

## Opinion No. 76-24

July 28, 1976

**BY:** OPINION OF TONEY ANAYA, Attorney General Raymond Hamilton, Assistant Attorney General

**TO:** Mr. E. C. Serna, District Attorney, Sixth Judicial District Grant County Courthouse, P.O. Box 1025, Silver City, New Mexico 88061

### QUESTIONS

#### Facts

A county commissioner after being duly qualified and elected for office sustained serious injuries in an accident. As a result of those injuries he has become seriously incapacitated and apparently has been unable to perform his duties as a county commissioner since the accident.

#### Question

Does the commissioner fall within any of the six categories set out in Section 5-3-4, NMSA, 1953 Comp. (Repl. Vol. 2) sufficiently to make a proper presentation of an accusation for removal to the court or to the grand jury when convened?

#### Conclusion

Yes.

### OPINION

#### {\*94} Analysis

Section 5-3-4, NMSA, 1953 Comp. (Repl. Vol. 2) gives the causes for removal of the class of officers of which the commissioner is a member. In pertinent part, it provides:

**5-3-4. Causes for removal of local officers. -- The following shall be causes for removal of any officer belonging to the class mentioned in the preceding section (5-3-3):**

\* \* \*

**5. Gross incompetency or gross negligence in discharging the duties of the office;** (Emphasis supplied.)

Statutory language is to be given its plain meaning. **Ex parte Collett**, 337 U.S. 55, 93 LEd. 1207, 69 S. Ct. 944 (1949); **Weiser v. Albuquerque Oil and Gasoline Company**, 64 N.M. 137, 325 P.2d 720 (1958). As used in Section 5-3-4 (5), **supra**, "gross" is an adjective modifying "incompetency." Used as an adjective "gross" means "glaringly noticeable" or "manifest." **Webster's Third New World International Dictionary**, p. 1002 (1959). A lack of physical or mental ability is "incompetence." **Webster's Third New World International Dictionary**, p. 1144 (1959). Taken together the plain meaning of the terms "gross incompetency" is a glaringly noticeable or manifest lack of physical or mental ability. The plain and ordinary meaning of "gross incompetency" compels the determination that the legislature intended that a local officer be removed if the officer is unable to discharge his duties due to a manifest lack of physical or mental ability.

It has been judicially determined that the term "incompetence" as used in removal statutes encompasses failure of performance due to physical disability. **Tafoya v. New Mexico State Police Board**, 81 N.M. 710, 472 P.2d 973 (1970). The language of **Tafoya** is instructive:

Obviously, 'incompetence' is the only statutory charge that has any reasonable relationship to physical disability.

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There being no clearly expressed legislative intent requiring otherwise, the word is to be given its usual, ordinary meaning. (citation omitted.) It includes physical inability to perform, which inclusion, we believe, fits in with the pattern and purpose of the statutory plan. Termination or removal for physical unfitness is no less final than one for another form of incompetence. **Tafoya v. New Mexico State Police Board**, **supra**, at 713, 714.

Several decisions dealing with the removal of public officers, officials and employees have determined that incompetence embraces physical inability to perform. **State ex rel. Hardie v. Coleman**, 115 Fla. 119, 155 So. 129, 92 ALR 988 (1934); **State ex rel. De Bellvue v. Ledoux**, 3 So. 2d 188 (La. App. 1941); **Sausbier v. Wheeler**, 299 N.Y.S. 466, 252 App. Div. 267 (1937); **County Board of Education of Clark County v. Oliver**, 270 Ala. 107, 116 So. 2d 566 (1959); **Collins v. Iowa Liquor Control Commission**, 252 Iowa 1359, 110 N.W. 2d 548 (1951); **Board of Public Education School District {95} of Philadelphia v. Beilan**, 386 Pa. 82, 125 A.2d 327 (1956), **aff'd** 357 U.S. 399, 2 L. Ed. 2d 1414, 78 S. Ct. 1317 (1958). 67 C.J.S. **Officers** § 60 (1950) notes that incompetency "refers to any physical, moral, or intellectual quality, the lack of which incapacitates the officer to perform his duties." Likewise, 20A Words and Phrases, **Incompetency** (1959) includes the definition that, "'Incompetency,' as a ground for removal of public officers, has reference to any physical, moral or intellectual quality, lack of which incapacitates officer to perform his duties for a period."

Texas' legislature, like New Mexico's, authorizes the removal of county officers for "incompetency." Vernon's Annot. Civ. Stat. Art. 5970. Vernon's Annot. Rev. Civ. Stat. Art 5972 defines "incompetency":

Art. 5972. "Incompetency"

By "incompetency" as used herein is meant gross ignorance of official duties, or gross carelessness in the discharge of them; **or an officer may be found to be incompetent when, by reason of some serious physical or mental defect, not existing at the time of his election, he has become unfit or unable to discharge promptly and properly the duties of his office.** R.S. 1879. (Emphasis supplied.)

The plain meaning of the underscored language of Art. 5972, **supra**, has been affirmed by an opinion of the Texas Attorney General, apparently arising from facts parallel to those on which this opinion is based, which stated that where a county officer has been injured, causing a physical defect not existing at the time of his election, so as to make him unable to discharge the duties of his office, such officer may be removed from office by a finding thereof in proceedings brought by a county or district attorney. Op. Atty. Gen. 1947, No. V-108.

In determining what a provision means, it should be construed with a view toward the purpose of the entire statute. See **State v. Trujillo**, 85 N.M. 208, 510 P.2d 1079 (Ct. App. 1973); **Sutherland Statutory Construction** § 46.05 (1972). As given in the statute, the purpose of Section 5-3-4, **supra**, is to provide "causes" for which an officer can be removed. It appears that the legislature's purpose in enacting the six provisions of the section was to establish a range of causes for removal. Among the varied causes for removal it is reasonable that the legislature would include removal of an officer who is unable to perform his duties due to physical or mental incapacity.

The public policy basis of a statute lends guidance when interpreting the statute. **Chavez v. State Farm Mutual Automobile Insurance Co.**, 87 N.M. 327, 533 P.2d 100 (1975). The policy imported by Section 5-3-4, **supra**, is the promotion of sound and effective local government by providing bases for removing governing officials who are either unable, unwilling, involved in illegal conduct or otherwise constrained in the performance of their governmental duties. Certainly the public's interest in workable local government would not be promoted if the provisions of Section 5-3-4, **supra**, were read to exclude the removal of an officer unable to perform governmental duties because of physical or mental incapacity.

In conclusion, the plain meaning of "gross incompetency," the judicial and statutory interpretations of similar terms, the legislative {96} purpose discerned from the context of the provision and the public policy basis of the statute compels the determination that subsection five of Section 5-3-4, **supra**, provides statutory authority for removal of a local officer who is incompetent to discharge the duties of his office due to physical disability. If the incapacitating disability has arisen since his election, the officer may be removed in accordance with the statutory means for such removal.