

Opinion No. 61-42

May 22, 1961

BY: OPINION OF EARL E. HARTLEY, Attorney General Thomas O. Olson, First Assistant Attorney General

TO: Mr. Richard H. Folmar, Assistant Director, New Mexico Legislative Council, Rm. 201, State Capitol, Santa Fe, New Mexico

QUESTION

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Can a member of the legislature concurrently with the term for which he is elected contract for and operate a school bus route?

CONCLUSION

Yes.

OPINION

ANALYSIS

The prohibition, if any, against contracting for the task suggested in your inquiry would be imposed by Art. IV, Sec. 28 of the Constitution of New Mexico. This section provides 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 be 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."

The above constitutional prohibition has two areas of disqualification of legislators in carrying on functions for or with the State. The first of these is that legislators shall not be appointed to any civil office of the State. The criteria for determining a civil office has been clearly enunciated by our Supreme Court in **State ex rel. Gibson v. Fernandez**, 40 N.M. 288, 58 P. 2d 1197, and has been the subject of several Attorney General's opinions. See Opinions Nos. 59-79, dated July 29, 1959, 59-139 and 59-140, dated September 14, 1959. We shall not again set forth the criteria as enunciated in the **Fernandez** case in this opinion. Suffice it to say that we believe the duties of a school bus driver do not fulfill the qualifications of a civil office as defined in that case. Further,

and perhaps more importantly, the work is performed pursuant to contract and the person performing is more in the nature of an independent contractor than he is an employee or an officer. Therefore, the first mentioned disqualification of Art. IV, Sec. 28, is not applicable.

The second disqualification of Section 28, supra, is that a member of the legislature shall not be interested directly or indirectly in any contract with the State or any municipality thereof which was authorized by any law passed during the term for which he was elected nor within one year thereafter. Authorization for the contracting for the transportation of pupils has been in our statutes for a great number of years, dating back at least to 1937. See Laws, 1937, Chapter 156. We are not advised that there were any changes made in the authority for transportation of pupils by our recent legislature. Assuming this to be true, it is clear that the authority for the contract in question is not the product of the term for which the legislator in question was elected. Even should there have been amendments, it is quite possible that the situation would not be unlike that presented to our Supreme Court in the case of **State v. Highway Commission**, 38 N.M. 482, 35 P. 2d 308. In effect, our Supreme Court held in that case that an amendment of the statute under consideration was not such as would bar a legislator from contracting or having an interest in a contract with the state since the amendment did not substantially change the pre-existing authority. In view of this, it is our opinion that a member of the legislature is not barred from contracting with a school district for the operation of a school bus for such district.

To summarize, it is our opinion that a legislator is not barred by Art. IV, Sec. 28 of our Constitution, from contracting with a school bus district for the operation of a school bus route.