

Opinion No. 42-4141

August 21, 1942

BY: EDWARD P. CHASE, Attorney General

TO: Mr. C. R. Sebastian State Comptroller Santa Fe, New Mexico

{*233} In your letter of August 6, 1942, you relate that the duly elected and qualified County School Superintendent of Taos, New Mexico has been drafted in the Army, and left Taos County on August 1, 1942. In the light of these premises you request our opinion on the following three questions:

"1. Does a vacancy exist when a county officer moves from the county and can not perform his duties as the elected official and has no deputy provided by statute to act in his place?

"2. Does the Board of Education have the power to appoint an Acting County School Superintendent?

"3. If a vacancy does exist, what Board has the authority to designate an Acting Superintendent?"

In view of the questions propounded, let us hasten to review the provisions of Section 96-105, New Mexico Statutes Annotated, 1929 Compilation, which 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."

and also Section 96-107, New Mexico Statutes Annotated, 1929 Compilation:

"Any office belonging to the class mentioned in section 3954 (96-105) becomes vacant under any of the following circumstances:

1. By death of the party in office;
2. Removal of the officer as provided by this chapter;
3. Failure of the officer to qualify as provided by law;
4. Expiration of the term of office when no successor has been chosen as provided by law;

5. When the officer removes from the county in which he is elected and in case of municipal officers, when he removes from the town or city for which he is elected:

6. Absence from the county for six consecutive months, and in cases of municipal officers, absence for such length of time from the village, town or city for which he is elected; but this provision does not apply to those officers wherein the law provides that the duties may be discharged by a deputy, when such absence is due to illness or other unavoidable cause;

7. By resignation of the officer;

8. By an officer accepting and undertaking to discharge the duties of another incompatible office."

It is patent that the first four and seventh circumstances set forth under Section 96-107, supra, cannot apply in the instant case for the reasons: (1) the superintendent is alive; (2) removal proceeding have not been instituted, nor has he been removed from office; (3) the superintendent has qualified; (4) his term of office has not expired; and (7) he has not resigned.

In determining whether circumstance {^{*234}} 5 applies, it is necessary for us to determine whether the word "remove," as therein used, means a change of legal residence or means the mere physical removal of one's person from the county. If the former interpretation is placed on the word "remove," no vacancy will exist in the absence of an express desire by the county school superintendent to the contrary. If the latter construction be placed upon the word "remove," a vacancy will, at this time, exist. Our Supreme Court has never defined nor interpreted this portion of Section 96-107, but we find that the courts of other states, in construing and interpreting similar provisions where the word "remove" was used, have held that a change of legal residence was contemplated. See *Prather v. Hart*, 24 N. W. 282, 283, 17 Neb. 598; *Davis v. Brandon*, 75, So. 908,909, 200 Ala. 160; *Barstow v. Stone*, 52 P. 48, 51, 10 Colo. App. 396; *Stone v. Granite State Fire Ins. Co.*, 45 A. 235, 236, 69 N. H. 438; *Ware v. Schintz*, 60 N. E. 67, 69, 190 Ill. 189; *P. R. Smith Motor Sales v. Loy*, 3 S. E. (2d) 190, 191, 194, 173 Va. 117.

Thus, as heretofore related, in the absence of an expressed intention on the part of the county school superintendent to the contrary, his removal to the Armed Forces would not create a change of his legal residence, and especially is this true in New Mexico, by reason of Article VII, Section 4, of our Constitution, which reads as follows, to-wit:

"No person shall be deemed to have acquired or lost residence by reason of his presence or absence while employed in the service of the United States or of the state, nor while a student at any school."

Circumstance 6 of Section 96-107, supra, we believe to create a vacancy subsequent to the time that the county school superintendent has been absent from the county for six

consecutive months. A county school superintendent does not fall under the exception related in circumstance 6, for the reason that our law does not provide that the duties of such an office may be discharged by a deputy. In this connection, it is to be noted, however, that since the county school superintendent did not leave until August 1, 1942, no vacancy has, as yet, occurred under the provision of the statute. Our conclusion in respect to circumstance 6 is not, in our opinion, contrary to or in conflict with the provisions of Chapter 10, Laws of 1941. *Gullickson v. Mitchell*, 126 P. (2d) 1106.

As to circumstance 8, I am of the opinion that it does not apply. Our Supreme Court, in the case of *Haymaker v. State*, 22 N.M. 400, 163 P. 248, referred with approval to the following rule:

"The incompatibility between two offices, which upon the acceptance of the one by the incumbent of the other operates to vacate the latter, is not simply a physical impossibility to discharge the duties of both offices at the same time, but it is an inconsistency in the functions of the two offices, 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."

Also, to the same effect, see *People v. Green*, 58 N. Y. 295; *Stubbs v. Lee*, 64 Me. 195, 18 Am. Rep. 251; *State v. Brown* 5 R. I. 1; C. J., Sec. 46, p. 941; 22 R.C.L., Sec. 55, p. 413. .

In view of the foregoing authorities, I conclude that the county school superintendent herein involved has not accepted or undertaken to discharge the duties of another incompatible office.

{*235} Summarizing the foregoing, it is my opinion, in response to your first question, that under the facts related by you, no vacancy has, as yet, occurred in the office of the county school superintendent of Taos, New Mexico. There will, however, be a vacancy in said office subsequent to the time when six month have elapsed from August 1, 1942.

As to your second question, I am of the opinion that even when a vacancy occurs, neither the Board of Education nor any other board has the power, under our statutes, to appoint an "acting" county school superintendent.

In answer to your third question, we turn to the provisions of Section 33-4233, New Mexico Statutes Annotated, 1929 Compilation, which reads as follows, to-wit:

"Whenever any vacancy in any county or precinct office in any of the counties of this state other than a vacancy in the office of county commissioner, shall occur by reason of death, resignation or otherwise it shall be the duty of the board of county commissioners of the county where such vacancy has occurred to fill said vacancy by appointment and said appointee shall be entitled to hold said office until his successor shall be duly elected and qualified according to law."

In view of the foregoing statute, I conclude that if a vacancy occurs, it shall become the duty of the county commissioners of Taos County to appoint a new county school superintendent.

Trusting that the foregoing sufficiently answers your inquiries, I am

By HOWARD F. HOUK,

First Asst. Atty. General