Opinion No. 58-145

July 8, 1958

BY: OPINION OF FRED M. STANDLEY, Attorney General Robert F. Pyatt, Assistant Attorney General

TO: Honorable Earl E. Hartley, State Senator, Curry County, Clovis, New Mexico

QUESTION

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The residents of a rural school district are anxious to become a municipal district. With that thought in mind they are proceeding to incorporate as a village under Article 4 of Chapter 14, New Mexico Statutes Annotated. In this connection we need to know whether or not the provisions for petition as set out in 73-10-10 are in lieu of the provisions for election as set out in 73-10-7.

CONCLUSION

No.

OPINION

ANALYSIS

Section 73-10-7, N.M.S.A., 1953 Compilation, provides:

"Hereafter, upon incorporation of any city, town, or village, a petition bearing the signatures of not less than 10% of the qualified electors of the municipality and the territory annexed thereto for school purposes may, at any time after such incorporation, be presented to the county board of education asking that an election be held to permit the qualified electors of the municipality and the territory annexed thereto for school purposes to vote upon the question as to whether the school or schools of such district shall become a municipal school, schools, or school district. The county board of education shall, within ten (10) days from the filing of such petition, meet and determine the sufficiency of the petition and the genuineness of the signatures and upon approval of such petition shall order an election to be held for such purpose. Such election shall be ordered, called, held, conducted and canvased in substantially the same manner as is provided for school bond elections.

The creation of no municipal school, schools, or school district as authorized herein shall become effective until July 1 following the creation thereof.

The governing board of each such municipal school, schools, or school district shall consist of five (5) members who shall be selected and who shall respectively hold office and in all things be governed by the law now relating to municipal schools; Provided that in event such municipal school, schools, or school district is created subsequent to the date now provided by law for the election of members of municipal school districts, a special election shall be ordered, called, held, conducted and canvassed, as now provided by law, for the selection of members of such municipal school, schools or school district."

At the outset, certain incorrect statements by the compilers must be disposed of. In the 1955 Supplement, under § 73-10-7, is a statement that Stokes vs. Board of Education, 55 N.M. 213, 230 P. 2d 243, held that what is now § 73-10-7 was repealed by implication by Laws 1941, Chapter 123, Sections 1 and 3, now compiled as §§ 73-20-1 and 3, N.M.S.A., 1953 Compilation, 1957 Supplement. This is not so. The Stokes case neither so held nor intimated. It did hold § 55-907, N.M.S.A., 1941 Compilation, was repealed by Laws 1941, Chapter 123, Sections 1 and 3, This much and no more. Section 55-907 (1941) was not carried into the present compilation for good reason. It is error to suppose however, that § 73-10-7 is nonexistent, or was impliedly repealed by the Stokes case.

At any rate, in Opinion of the Attorney General No. 5234, rendered August 2, 1949, the Village of Loving had been recently incorporated. Inquiry was made as to what action should be taken by Loving to change the classification of its school from rural to municipal. (Actually, this was regrettable confusion as it failed to observe the distinction between municipalities and municipal school districts.) To continue, it was held what is now § 73-9-13 controlled the case. It provides:

"Where the average daily attendance for the last two (2) preceding school terms is less than 100 in school districts within incorporated cities, towns and villages, including the territory thereto annexed for school purposes, and such vacancies have been certified by the county school superintendent to the county board of education, the said school district within such incorporated cities, towns and villages including the territory thereto annexed for school purposes, shall be classed and governed as rural districts and be within the jurisdiction and control of the county board of education, and if and when such districts shall have an average daily attendance of 100 or more pupils for two (2) or more consecutive school terms and such fact shall have been certified to the state superintendent of public instruction, such districts shall become municipal districts upon the certification of the state superintendent of public instruction, and shall be governed in all respects as municipal school districts."

We disagree with the above opinion. Without passing on the purpose and meaning of § 73-9-13, we do not see how it controls. Rather, the situation you have in mind is somewhat unusual, to a degree, since it deals with recently incorporated cities, towns and villages and alteration of school status as a consequence thereof. Section 73-9-13 is not applicable. Instead, it deals with fluctuating attendance, and more importantly, seems to presuppose prior status as a municipal school district with subsequent change

to rural status if the A.D.A. warrants, etc. In addition, our predecessor dismissed § 73-10-7 because, seemingly, it employed the language ". . . and the territory annexed thereto for school purposes . . .". But § 73-9-13 has similar language. To the extent No. 5234 conflicts with this opinion, it is overruled.

