Opinion No. 67-46

March 15, 1967

BY: OPINION OF BOSTON E. WITT, Attorney General

TO: Honorable William G. Shrecengost State Representative Legislative-Executive Building Santa Fe, New Mexico

QUESTION

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May a member of the twenty-eighth legislature upon resignation as such, be appointed to the position of State Selective Service Director and serve as such director?

CONCLUSION

Yes, but see analysis.

OPINION

*{*59}* **ANALYSIS**

The State Director of Selective Service is a federal office and the salary is paid by the United States. Section 460(b), U.S.C.A., provides in part as follows:

(b) The President **is authorized**

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(2) **to appoint upon recommendation of the respective governor** or comparable executive official, **a state director of the Selective Service System** for each headquarters **in each state,** territory, and possession of the United States and for the District of Columbia, **who shall represent the governor** and be in immediate charge of the state headquarters of the Selective Service Systems; * * * (Emphasis added)

Article IV, Section 28, New Mexico Constitution, reads in part 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, * * *"

The question to be resolved is that of whether this is a "civil office in the state" within the intent of this constitutional provision. If it is, a member of the legislature could not serve in the capacity of State Director of Selective Service during the term of the legislature to which he was elected, even though he should resign as such legislator. There is no

question but that the office of State Director of Selective Service is a civil office. The term is defined in Black's Law Dictionary, (3rd Ed.) as follows:

"An office, not merely military in its nature, that pertains to the exercise of the powers or authority of civil government."

Federal regulations and laws do not indicate in what way, if any, the State Director of Selective Service represents the governor. He is responsible for the operation of the state office but this responsibility is to the United States. It is an office of record for Selective Service **only** and **no other records may be kept there.** He is responsible for the carrying out of **selective service system functions** throughout the state. This again is a federal and not a state function.

Our Supreme Court in the case of **State ex rel. Gibson v. Fernandez,** 40 N.M. 288 had a similar question before it. The respondent, a member of the legislature, was appointed during his term of office to the position of special tax attorney. The court then laid down the test for use in determining whether an office was within the constitutional provision as follows:

" 'After an exhaustive examination of the authorities, we hold that five elements are indispensable in any position of public employment, in order *{*60}* 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.' "

The above test was taken by our Supreme Court from the case of **State v. Page,** 98 Mont. 14, 37 P.2d 575, 576. However, the above test has generally been considered as applicable under our constitution and laws. Opinions of the Attorney General Nos. 59-79, 59-93, 59-134, 59-140, 59-167, 10-32, 10-139; Report of the Attorney General, 1959-60, No. 61-42, Report of the Attorney General, 1961-62; and Opinion No. 63-23, Report of the Attorney General, 1963 -- 64.

Under **State v. Page,** supra, the constitutional ban applies only to a civil office created by the state and would not apply to one created by the federal government. The office of State Director of Selective Service is not one that was created by our constitution, legislature, a municipality of this state or other such body to whom such authority had been delegated. It does not possess a delegation of a portion of the sovereign power of

our government and the duties are not defined directly or impliedly by the constitution or the legislature. It can thus be seen that if this test is applied, the holding of the position of State Director of Selective Service by a former legislator during the term of office to which he was elected is not barred.

It is implicit in the facts upon which this opinion is based that the person named as State Director of Selective Service would not also continue in his legislative capacity. Article IV, Section 3 of our constitution would seem to bar this since the office is one of trust and profit of the national government.

By: James V. Noble

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