

Opinion No. 65-46

March 19, 1965

BY: OPINION OF BOSTON E. WITT, Attorney General Thomas A Donnelly, Assistant Attorney General

TO: Honorable C. D. Maestas, State Senator, Twenty-Seventh State Legislature, Santa Fe, New Mexico

QUESTION

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May a board of education prior to the expiration of their term but subsequent to the election of a duly elected school board, bind the newly elected board by entering into employment contracts with teachers and other persons employed by the school system?

CONCLUSION

Yes, if such action is taken at a properly called and conducted board meeting after due notice, a quorum is present and the action passed upon by a majority of those voting on the action.

OPINION

{*78} ANALYSIS

At the outset it should be noted that by virtue of the New Mexico State Constitution, Article XX, Section 2, every "officer, unless removed, shall hold his office until his successor has duly qualified."

This constitutional provision empowers any public officer to fully exercise any of the powers attendant to such office until his successor has duly qualified.

We next examine briefly, the time for school board elections in the various districts. School board elections are required by statute to be held on the first Tuesday in February in each odd numbered year. Section 73-10-5, N.M.S.A., 1953 Compilation, sets out as follows:

"On the first Tuesday in February in each odd numbered year, the qualified electors of the district and territories attached thereto for school purposes shall elect at large one or two members of the said board as the case may be (except as provided in the section next preceding) to succeed those now holding office whose terms expire. The election shall be called by the municipal board of education and shall be called conducted,

returned and canvassed by the board as in the case of officers in the respective incorporated cities, towns and villages. . . ."

As set forth in Section 73-9-16 N.M.S.A., 1953 Compilation the procedure for the election of members of **independent districts** is "the same as that prescribed for the election" of municipal board members. In respect to **county boards of education**, Section 73-9-1, N.M.S.A., 1953 Compilation specifies that such boards shall consist of five appointed members. Section 73-9-4, N.M.S.A., 1953 Compilation, sets out that the appointing power for county boards of education shall rest in "the state superintendent of public instruction, the chairman of the board of county commissioners, and the district judge in and for the county."

Consideration of each of the above enumerated types of school districts indicates that statutory provision is made for the staggering of the terms of school board members of each board whether elected or appointed, so that continuity on the board will continue.

The employment of teachers or other personnel by a board, who do not possess tenure in such district, may be entered into at any date during the year by the school board. As specified in Section 73-12-13, {*79} N.M.S.A., 1953 Compilation, however,

"On or before the closing day of each school year the governing board of education . . . of each school district in the state, whether rural, municipal or otherwise, shall serve written notice of reemployment of or dismissal upon all personnel by it then employed certified as qualified school personnel by the state board of education. Written notice of placement shall also be given to such qualified school personnel employed by county boards of education on or before the closing day of school of each year. Failure of the governing board to serve written notice shall be construed the same as if such qualified person had been reemployed for the ensuing school year. . . . Written contracts on forms approved by the state board shall be executed by governing boards and certified personnel not later than ten (10) days before the opening of the next school term. . . ."

From the statutes quoted hereinabove, it is our opinion that a majority of the members of a school board may enter into employment contracts with teaching or other school personnel at appropriate times during the year when the statutes above cited are followed, and when in the opinion of the board such contracts should be consummated. As stated in 78 **C.J.S.**, "**Schools and School Districts.**" Section 185, at page 1038:

"In the absence of a statutory provision limiting, either expressly or by implication, the time for which a contract for employment of a school teacher may be made to a period within the contracting school board's or officers' term of office, such board or officers may bind their successors in office by employing a teacher or superintendent for a period extending beyond their term of office, or for the term of school succeeding the term of office of the board, or of some of its members, provided such contract is made in good faith, without fraud or collusion, and for a reasonable period of time. The fact that the contract was entered into just before a change in the personnel of the employing board does not warrant an inference of fraud or collusion, and even though the outgoing

board may have negotiated the contract in order to forestall the incoming board, in the absence of evidence that the teacher was party thereto, the contract of the teacher is not invalidated thereby. . . ."

As discussed in the cited text *supra*, in the absence of a statute to the contrary, a school board may properly enter into contracts of employment for teachers and other personnel despite the fact that some of the members of the board may be subsequently replaced by newly appointed or elected school board members at a later date. No State Statute limits the time when a board may act to hire personnel in New Mexico as long as the written contracts are executed not later than ten days before the opening of school, and notice of rehiring or placement is given on or before the last day of school. Under Article XX, Section 2, of the State Constitution an officer may, unless removed, fully exercise the powers of his office until his successor has duly qualified.

Thus, we find that a school board may fully enter into such contracts of employment if the action is taken at a properly called and conducted school board meeting, with due notice of the action to be taken, a quorum of the board is present and a majority of the board affirmatively approves of the action.