

## Opinion No. 55-6235

July 25, 1955

**BY:** RICHARD H. ROBINSON, Attorney General

**TO:** Mr. John D. Murphy, District Attorney, Second Judicial District, Second Floor, Court House, Albuquerque, New Mexico

We have your request of July 7 for an opinion as to whether a member of the Legislature representing Valencia County can be appointed Deputy County Clerk.

As you pointed out, this involves Section 28, Article IV, of the New Mexico Constitution, which reads as follows:

"No member of the legislature shall, during the term for which he was elected, be appointed to any **civil office** in the state, nor shall he within one year thereafter be appointed to any civil office created, or the emoluments of which were increased during such term; nor shall any member of the legislature during the term for which he was elected nor within one year thereafter, be interested directly or indirectly in any contract with the state or any municipality thereof, which was authorized by any law passed during such term." (Emphasis supplied)

The controlling question is whether a deputy county clerk is a "civil office" within the meaning of this particular section of the Constitution. A "civil office" has been defined as follows:

"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." *State ex rel. Barney v. Hawkins*, 53 A.L.R. 583 at page 594, 257 P. 411 (Mont.).

We call your attention to the fact that the New Mexico Supreme Court has cited this definition in *State v. Quinn*, 35 N.M. 62, 290 P. 786, and *State ex rel. Gibson v. Fernandez*, 40 N.M. 288, 58 P. 2d 1197.

A deputy has been defined as follows:

"A deputy is said to be one who occupieth in right of another, and for whom regularly, his superior shall answer. A deputy has not any estate or interest in the office, but is as servant to the officer." *Erwin v. United States*, 37 F. 470, 475, 2 L.R.A. 229.

It is our opinion that a deputy county clerk is, in fact, a mere employee and not a civil officer within the contemplation of Section 28, Article IV, of the New Mexico Constitution. (For a detailed distinction between civil officer and employee, see 53 A.L.R. 595, 93 A.L.R. 333, and 140 A.L.R. 1076.)

We come to this conclusion for the following reasons:

1. A deputy county clerk is not required under New Mexico law to take an oath of office or file a bond.
2. A deputy county clerk does not exercise any authority within his own right. All acts performed by a deputy county clerk are in the name of his principal, the county clerk.
3. There is no permanence to this office, but service in the office is at the discretion of the county clerk.
4. In order to constitute a public office, some portion of the sovereignty must be vested in the occupant. *State v. Fernandez*, 40 N.M. 288, at 292. By the statutes of the State of New Mexico, Sections 15-39-1 to 15-39-11, N.M.S.A., 1953, the powers of the county clerk are vested in the office of county clerk and not the deputy. In fact, there are no provisions nor mention made for deputies in the sections of the New Mexico statutes creating the office of county clerk.

For the reasons hereinabove set out, we are of the opinion that the present representative of Valencia County could be appointed Deputy County Clerk and not violate Article IV, Section 28, New Mexico Constitution.

By Paul L. Billhymer

Assistant Attorney General