

Opinion No. 91-02

March 27, 1991

OPINION OF: TOM UDALL, Attorney General

BY: Elizabeth A. Glenn, Assistant Attorney General

TO: The Honorable Fred Luna, State Representative, 1651 Los Lentos, NE, Los Lunas, New Mexico 87031

QUESTIONS

May a member of the state legislature also serve as an elected member of a local school board?

CONCLUSIONS

A legislator is not precluded by state law from serving as an elected local school board member.

FACTS

In February, 1990, State Representative Fred Luna sought election to the Los Lunas school board. One of his opponents objected that the New Mexico Constitution prohibits simultaneous service in the state legislature and on a local school board. Representative Luna was elected to the school board.

ANALYSIS

The ability of a state legislator to hold another elective office is controlled by various statutory, constitutional and common law principles. Our analysis of those principles, as discussed below, leads us to conclude that a state legislator may concurrently serve as an elected member of a local school board.

1. Constitutional Limits on a Legislator's Ability to Hold Another Public Office.

a. Separation of Powers: Article III, Section 1.

In pertinent part, Article III, Section 1 of the New Mexico Constitution states:

The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others....

In *State ex rel. Stratton v. Roswell Indep. Schools*, Nos. 10,957, 10,958 (consolidated) (N.M. Ct. App. Jan. 31, 1991), the New Mexico Court of Appeals determined that this provision did not bar public school employees such as teachers and administrators from also serving as legislators. The court reasoned that Article III, Section 1 applies only to public officers in the various branches of government because, by definition, "public officers" and not "employees" exercise sovereign power. Slip op. at 16. The majority opinion did not address whether school districts are part of the executive branch of state government for purposes of Article III, Section 1. Resolution of this issue is necessary here because, in general, the members of a school board are considered "public officers."¹

New Mexico case law supports the view that when the constitution's framers referred to the "state," they did not intend to include political subdivisions such as school districts and, therefore, that Article III, Section 1 should not preclude a legislator from holding office on a local school board. For example, although the majority in *Roswell Indep. Schools* did not decide whether a school district is part of the executive branch of state government, it made the following pertinent observations:

[T]he New Mexico Constitution does not include "political subdivisions" within the term "state." School districts are designated "as the political subdivision[s] of the state for the administration of public schools and segregated geographically for taxation and bonding purposes." NMSA 1978, § 22-1-2(J) (Repl. Pamp. 1989). Political subdivisions are not synonymous with "state."

...When the constitution either grants or prohibits certain powers, the affected subdivisions are specifically enumerated.

Slip op. at 11. See also *Board of County Comm'rs v. Padilla*, No. 10,721 (N.M. Ct. App. Dec. 4, 1990), Vol. 29, No. 4, SBB 29, 30 (1991) (New Mexico Constitution's separation of powers provision does not apply to the distribution of power within local governments); *State ex rel. Gomez v. Campbell*, 75 N.M. 86, 400 P.2d 956 (1965) (acknowledging that N.M. Const. art. V, § 1 did not preclude the legislature from creating other executive officers, but holding that Article V's requirement that officers of the executive department reside at the seat of government applied only to the elected officials specifically named); *Albuquerque Metro. Arroyo Flood Control Auth. v. Swinburne*, 74 N.M. 487, 495, 394 P.2d 998, 1003 (1964) (stating in connection with the constitutional debt limitations of Article IX that "[c]onstitutional limitations upon the legislative power respecting governmental subdivisions as well as the debt limit thereof have application only to the particular subdivision named in the respective inhibiting constitutional provisions"); *AG Op. No. 6530* (1956) (legislator was not prohibited from employment as a deputy county assessor by Article IV, Section 28's restrictions on contracts between legislators and "the state or any municipality thereof").

In his concurring opinion in *Roswell Indep. Schools*, Judge Hartz specifically concluded that "for the purposes of article III, section 1, employees of local school districts are not employed by the state executive department." Concurring slip op. at 9. He based his

conclusion on the structure of the New Mexico Constitution which, in Article III, Section 1, divides the government into the legislative, executive and judicial departments and, in subsequent provisions, further defines those departments. See N.M. Const. arts. IV -- VI. Because local school districts are not part of the executive department envisioned by the constitution's framers,² school board members do not exercise powers of the executive department for purposes of Article III, Section 1.

