

## Opinion No. 67-04

January 9, 1967

**BY:** OPINION OF BOSTON E. WITT, Attorney General

**TO:** Senator-Elect John P. Eastham P. O. Box 1888 Albuquerque, New Mexico

### QUESTION

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Does a member of the Commissioners for the Promotion of Uniformity of Legislation in the United States hold a civil office so as to disqualify him from being a member of the State Senate?

#### CONCLUSION

No.

### OPINION

#### {\*5} ANALYSIS

Involved in your question are two provisions in the state constitution, namely, Article 4, Sections 3 and 28. The former section provides as follows:

"No person shall be eligible to serve in the legislature who, at the time of qualifying, holds any **office of trust or profit** with the state, county or national governments, except notaries public and officers of the militia who receive no salary." (Emphasis added).

The other pertinent constitutional provision (Article IV, Section 28) is 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. . . ." (Emphasis added).

{\*6} The question of what is, or is not, a civil officer, within the meaning of constitutional and statutory provisions was considered at length in the case of **State ex rel. Gibson v. Fernandez**, 40 N.M. 288, 58 P.2d 1197.

The test according to the Court is as follows:

"(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."

The office of Uniform State Law Commissioner does not meet at least two of these requirements for a civil office. The position does not possess a delegation of a portion of the sovereign power of government. Further, members of the Commission do not take and file an oath of office.

The function of the commissioners is of an advisory nature. They hold conferences with the Commissioners from other states. Section 2-4-2, N.M.S.A., 1953 Compilation. They then "report to the legislature from time to time, giving the result of their investigations, and making such recommendations with respect to the adoption of uniform legislation as they may deem proper." Section 2-4-4, N.M.S.A., 1953 Compilation.

Based on the **Fernandez case**, supra, we do not believe that a Uniform State Law Commissioner holds a civil office or office of trust within the contemplation of the constitution and being an unpaid position it is not an office for profit.

Thus a member of that Commission may serve as a legislator.

By: Oliver E. Payne

Deputy Attorney General