

May 7, 1997

No. 8248

This opinion is in response to a question from C. Gregory McMurdo, Deputy Superintendent of Public Instruction, concerning the office of State Superintendent of Public Instruction (state superintendent).

QUESTION PRESENTED

Does the Legislative Assembly have the constitutional authority to repeal existing statutes providing for the election of the state superintendent and to provide instead that the Governor shall be the state superintendent?

ANSWER GIVEN

The Legislative Assembly may repeal the statutes providing for the election of the state superintendent and provide that the Governor shall be the state superintendent.⁽¹⁾

DISCUSSION

We first discuss briefly the relevant constitutional and statutory provisions and certain attorney general opinions and court cases that have discussed the office of the state superintendent and its function within the system of public education in Oregon. Then, we address your specific question.

I. Background

The office of superintendent of schools has existed in Oregon since 1849 when the territorial legislature provided for a system of county schools and for a territorial superintendent to be elected triennially. Statutes of Oregon, ch I-II (Common Schools), at 66, 68 (Bush 1851). Two years later, the legislature abolished the position of territorial superintendent and transferred certain fiscal duties to the county commissioners of each county. *Id.* at 76.

Reference to the office reappeared in the Oregon Constitution, which was approved by the people of Oregon in 1857 and became effective on February 14, 1859. Article VIII of the Constitution is devoted to education and school lands. Section 1 states:

The Governor shall be superintendent of public instruction, and his powers, and duties in that capacity shall be such as may be prescribed by law; but after the term of five years from the adoption of the Constitution, it shall be competent for the Legislative Assembly to provide by law for the election of a superintendent, to provide for his compensation, and prescribe his powers and duties. --

Article VIII, section 1, has not been amended since the Oregon Constitution was approved by the people.

On its face, Article VIII, section 1, mandates the existence of a state superintendent and requires the Governor to act in this capacity for at least five years. Thereafter, the legislature "shall be competent" to enact laws to provide for the election of a superintendent. Section 1 is silent as to the superintendent's powers, but directs the legislature to prescribe them.

For the first 16 years of statehood, the Governor served as state superintendent. Then, in 1872 the legislature enacted "An act to establish a uniform course of public instruction in the common schools of this state." General Laws of Oregon, ch IV (Common Schools), §§ 1-14, at 502-13 (Deady and Lane 1872). Under this Act, the state superintendent was "hereby detached from the office of governor," and "a distinct and separate office" was created. *Id.* § 1, at 502. The state superintendent was to be elected initially by joint ballot of the Legislative Assembly⁽²⁾ and then by election every four years, beginning with the general election in 1874. The Act prescribed the state superintendent's duties in detail and established his salary at \$1500 per year. It also created a state board of education, consisting of the Governor, the Secretary of State and the state superintendent, which was authorized, among other things, to prescribe a series of rules for the general governance of public schools. *Id.* §§ 15, 17, at 504-505.

In 1941, the state board was enlarged by adding four appointed members to serve with the Governor, Secretary of State and state superintendent. Or Laws 1941, ch 370. Currently, the state board consists of seven gubernatorially appointed public members and has broad authority to establish rules and standards for Oregon public schools. ORS 326.021, 326.051. The state superintendent functions as the administrative officer of the state board and the executive head of the

In *State ex rel Musa v. Minear*, 240 Or 315, 401 P2d 36 (1965), the Supreme Court of Oregon considered whether Article VIII, section 1, rendered unconstitutional a statute that repealed laws requiring the popular election of the state superintendent and provided that the state board of education would "elect" the superintendent. The issue, as defined by the Court, was "whether the [Legislative] Assembly was free to make the office appointive rather than elective, if it saw fit to create the office at all." *Id.* at 318. The court held that the statute was unconstitutional and concluded that Article VIII, section 1, requires the state superintendent to be selected through an election by the electors of the state.⁽³⁾

We previously considered your question in a 1959 opinion when we were asked about the constitutionality of proposed legislation providing that the Governor be superintendent of public instruction and repealing existing statutory provisions for the election of a superintendent. 29 Op Atty Gen 161 (1959). We concluded that the phrase "shall be competent" to provide for the election of a state superintendent as used in Article VIII, section 1, means that the legislature has the power to decide whether the state superintendent shall be elected. We also acknowledged in our 1959 opinion that the legislature has plenary authority to enact, amend or repeal laws except as clearly prohibited by the constitution, but we noted that Article VIII, section 1,

is susceptible of being interpreted as imposing a mandatory duty upon the Legislative Assembly to continue the office of Superintendent of Public Instruction as an elective office. * * *

Article VIII, § 1, Oregon Constitution, does provide for the election of the office of Superintendent of Public Instruction, which would apparently result in the creation of a "constitutional office," which the legislature cannot abolish * * *. Under this construction the first portion of [Article VIII, section 1, providing for the governor to serve as state superintendent] would have served its purpose and will not be revived by a repeal of provisions relating to the elective office.

