Sanchez, 32 N.M. 265, 255 P. 1077, when called upon to consider the Governor's removal power as suggested in the aforesaid constitutional provision, pointed out the following:

"The Governor may remove officers appointed by him. Whether this class of officers is also subject to impeachment may be doubted, but is immaterial in this case. However, it might be observed that, if appellants' contention that officers appointed by the Governor with the concurrence of the Senate may not be removed by the governor is correct, and if they are not 'state officers' who may be impeached then it would appear that a numerous class of officers would not be subject to removal at all, and we do not think it was the intention of the Constitution makers to create such a situation."

And in giving consideration and thought to the Committee deliberations out of which arose the present constitutional provision the Court further said:

"It would have been competent for the framers of the Constitution to provide that officers appointed by the Governor, by and with the consent of the Senate, be removed only

with the consent of the Senate, but they did not do so, and the omission may not be ignored."

The Court also, making reference to its opinion in Conklin v. Cunningham, 7 N.M. 445, 38 P. 170, said:

"The powers of a Governor are executive, **not judicial, and they must be exercised promptly, to be effective. Notice to a defaulter is invitation to repair deficiency with a view to retention of office.** To afford opportunity to make good delinquency is to protect the violator of a trust, and to supplant summary action by judicial investigation. The impending penalty of removal is to deter breach in office, and to encourage fidelity and promptness in the discharge of its duties. **Trial is not an executive function, and its assumption would be the emasculation of executive efficiency.'"**

And by way of conclusion in the Ulrick case, the Court said:

"The only inquiry left open to the court in this sort of proceeding is whether the cause assigned for removal is one for which the Constitution authorizes a removal to be made. If it is, the Governor acted within his jurisdiction in making it, no matter how grievously he might err in judgment."

With reference to the constitutional and statutory provisions hereinafore quoted, wherein are found provisions establishing a definite term of office and the requirement for stating a constitutional basis for removal, it is our opinion that an executive termination is a nullity only where there is a failure to state the reason for removal as required. In accordance with the holding of the Ulrick case, supra, proof of the stated reason nor a hearing called thereon is required. It is further the opinion of this office that the 1955 amendment, as herein considered, does not bring into existence a requirement for impeachment proceedings as would be necessary in the case of persons otherwise classified as "public officials".