

Opinion No. 56-6396

February 20, 1956

BY: RICHARD H. ROBINSON, Attorney General

TO: Mrs. Natalie Smith Buck, Secretary of State, Santa Fe, New Mexico

You have asked this office for an interpretation of § 5-2-7, N.M.S.A., 1953 Compilation, which reads as follows:

"The bonds of all state officials, and of the members of all state boards and institutions, after having been recorded as required by law, shall be filed and kept in the office of the secretary of state; and all state bonds now filed elsewhere shall be transferred to the office of the secretary."

The following is quoted from the case of State ex rel. Gibson v. Fernandez, 40 N.M. 288, and adequately answers your inquiry concerning the definition of the term "state official":

"After an exhaustive examination of the authorities, we hold that five elements are indispensable in any position of public employment, in order to make it a public office of a civil nature: (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."

It should be added, however, that it is our opinion that should our statutes require a bond to be furnished by a state employee who might not technically fall within the above definition, that said bond should be filed and kept in your office. This interpretation is placed because of the wording of the above cited statute relative to the filing of all state bonds with your office.

You further ask what is the meaning of the phrase "all state bonds now filed elsewhere".

It is to be noted that this law was passed in 1905. It would, therefore, appear that certain statutes prior to that date made provision for the filing of certain bonds somewhere other

than with the then Secretary of the Territory. This is apparent from the title of Chapter 59, Laws of 1905, which reads as follows:

"An Act Providing for Uniformity in Filing Official Bonds."

Therefore, the subject phrase was intended to consolidate all state bonds, including bonds of members of state boards and institutions, in your office.

It is suggested that this opinion be circularized to all state departments, institutions, boards and commissions.

By J. A. Smith

Assistant Attorney General