Id. at 163. We finally concluded that the issue was a close one and expressed no opinion on whether a law to reestablish the governor as the state superintendent would be constitutional.⁽⁴⁾

With this background in mind, we turn to your question.

II. Authority to Repeal Laws for the Election of the State Superintendent

The primary issue raised by your question is whether the legislature may constitutionally repeal laws providing for the election of the state superintendent and provide that the Governor shall be superintendent. We begin with the established principle that the legislature has absolute power to enact laws as it deems fit, except as prohibited by the Constitution of Oregon or by the constitution or laws of the United States. *Bd. of Educ. v. Fasold*, 251 Or 274, 279, 445 P2d 489 (1968); *State ex rel Overhulse v. Appling*, 226 Or 575, 585, 361 P2d 86 (1961); 43 Op Atty Gen 17, 84-5 (1982).

The legislature's power to enact laws necessarily includes the power to modify or repeal prior laws. 1A Sutherland Statutory Construction § 23.03 (5th ed 1992). As a general matter, the legislature may not prohibit itself or a future legislature from modifying or repealing existing laws. *Stone v. Mississippi*, 101 US 814, 817, 25 L Ed 1079 (1879). Hence, we conclude that the legislature has the authority to repeal statutes calling for an elected state superintendent unless there is a clearly expressed limit under Article VIII, section 1, or another part of the Oregon Constitution.

In interpreting a provision of the Oregon Constitution, we consider the specific wording of the provision, the case law surrounding it and the historical circumstances that led to its creation. *Neher v. Chartier*, 319 Or 417, 422, 879 P2d 156 (1994). The text of Article VIII, section 1, provides that anytime after five years from the adoption of the Constitution,

it shall be competent for the Legislative Assembly to provide by law for the election of a superintendent * * *
* and prescribe his powers and duties.

This provision empowers the legislature to vest the office in an elected official. The Governor is an elected official. Therefore, it would appear that the legislature may exercise its prerogative by restoring the state superintendent to the office of the Governor and prescribing the Governor's duties as superintendent. We have previously concluded that the state superintendent is a constitutional office. 33 Op Atty Gen 197, 199 (1967). An argument can be made that two constitutional offices may not be held by a single elected official because to do so effectively abolishes one of the offices. See 63A Am Jur 2d *Public Officers and Employees* § 32 (2nd ed 1984). However, the language of Article VIII, section 1, specifically permits a single person, i.e., the Governor, to hold both constitutional offices. Thus, this argument fails. Similarly, an argument can be made that if the Governor also holds the office of state superintendent, he is holding dual lucrative offices in violation of Article II, section 10, of the Oregon Constitution. There is no question that both the office

of Governor and state superintendent are public offices. So long as one of the public offices does not have any pay associated with the performance of its duties, it will not constitute a lucrative office. *Holman v. Lutz*, 132 Or 185, 215-16, 282 P 241 (1929). In addition, Article II, section 10, specifically permits holding more than one lucrative office at the same time if the constitution expressly provides for that. Article VIII, section 1, specifically provides for one person, i.e., the Governor, to hold both the offices of Governor and state superintendent.

An argument might also be made that the legislature's authority extends only to providing for the election of a state superintendent other than the Governor and does not authorize the legislature to reverse that action once it is taken. In 29 Op Atty Gen 161, we cited *State ex rel. Powers v. Welch*, 198 Or 670, 259 P2d 112 (1953) as possible authority for the proposition that once the state superintendent was made an elective position the legislature must continue the office as such. We now conclude that *Powers* does not support that conclusion. At issue in *Powers* was an attempt by the legislature to add, by statute, qualifications necessary to become county surveyor in addition to those imposed by the constitution. The court found the law to be well established that when the "state constitution provides for certain officials and names the qualifications for such officers, the legislature is without authority to prescribe additional qualifications unless the constitution, either expressly or by implication, gives the legislature such power." *Id.* at 672-73. In concluding that the constitutional requirement that the county surveyor be an elector of the county was a qualification intended to limit the power of the legislature to prescribe additional requirements, the court quoted from an Illinois case:

"It is essential to the freedom of elections mentioned in the constitution that every voter shall be permitted to choose from all eligible persons and shall not be required to choose from certain classes. As he cannot be restricted in his choice of senators to residents of a particular county, as has been mentioned, so he cannot be restricted in his choice of Governor to persons who are more than thirty-five years of age or have been citizens of the United States for ten years; * * * in his choice of superintendent of public instruction to persons holding a State teacher's certificate * * *."

Id. at 677 (quoting *The People v. McCormick*, 103 NE 1053 (Ill 1913)). Thus, we seemed to be suggesting in our earlier opinion that *Powers* may lead to the conclusion that once having created the constitutional office of state superintendent as an elected office, the legislature would be unconstitutionally prescribing an additional qualification for that office by restricting the voters' choice of the superintendent to someone who is also the Governor. Unlike the county surveyor, however, the state superintendent does not have any qualifications set out in the constitution. In this situation, *Powers* notes that "the legislature may create any reasonable qualifications for * * * a constitutional officer where no qualification is prescribed in the constitution itself." 198 Or at 673.

