

Opinion No. 63-23

March 27, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

TO: Legislative Council State Capitol Building Santa Fe, New Mexico

QUESTION

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May a member of the State Legislature who has resigned his position in the legislature serve as city clerk before the expiration of the term for which he was elected to the legislature?

CONCLUSION

No.

OPINION

{*47} ANALYSIS

New Mexico Constitutional Article IV § 28 provides:

"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."

At the outset we would point out that in Opinion of the Attorney General 60-139, August 1960, it was held that the prohibition of Article IV § 28 is applicable during the term for which the legislator was elected regardless of whether he resigns his office prior to the expiration of the term. A legislator may not therefore, become eligible for an appointive civil office merely by resigning his position in the legislature.

Article IV § 28 prohibits a legislator accepting an **appointive** civil office. N.M.S.A. 14 - 15 - 2 (1953) empowers a city council to appoint a city clerk. N.M.S.A. 14-15-6 (1953) provides that a city clerk shall continue office until his successor is appointed and qualified. The office of city clerk is, therefore, an appointive office, and not an elective office. See also Opinion of the Attorney General 4030-42.

Article IV § 28 prohibits a legislator from holding an appointive **civil office**. Is the office of city clerk a "civil office"? We believe that it is. The term "civil office" was defined in **State ex rel Gibson v. Fernandez**, 40 N.M. 288 58 P. 2d 1197 (1936) and Opinions of the Attorney General 60-32, February 1960, 59-79, July 1959, 59-93, August 1959, 59-139, September 1959, 59-140, September 1959. There are five elements which are necessary to make a public office a civil office:

(1) It must be created by the Constitution or by the legislature or 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 the government, to be exercised for the benefit of the public; (3) the power 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 {*48} by the legislature, and by it placed under the control of a superior officer or body; (5) it must have some permanency and continuity, and not be only temporary or occasional.

1. The office of city clerk is created by an exercise of the authority granted by the legislature to the municipality. Section 14-15-2, Section 14-15-6.

2. It is the duty of the city clerk to keep custody of the laws and ordinances of the municipality, to keep a regular and correct journal of the proceedings of the city council, and to perform such other duties as may be required by city ordinances. Section 14-15-6. Whether duties such as the ones described constitute a delegation of some of the sovereign authority of the municipality is a question which has often perplexed the courts. The Annotations at 53 A.L.R. 595, 93 A.L.R. 33, 140 A. L. R. 1076, say that one who exercises sovereign authority must be one whose duties are not merely clerical, or those of an agent or servant, but are duties which must be performed in the execution or administration of the law which confers upon that officer certain official duties. We realize that those duties mentioned above which have been placed upon city clerks by the legislature usually constitute only a small portion of the responsibilities of the city clerk. Even so, we think that they are sufficient to make him an officer who exercises a portion of the sovereign powers of the city.

3. Some of the duties of a city clerk are conferred upon him by the legislature. Sections 14-15-5 and 14-15-6 say that the city clerk shall also perform those acts which are required of him by city ordinance. His duties are therefore defined, both by the legislature and by ordinance.

4. The city clerk holds an inferior office within the meaning of criteria four as set out in the **Fernandez** case, supra, subject to the general control of a superior body - the city council.

5. The city clerk is appointed for a two year term, section 14-15-2. His office is therefore permanent and not temporary.

It is apparent that since the office of city clerk is an appointive civil office, a legislator may not be appointed to fill the office during the term for which he was elected to the legislature and this is true even though he may have resigned from the legislature.

By: Joel M. Carson

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