

Opinion No. 60-132

July 5, 1960

BY: OPINION of HILTON A. DICKSON, JR., Attorney General

TO: Mr. Tom Wiley Superintendent of Public Instruction Department of Education Santa Fe, New Mexico

QUESTION

QUESTION

Is there any legal manner for removal of a municipal school board member where such member is continually absent from board meetings and gives no reason or excuse for such absence?

CONCLUSION

See Analysis.

OPINION

{*509} ANALYSIS

A member of a municipal school board is an elected public official, elected for a term of six years beginning on March 1st next succeeding his election. § 73-10-4, N.M.S.A., 1953 Compilation. As an elected official, he can be removed from office only by following the statutory procedure required to be followed for the removal of such officials. These procedures in the case of removal of a school district officer are set forth in §§ 5-3-3, et seq., N.M.S.A., 1953 Compilation.

§ 5-3-3 reads as follows:

"Any county, precinct, **district**, city, town or village officer elected by the people, and any officer appointed to fill out the unexpired term of any such officer, may be removed from office on any of the grounds mentioned in this chapter and according to the provisions hereof." (Emphasis supplied).

The word "district" in this section has been construed to mean "school district." **State ex rel. Hannah v. Armijo**, 37 N.M. 423, 24 P. 2d 274 (1933). Further, the **Armijo** case specifically held that the section quoted above and the procedures set forth in the sections following it in the statutes may be used to remove board of education members.

§ 5-3-4 spells out the causes for removal of the officers named in § 5-3-3. The causes are (1) Conviction of a felony or misdemeanor involving moral turpitude, (2) **Failure, neglect or refusal to discharge the duties of the office, or failure, neglect or refusal to discharge any duty devolving upon the officer by virtue of his office,** (3) Knowingly demanding or receiving illegal fees as such officer, (4) failure to account for money coming into his hands as such officer, (5) gross incompetency or gross negligence in discharging the duties of the office and (6) any other act or acts, which in the opinion of the court or jury amount to corruption in office or gross immorality rendering the incumbent unfit to fill the office. In view of the facts presented, cause number (2) above would appear to {*510} be the only cause with possible applicability in this situation.

The remaining sections relating to removals following § 5-3-4 relate entirely to the procedural method by which the removal proceeding is held in District Court and are not important to consideration of your question. Suffice it to say that such proceedings may be begun either by a Grand Jury presentment (§ 5-3-5) or by the District Attorney in cases where there will be no Grand Jury in the county for at least 20 days after the presentment of the accusation (§ 5-3-19). The proceedings are civil and not criminal in nature. (**State ex rel. Mitchell v. Medler**, 17 N.M. 644, 131 Pac. 976 (1913).)

The question is, therefore, whether the mere failure of the member to attend board meetings constitutes "failure, neglect or refusal to discharge the duties of the office." No categorical answer to this question is possible. However, certain guides in this regard can be gleaned from the case law relating to the removal of public officers.

Generally, the rule is that the dismissal of a public officer for neglect of duty cannot be for honest errors in judgment or mistakes in administration. The dismissal must be for failure or neglect to do a positive duty. **Finnigan v. Miller**, 132 N.J. Law. 192, 38 A. 2d 854 (1944). Put another way, in the words of the Pennsylvania court in **In re Shoaf, et al.**, 370 Pa. 567, 88 A. 2d 871 (1952), the neglect must constitute "cupidity or pathological sloth." The mere failure to perform an act, with nothing more, does not constitute a neglect of duty. **Rapaport v. Civil Service Commission**, 134 Cal. App. 319, 25 P. 2d 265 (1933); **State ex rel. Hardie v. Coleman**, 115 Fla. 119, 155 So. 129, 92 A.L.R. 988 (1934).

In our opinion, the consistent, continual failure of an elected school board member to attend board meetings could be construed as a neglect of duty. The board is charged with the overall supervision of the schools of the district over which it has jurisdiction, and members thereof are certainly charged with a positive duty of such interest in the matters before the board to attend at least a part of its meetings. A complete failure on the part of a board member to take part in board affairs is, in our opinion, a dereliction of a positive duty constituting neglect of office.

However, we do not have enough facts before us to rule as to whether this board member is guilty of neglect of office. Perhaps his continual absences can be adequately explained. Perhaps the so-called "continual absences" have not been for a sufficient

length of time to establish neglect. It must be remembered that the mere failure to perform an act is not neglect. **Rapaport v. Civil Service Comm., supra.** Thus, before any action of removal is contemplated against the member in question, the necessary "cupidity or pathological sloth" must be present.

By: Philip R. Ashby

Assistant Attorney General