Article VIII, section 1, specifically provides that the legislature "shall be competent * * * to provide by law for the election of a superintendent." We interpret the text of this provision to give the legislature both the legal authority to provide for a separately elected state superintendent, and the discretion to decide whether a separately elected superintendent is appropriate. Article VIII, section 1, does not limit, either expressly or by implication, the legislature's authority to reverse its decision and return the position of state superintendent to the Governor. In fact, the people already expressly permitted the Governor and the state superintendent to be one office; that choice was authorized when the constitution was ratified.

Thus, we conclude based on the text of Article VIII, section 1, that the legislature may repeal the existing statutes providing for a separately elected superintendent and provide instead that the Governor shall be the state superintendent.

Turning to relevant court decisions, the only significant case interpreting Article VIII, section 1, aside from *State ex rel Musa v. Minear*, 240 Or 315, described above, is *Bd. of Educ. v. Fasold*, 251 Or 274, 445 P2d 489 (1968). In *Fasold*, the Supreme Court considered whether Article VIII, section 1, limited the legislature's authority under Article VIII, section 3, to delegate responsibility for regulating and administering the public school system to the State Board of Education (board). The court held that the constitutional creation of the state superintendent is not a limitation or prohibition on the power of the legislature to create the board and to give the board authority to adopt and enforce rules on average class loads per teacher. Although the *Fasold* court based its decision primarily on the legislature's plenary authority and the constitutional directive under Article VIII, section 3, to "provide by law for the establishment of a uniform, and general system of Common schools," the court's recognition of the legislature's broad powers in matters of educational policy further supports our conclusion that Article VIII, section 1, does not limit the legislature's ability to return the state superintendent to the office of the governor.

The historical circumstances at the time of the adoption of the Constitution do not indicate that Article VIII, section 1, was intended to preclude the legislature from making the state superintendent the Governor. The only identified purpose for establishing the Governor as state superintendent was to save money. *Fasold*, at 278; *Musa*, at 317. The framers of the constitution made allowance for a future time when the responsibilities of Governor and superintendent "might unduly tax

the energies of one man," and they apparently anticipated that a future legislature would create a separate elected office when sufficient resources were available. *Musa*, at 317-18. However, despite these apparent expectations, the framers chose not to prescribe criteria for the legislature to follow in making this decision. Under these circumstances, the legislature is free and competent to choose its own criteria, within the parameters of Article VIII, to determine the status of the state superintendent. *Cf.* 39 Op Atty Gen 560, 562 (1979) (in absence of criteria under Oregon Constitution, senate may base its decision to confirm or reject governor's appointments on whatever criteria it chooses to apply.)

An argument could be made that having the Governor take on the duties of state superintendent now would "unduly tax the energies of one man." When the Oregon Constitution was adopted, administrative agencies did not exist; all of the duties of the Governor were carried out by the Governor and one secretary. Today, the Governor has a staff to assist him in carrying out his duties. Similarly, the state superintendent has a staff to help her carry out her duties. Thus, we conclude that the fact that the Governor could not carry out all his duties as Governor and the state superintendent without assistance does not prohibit the legislature from providing that the Governor serve in both capacities. *See* 33 Op Atty Gen 197, 198 (1967) ("To hold that offices established by the Constitution were restricted to duties and functions normally associated with the office at the time of the adoption of the Constitution would strait-jacket constitutional government and confine its grants of power to those activities that predated the present scientific age.").

We find nothing in the specific wording of the Oregon Constitution, the relevant case law or the history of Article VIII, section 1, that would limit the authority of the legislature with respect to its decision to provide for an elected state superintendent. Therefore, we conclude that the Legislative Assembly may constitutionally repeal laws providing for the election of the state superintendent and provide that the Governor shall serve in that capacity.

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Attorney General

1. For purposes of this opinion, we assume that any legislation repealing the existing statutes and making the Governor the state superintendent would be effective only after the end of the term of an incumbent superintendent. If this were not the case, additional legal issues would arise.

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2. The legislature failed to elect a state superintendent during the 1872 legislative session, reportedly because of the need to attend to more pressing business. As a result, the Governor exercised his authority to fill the vacancy by appointing Sylvester Simpson as state superintendent on January 30, 1873. Raymer, *A History of the Superintendent of Public Instruction in the State of Oregon, 1849 to 1925*, at 37 (1926).

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3. The court was not required to consider whether a procedure for an "election" by the Legislative Assembly would have been constitutional. As discussed above, the 1872 statute called for the first superintendent to be elected by both houses of the legislature.

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4. In 1987, the legislature enacted Senate Bill 397, which repealed laws for the election of the state superintendent and restored the office to the Governor. The bill provided that the Governor could appoint a deputy superintendent, subject to Senate confirmation, who would have authority to perform any act or duty of the office of state superintendent. Governor Goldschmidt vetoed the bill, partially on

the ground that it was of "doubtful constitutionality." Senate Journal 200 (1987).

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