In addition, the New Mexico Supreme Court, in *State ex rel. Chapman v. Truder*, 35 N.M. 49, 289 P. 594 (1930), decided that the same person could serve as a district attorney, an office within the judicial branch of state government, and as mayor, described by the court as an "executive officer." *Id.* at 52, 289 P. at 596. The court concluded the Article III, Section 1 did not prevent the same person from holding both offices because it applied "to state offices only, and not to municipal offices." Similarly, Article III, Section 1 should not preclude a legislator from holding office as a local school board member.

b. Article IV, Section 3.

With certain exceptions not relevant here, paragraph A of Article IV, Section 3 of the New Mexico Constitution provides that "[n]o person shall be eligible to serve in the legislature who, at the time of qualifying, holds any office of trust or profit with the state, county or national governments...." For reasons similar to those discussed above in connection with Article III, Section 1, we believe that, by specifying particular governments in Article IV, Section 3, the provision's drafters intended to exclude local governments not listed. Because a school board member does not hold a state, county or national government office, he is not prohibited from serving as a legislator by Article IV, Section 3.

c. Article IV, Section 28.

Also limiting a legislator's ability to hold another public office is Article IV, Section 28, which provides that "[n]o member of the legislature shall, during the term for which he was elected, be appointed to any civil office in the state...." By its terms, the prohibition of Article IV, Section 28 applies only to appointments and not to elections. *State ex rel. Anaya v. McBride*, 88 N.M. 244, 251-52, 539 P.2d 1006, 1013-14 (1975). Thus, it does not prevent a legislator from being elected to a local school board. See AG Op. No. 59-196 (1959) (N.M. Const. art. IV, § 28 does not prevent a state legislator from holding elected positions on a city council or a municipal school board).

2. Statutory Restrictions on a Legislator's Ability to Hold Another Public Office.

By statute, the New Mexico legislature prohibits its members from receiving any compensation from state employment other than that to which they are entitled as legislators. Under NMSA 1978, § 2-1-3 (Repl. Pamp. 1983):

It is unlawful for any member of the legislature to receive any compensation for services performed as an officer or employee of the state, except such compensation and expense money as he is entitled to receive as a member of the legislature.

Similarly, NMSA 1978, § 2-1-4 (Repl. Pamp. 1983) provides:

It is unlawful for any officer of the state of New Mexico to pay to any member of the legislature compensation for services rendered the state of New Mexico as an officer or employee thereof except such compensation and expense money which such member is entitled to receive as a member of the legislature.

These provisions do not prevent a legislator from being elected to a local school board because, by statute, local school board members serve without compensation. NMSA 1978, § 22-5-5 (Repl. Pamp. 1989). They are entitled only to per diem and mileage for board meetings they attend and for travel on official business. NMSA 1978, § 10-8-4 (Repl. Pamp. 1990).

Even assuming, however, that per diem and mileage amount to compensation,³ the New Mexico Court of Appeals held in *Roswell Indep. Schools* that public school instructors and administrators are not state employees within the meaning of Sections 2-1-3 and 2-1-4.⁴ Central to the court's reasoning was that, for purposes of those statutes, the legislature did not view local school districts as part of state government. Slip op. at 4-14. Thus, a school district employee did not receive compensation as an officer or employee of the state. By logical extension, the Court of Appeals' decision means that members of the governing authority of a local school district also are not officers or employees of the state within the contemplation of Sections 2-1-3 and 2-1-4, and are not prevented by those provisions from serving in the state legislature.

3. Incompatibility Restrictions on a Legislator's Ability to Hold Another Public Office.

Finally, when the same person holds two public offices there is a concern that the two positions may be incompatible. We do not believe that the positions of state legislator and school board member are necessarily incompatible, under either state statutes (physical incompatibility) or the common law (functional incompatibility).

There is no physical incompatibility so long as the same person can hold both positions without failing for thirty successive days to devote his time to the usual and normal extent to the duties of both positions. See NMSA 1978, §§ 10-3-1(H), 10-4-1, 10-6-3 and 10-6-5 (Repl. Pamp. 1990).⁵ Compare AG Op. No. 70-74 (1974) (person cannot hold two salaried positions in county government that must be performed during the same hours) with AG Op. No. 68-111 (1968) (no physical incompatibility where a person served as municipal judge after his working hours as a city clerk). Local school boards are required to meet only once a month, NMSA 1978, § 10-3-2(A) (Repl. Pamp. 1990), and the legislature meets for only a thirty-day or sixty-day period in alternate years, N.M. Const. art. IV, § 5. Thus, unless the school board had meetings thirty days in a row

during a legislative session, it is unlikely that school board membership would cause a legislator to fail to perform his duties for thirty consecutive days or vice versa.

