

Opinion No. 60-32

February 24, 1960

BY: OPINION of HILTON A. DICKSON, JR., Attorney General

TO: Mr. Dan Sosa, Jr. District Attorney Third Judicial District Las Cruces, New Mexico

QUESTION

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May a State Senator hold the position of Special Investigator for the District Attorney's office at the same time?

CONCLUSION

Yes.

OPINION

{*383} ANALYSIS

Article IV, § 28 of the New Mexico Constitution, relating to the holding of public offices by members {*384} of the Legislature, 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.)

Therefore, the answer to your question lies in the determination of whether the office of Special Investigator for the District Attorney's office is a "civil office" subject to the prohibition contained in § 28, or merely public employment.

The New Mexico Supreme Court has on two occasions discussed the definition of the term "civil office" in connection with the prohibitions contained in Article IV, § 28. In the case of **State ex rel. Baca v. Otero**, 33 N.M. 310, 267 P. 68, (1928), the New Mexico Supreme Court held, upon a stipulated set of facts without extended discussion of the legal theories involved, that the position of rural school supervisor was not a public office but a public employment and the incumbent was entitled to the salary incident to such employment. An extended discussion of this question was set forth in the case of **State ex rel. Gibson v. Fernandez**, 40 N.M. 288, 58 P. 2d 1197 (1936), in which the

Supreme Court, citing from **State v. Page**, 98 Mont. 14, 37 P. 2d 575, 576, said as follows:

"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."

See also our recent Opinions Nos. 59-79, 59-93, 59-139 and 59-140.

After this citation, the court went on to hold that the position of special tax attorney for the New Mexico Tax Commission was not a public office, so that a member of the House of Representatives could be employed as such a tax attorney.

The position of Special Investigator for the District Attorney's office is not a public office but public employment and, therefore, one person may hold such a position and be a State Senator at the same time. The Special Investigator's position does not contain all of the five indispensable elements set forth in the **Fernandez** case. In particular, it is at least not a position {*385} created by the Constitution or by the Legislature or by another body through authority conferred by the Legislature; its duties are not performed independently and without control of 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; and it is only a temporary position, not a permanent and continuous, i.e., the position may be abolished at the will of the District Attorney or the incumbent removed and another person employed.

Therefore, we conclude that the same person may, at the same time, be a State Senator and hold the position of Special Investigator for the District Attorney's office.

By: Philip R. Ashby

Assistant Attorney General