The other statute cited by you is § 73-10-10, N.M.S.A., 1953 Compilation. It reads:

"Whenever a city, town or village has been or shall hereinafter be incorporated, the board of education of said city, town or village may, in its discretion, annex thereto, for school purposes only, the remainder or any part of the remainder of the district or districts from which such city, town or village was organized whenever a majority of the qualified electors residing within the territory to be annexed shall (sign and) file (a written petition) with said board of education for such purpose. When said remainder or part thereof of said additional outside territory has been by resolution of said board, annexed to said city, town or village it shall be deemed to be a part of said city, town or village for all school purposes."

You will observe the latter statute has no election provision as does § 73-10-7, although each have petition requirements, but with far less stringent requirements in § 73-10-7.

Perhaps the best way to initially answer your query is to refer to Green vs. Curry County Board of Education, 44 N.M. 116, 99 P. 2d 445. The facts of the case, 44 N.M. 117, were as follows:

"The essential facts in the the case are as follows: Grandy School District No. 61 is a consolidated school district in Curry and Quay counties, New Mexico. The major portion of the district is located in Curry County, New Mexico. All buildings of the district are located in the Village of Grady, Curry County, New Mexico.

Prior to the year 1939 Grady was an unincorporated village. Early in the year 1939 it was incorporated as a village. All of the territory embraced in the village of Grady, as incorporated, is located in School District No. 61.

Immediately following the incorporation of the village of Grady a petition containing the signatures of more than ten per cent of the qualified electors of the entire Grady School District No. 61 was presented to the Curry County Board of Education praying for an election to be held in said district to vote upon the question as to whether School District No. 61 should become a municipal school district in the manner provided by L. 1937, Ch. 204, Sec. 2."

In the case, both sections you have cited were construed, and at 44 N.M. 118-119, Mr. Justice Zinn said of what is now § 73-10-7:

"The proceedings to be followed for the conversion of a rural school district into a municipal school district are clearly set out in L. 1937, Ch. 204, Sec. 2. This expressly provides that the county board of education shall, within ten days from the filing of the

necessary petition, meet and determine the sufficiency of the petition and the genuineness of the signatures. All this was done. . . ."

and at 44 N.M. 119 said of what is now § 73-10-10:

"On cross-appeal, appellees claim that before an election as proposed by appellants can be held that L. 1937, Ch. 204, Sec. 6, must be complied with . . .

It is here conceded that when the village of Grady was incorporated no petition was circulated among the people living within school district 61, but who resided outside of the boundaries of the new municipality, for the purpose of obtaining their signatures to a petition praying for annexation to the municipal school district in accordance with said Sec. 6 as construed by cross-appellant.

The answer is obvious. The former consolidated school district has not yet been transformed into a municipal school district. That was the object of the election which the trial court held invalid. Until the special election required by Sec. 2 of said Ch. 204 is held to elect a municipal board of education, action if any that might be required of said board of education by Sec. 6, where applicable, could not be taken. Hence, whatever be the meaning of Sec. 6, which admittedly is somewhat obscure, the present facts do not call for an application of the requirements thereof.

The cross-appeal is without merit."

Accordingly, § 73-10-10 is not in lieu of § 73-10-7.

At the risk of going beyond the scope of the inquiry, § 73-10-10 is possessed of a possible infirmity. We say this since the provisions of § 73-10-10 may be sought to be employed.

You will observe certain bracketed inserts in this section as quoted from the compilation. The compiler's note says this language was in Laws 1937, Ch. 204, Sec. 6., but not in the enrolled and engrossed bill. A reading of the session laws and an investigation in the Secretary of State's office of the enrolled and engrossed bill discloses this to be so.

Of course, there is a discrepancy, and to the extent thereof, the enrolled and engrossed bill controls, Section 1-2-1, N.M.S.A., 1953 Compilation, or more accurately, is all that can be properly considered by us in interpreting the law, despite the fact that in a non-legal sense, all would agree the language in brackets was intended by the members of the Legislature to have been duly enacted.

Now, does the fact we are restricted to the enrolled and engrossed bill mean that we must strike down the statute as being void for uncertainty? We think not. Enough sense can be derived therefrom to give effect to § 73-10-10. This we must do. Accordingly, if a majority of the qualified electors residing in the territory to be annexed give their

consent, in writing duly filed, to the annexation, whatever the document evidencing the consent may be styled, and the other conditions of § 73-10-10 are met, we think § 73-10-10 can be followed.

Admittedly, this leaves much to be desired, and it may be that you would want to place this opinion in your legislative file, in order that § 73-10-10 can be placed in proper order when the Legislature next convenes.

By way of passing, we held in Opinion of the Attorney General No. 5891, dated January 20, 1954, that under § 73-10-7, a municipal school district is not ipso facto created upon incorporation as a municipality, but that § 73-10-7 must be nonetheless followed. Consequently, the petition provisions of § 73-10-10 are not in lieu of the election provisions of § 73-10-7.