There is no functional incompatibility so long as the functions of the two offices are not inconsistent, such as where one is subordinate to the other, or where a "contrariety and antagonism would result in the attempt by one person to faithfully and impartially discharge the duties of both." *Haymaker v. State*, 22 N.M. 400, 403-04, 163 P. 248, 249 (1917) (holding that the same person could not be both a member of a school board and its clerk where it was found that she had cast the deciding vote as a board member on matters pertaining to her interests as clerk, voted herself into the clerk's position, fixed her salary as clerk, and approved warrants for payment of her salary). Cf. *State ex rel. Chapman v. Truder*, 35 N.M. 49, 289 P. 596 (1930) (applying Haymaker test and finding that offices of district attorney and mayor were compatible).

The legislature has no inherent authority to oversee local school boards or to supervise, hire or discharge school board members. See *Reilly v. Ozzard*, 166 A.2d 360, 371 (N.J. 1960) (office of county school commissioner was not subordinate to or controlled by office of state legislator "in any executive, administrative or judicial sense"). See also AG Op. No. 77-26 (1977) (offices of legislator and mayor are not incompatible; "neither office is subordinate to the other, nor are their functions or duties inconsistent, contrary or antagonistic"). Although the legislature appropriates funds for public school support and, arguably, a school board member serving as a legislator might experience a "contrariety and antagonism" in attempting to objectively allocate the state's money, this kind of potential conflict is not sufficient to preclude a local school board member from serving as legislator in a state which has a "citizens" legislature. *Roswell Indep. Schools*, slip op. at 13 (also observing that "[i]n a sparsely populated state like New Mexico, it would prove difficult, if not impossible, to have a conflict-free legislature"). Accordingly, we conclude that common law incompatibility principles do not preclude a legislator from membership on a local school board.

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GENERAL FOOTNOTES

[n1](#) See, e.g., N.M. Const. art. XII, § 14 (procedures for recalling a local school board member from "office" by school district voters); NMSA 1978, § 22-5-9.1 (Repl. Pamp. 1989) (requiring school board members to take the oath of office prescribed by N.M. Const. art. XX, § 1); AG Op. No. 69-16 (1969); AG Op. No. 67-33 (1967); AG Op. No. 64-20 (1964); AG Op. No. 57-183 (1957). Other state's courts have held that local school board members are public officers. See, e.g., *Williams v. Douglas*, 473 S.W.2d 896, 898 (Ark. 1971) (citing cases).

[n2](#) Article V, Section 1 of the New Mexico Constitution states that "[t]he executive department shall consist of a governor, lieutenant governor, secretary of state, state

auditor, state treasurer, attorney general and commissioner of public lands." According to Judge Hartz, the constitution's structure "makes it apparent that article III, section 1 refers only to the executive department described in article V." Roswell Indep. Schools, concurring slip op. at 15.

[n3](#) Under the state's constitution, legislators receive per diem and mileage and "no other compensation, perquisite or allowance." N.M. Const. art. IV, § 10. Based on the constitutional provision's wording, past opinions of this office have concluded or assumed that the per diem and mileage permitted by that provision constitute "compensation." See AG Op. No. 71-11 (1971); AG Op. No. 59-68 (1959). See also AG Op. No. 69-135 (1969) (payment or per diem in addition to actual expenses was an increase in compensation prohibited by N.M. Const. art. IV, § 27). But see AG Op. No. 59-91 (1959) (interpreting "per diem expenses" as referring to reimbursement only and overruling AG Op. No. 59-68 to the extent it was contrary). Thus, whether per diem and mileage constitute "compensation" for some purposes is at least debatable.

[n4](#) The Court of Appeals' decision effectively overrules AG Op. No. 88-20 (1988) which concluded that teachers and administrators were precluded by NMSA 1978, §§ 2-1-3 and 2-1-4 from serving as state legislators. The decision also casts doubt on AG Op. No. 89-34 (1989) to the extent it concluded, based on AG Op. No. 88-20, that (1) a legislator's ability to contract with a school district was limited by N.M. Const. art. IV, § 28, which prohibits legislators, during their term and one year afterwards, from having an interest in a contract with the "state" authorized by law during the legislator's term; and (2) school districts were "state agencies" for purposes of the New Mexico Conflict of Interest Act's restrictions on contracts between legislators and state agencies. NMSA 1978, § 10-16-9 (Repl. Pamp. 1990).

[n5](#) See also NMSA 1978, § 10-3-2 (Repl. Pamp. 1990) (office of school board member shall be vacant if the member misses six consecutive regular meetings and may be declared vacant by majority vote of the remaining members if the member misses four consecutive meetings).