

Opinion No. 54-5952

May 20, 1954

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. L. D. Wilson Administrative Engineer State Highway Commission State Capitol Santa Fe, New Mexico

{*408} You request an opinion as to whether employment by the Highway Commission of a person, convicted of a felony who has not been pardoned or had his political rights restored, in any capacity other than as deputy or assistant to the chief highway engineer would be a violation of Section 10-103.

This law originally passed as Section 2, Chapter 44 of the Laws of 1912, reads as follows:

"10-103. Deputies and assistants convicted of crimes -- Penalty for appointment or retention. -- It shall be unlawful for any state, county, district, or municipal officer to appoint, employ, or retain as a deputy or assistant any person convicted of a felonious or infamous crime, unless such person has been pardoned or restored to political rights; and any public officer who shall knowingly violate the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction shall be punished by fine of not less than one hundred dollars (\$ 100) nor more than five hundred dollars (\$ 500) and, in addition to such punishment, shall be removed from office in accordance with the provisions of this chapter.

{*409} Article 5, Section 14 of the Constitution which sets up the permanent Highway Commission, provides: "A. * * * it shall have charge of all matters pertaining to Highway employees, * * *" and under "D. * * * The State Highway Commission shall appoint a competent highway engineer, who shall be chief administrator of the Highway Commission and shall have charge of the hiring and firing of employees of the Highway Commission subject to the control and supervision of the Highway Commission." We need not discuss the full effect of this constitutional provision on Section 10-103 other than to state that it appears from it that the Commission is the final authority in the hiring of employees.

Section 10-103 prohibits the employment of a deputy or an assistant by a state officer and we are convinced that it means as **his** deputy or assistant, rather than the deputy or assistant of some other state employee. If the statute meant otherwise it would conceivably prohibit the employment of all such persons as no doubt such employee is an assistant to some other. Who then are "state officers"? The Supreme Court has provided us with a comprehensive formula for determining this question, first set forth in *State v. Quinn*, 35 N.M. 62, and later set forth in *State v. Fernandez*, 40 N.M. 288, and *Pollack v. Montoya*, 55 N.M. 390. The Supreme Court has adopted the test laid out in *State ex rel. Barney v. Hawkins*, 79 Mont. 506, 257 Pac. 411, 53 A.L.R. 583. Five

elements are indispensable to create a public office as distinguished from a public servant or employee, and we quote:

"(1). It must be created by the Constitution or by the Legislature or created by a municipality or other body through authority conferred by the Legislature; (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers conferred, and the duties to be discharged, must be defined, directly or impliedly, by the Legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power, other than the law, unless they be those of an inferior or subordinate office, created or authorized by the Legislature, and by it placed under the general control of a superior officer or body; (5) it must have some permanency and continuity, and not be only temporary or occasional. In addition, in this state, an officer must take and file an official oath, hold a commission or other written authority, and give an official bond, if the latter be required by proper authority."

We know of no person other than the Commissioners themselves who will completely pass the tests above set forth, with the possible exception of the Chief Highway Engineer, but his case is not free from doubt. It would appear, therefore, that the employment by the Commission or the Chief Highway Engineer of a person in any position other than as deputy or assistant to the Commissions or the Chief Highway Engineer would not violate the statute. And this might not be true as to the Chief Highway Engineer. See *Dean v. Humphrey*, (Ark. 1954), 264 S.W. 2d 607.

In Attorney General's Opinion No. 5448, dated October 23, 1951, to Robert D. Castner, State Auditor, this office had occasion to define the words "clerk", "deputy" or "assistant" as used in Section 10-110, {**410*} N.M.S.A., 1941, the anti-nepotism statute. There we held that one employed as a levelman in the Highway Department could not be deemed a clerk, deputy or assistant within the meaning of the statute, and it would seem that the employment of an unpardoned felon in any minor position in a department would not violate the statute and that thus assisting, in the rehabilitation of such persons could be adopted by the Commission as its policy under the broad powers given it in matters pertaining to its employees by the Constitution above quoted.

Whether such persons could be employed as deputy or assistant chief highway engineer, or be placed in positions as division heads where this might be the effect, you have not inquired and we need not determine at this time.

We trust that this is the information you desire.

By: John T. Watson

Spe. Assist. Atty. General