

Opinion No. 62-116

September 20, 1962

BY: OPINION OF EARL E. HARTLEY, Attorney General Oliver E Payne, Assistant Attorney General

TO: Mr. Milton E. Scudder, Director of Personnel, State Personnel Board, Santa Fe, New Mexico

QUESTION

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May a State employee covered by the Personnel Act engage in political activity while on annual leave? On week-ends? After working hours during the work week?

CONCLUSION

Yes.

OPINION

ANALYSIS

It should be noted first that the Section of the Personnel Act which is here involved (Section 5-4-42 F) is separate and distinct from the provision which precludes covered employees from holding either political office or an office in a political organization.

Paragraph F of Section 5-4-42 provides that "no employee or probationer shall engage in partisan political activity **while on duty.**" (Emphasis added)

The courts have generally sustained prohibitions against certain political activities by public employees stating that the legislature may impose reasonable restrictions on the political activities of such employees. **Garner v. Board of Public Works**, 341 U.S. 716, 95 L. Ed. 1317.

However, since the right to engage in political activity is a privilege of citizenship, it should not be denied to off-duty State employees in the absence of an express or necessarily implied prohibition. 19 Opns. of the Atty. Gen. 150 (Calif.). See **State v. City of Cleveland, Ohio**, 33 N.E. 2d 35.

We think it highly significant that the legislature used the phrase "while on duty." If the legislative intent had been to prohibit partisan political activity at all times, the phrase would simply have been omitted.

The New Mexico Constitution itself provides in Article XX, Section 19, that "Eight hours shall constitute a day's work in all cases of employment by or on behalf of the state or any county or municipality thereof." While this provision is not self-executing (**Jaramillo v. Albuquerque**, 64 N.M. 427, 329 P.2d 626), it does indicate a State policy. In addition, the legislature has granted to the Personnel Board the authority to provide for "hours of work, holidays and leave." Section 5-4-36 F, N.M.S.A., 1953 Compilation (P.S.).

It is our view that the phrase "while on duty" as used in the Personnel Act means to be actually on the job. See **United States v. Denver & Rio Grande R. Co.**, 197 Fed. 629. Accordingly, we do not believe that the legislature intended to prevent employees who are covered by the Personnel Act from engaging in partisan political activity during off-duty hours.