

Opinion No. 59-19

March 3, 1959

BY: FRANK B. ZINN, Attorney General

TO: Senator Fabian Chavez, Jr. New Mexico State Senate Santa Fe, New Mexico

The employment security commission is a state agency, a part of the executive branch of state government and should not maintain its principal offices at a place other than the seat of state government.

OPINION

{*28} This is reply to your recent inquiry asking for an opinion on the questions:

Is the employment security commission a state office?

May the employment security commission maintain its principal offices at a place other than Santa Fe, the seat of state government?

It is my opinion that the employment security commission is a state agency, a part of the executive branch of state government, and that as such it should not maintain its principal offices at a place other than Santa Fe, the seat of state government.

The question of the proper location for those offices and agencies of state government created by the legislature as departments of the executive branch has been passed upon by the Attorney General in prior opinions. The latest of these was No. 57-46 dated March 8, 1957 holding that the Commission on Alcoholism might not establish its offices in Albuquerque or any place other than at the seat of government. It is my belief that the previous opinion was founded solidly in law.

The request you have made, and this opinion raise a larger and more serious problem that must be faced by the legislature as well as by this office. According to a summary study, there are twenty-one state agencies, created by the legislature as departments of the executive branch, having principal offices at places other than Santa Fe, the seat of state government. Article XXI, Section 6, makes Santa Fe the capital.

What constitutes an officer a state officer and his office an arm of the executive branch was answered by the Supreme Court of New Mexico in the case of **Pollack v. Montoya**, 55 N.M. 390, 234 P. 2d 336. The question was also answered on previous occasions by that Court in cases cited in the **Pollack** case. The same standards are applicable to determine whether a state agency, board or commission is an executive office. The standards are as stated by the Court, "The specific position must be created by law; there must be certain definite duties imposed by law on the incumbent; and they must involve the exercise of some portion of the government power." The employment

security commission clearly meets this test. Sections 59-9-10 et seq., New Mexico Statutes Annotated, contains the applicable legislative provisions creating that agency and specifying its duties, powers and authority. That agency derives all powers it has from the state; it was created by authority of the state and was endowed by the state with governmental and public powers. It exists {29} only at the pleasure of the state and exercises important executive powers.

The same test is met by many other agencies not located in the capital city.

In the **Pollack** case, the Court said further:

"The enumeration by the Constitution of certain officers constituting the executive departments of the state, Article V, Section 1, does not necessarily deprive the Legislature of the power to create other executive officers, although it cannot abolish any of those created by the Constitution."

There have been no New Mexico decisions directly on the question of the authority of the legislature to create new executive offices and to locate them at place other than the seat of government; nor are there any on the power of a newly created executive officer to locate his office or of the Governor to do so.

This identical question, however, has been met and resolved in other states. In 1954 in the state of Washington, in the case of **State ex rel Lemon v. Langlie**, 45 Wash. 2d 82, 273 P. 2d 464, a citizens suit brought when the Governor and the Attorney General failed or refused to act, thirteen state agencies which had located in Seattle or elsewhere than in Olympia, the state capital, were determined by the Supreme Court of that state to have been located contrary to the requirements of Washington's Constitution which contains language quite similar to that of New Mexico's.

Our Constitution, Article V, section 1, states in part:

". . . The officers of the executive department except the lieutenant-governor, shall during their terms of office, reside and keep the public records, books, papers and seals of office at the seat of government."

The Washington Constitution states:

"The governor, secretary of state, treasurer, auditor, superintendent of public instruction, commissioner of public lands, and attorney general, shall severally keep the public records, books and papers relating to their respective offices at the seat of government, at which place also the governor, secretary of state, treasurer and auditor shall reside."

With respect to the Washington agencies and offices challenged, some of them had been located since 1891, shortly after statehood, at places other than Olympia without specific legislation placing them there. The difficulty to be caused by a change after the

passage of so many years and the investment in the locations was answered by the Washington Court with the following:

"Constitutions cannot be amended by estoppel, and the intent of the framers of the Constitution, and the people who adopted that instrument cannot be changed by failure to act on the part of the legislature."

The Court further pointed the way to the answer to the problem, stating:

"If it be a fact that the public convenience and administrative efficiency can be promoted by maintaining the thirteen state agencies at Seattle or elsewhere than at the seat of government, the Constitution may be so amended by majority vote of the people."

An early Oregon case, **State ex rel McCain v. Metschan**, 32 Or. 372, 46 P. 791, 53 P. 1071, 41 L.R.A. 692, held a district attorney correct in challenging the legislature's attempt to build a state mental institution at a place away {30} from the state capital. They stated in that case what I believe to be the view that must be taken of the situation pointed up by your inquiry.

"All such institutions must be located at the place designated in the Constitution, although it may now seem desirable to do so otherwise, until the consent of the people is obtained in the form of a Constitutional amendment. In their sovereign capacity the people have so provided, and no other power can alter or change their decree."

There is pending in the legislature a measure, S.J.R. 17, to propose an amendment to the Constitution permitting the legislature or the Governor to locate agencies created by the legislature in places other than the seat of government. Until the people actually amend the Constitution to allow such locating, it is my opinion that the employment security commission and any other state agency falling clearly into the category of being a department of the executive branch of state government should be located at Santa Fe, the seat of government as provided in the Constitution.