

## Opinion No. 69-05

January 31, 1969

**BY:** OPINION OF JAMES A. MALONEY, Attorney General Justin Reid, Assistant Attorney General

**TO:** Honorable David F. Cargo, Governor, State of New Mexico, Legislative-Executive Building, Santa Fe, New Mexico

### QUESTIONS

#### QUESTIONS

Is it legal for a member of the House of Representatives to serve on the Mining Safety Advisory Board?

#### CONCLUSION

No.

### OPINION

#### {\*8} ANALYSIS

Our Constitution has a provision specifically applicable to legislators being appointed to State governmental positions. Article IV, Section 28, New Mexico Constitution, provides in pertinent part as follows:

"No member of the legislature shall, during the term for {\*9} which he was elected, be appointed to any civil office in the state . . ."

Clearly the Constitution prohibits the appointment of legislators to any civil office in the State. To properly answer your question, we must, therefore, determine first whether a member of the Mining Safety Advisory Board is appointed and, secondly, whether that position is a civil office within the meaning of Article IV, Section 28, supra.

The Mining Safety Advisory Board was created by the Mining Safety Act, compiled as Sections 63-31-1, et seq., N.M.S.A., 1953 Compilation (P.S., being Chapter 136, Laws 1961). Section 63-31-3, supra, provides that the Mining Safety Advisory Board shall consist of nine (9) members all of whom are appointed by the Governor for a term of six (6) years. Obviously, then members of the Mining Safety Board are appointed within the meaning of Article IV, Section 28, supra.

Is membership on the Mining Safety Advisory Board a civil office of the State? The question of whether certain appointed state positions are civil offices has been the

subject of several previous Attorney General's opinions. We have held that appointed membership on the State Board of Finance, the Board of Educational Finance, the Boards of Regents of our universities, the Cattle Sanitary Board, State Police Board, Boys' School, the Miners Hospital, State Fair Board and the Sheep Sanitary Board are all civil offices of the State and appointment of a legislator to these positions is prohibited by Article IV, Section 28, *supra*. See e.g., Opinions of the Attorney General 59-79, July 22, 1959; 59-93, August 10, 1959; 59-139, September 14, 1959; 59-140, September 14, 1959, and 60-139, August 5, 1960.

The term "civil office" was first defined in **State v. Quinn**, 35 N.M. 62, 290 Pac. 786 (1930), and that definition has been cited by this office in the above referenced opinions as the test to be applied in determining whether a particular position is a civil office. The **Quinn** definition is as follows:

"To constitute a position of public employment a public office of a civil nature, it must be created by the Constitution or through legislative act; must possess a delegation of a portion of the sovereign power of government to be exercised for benefit of the public; must have some permanency and continuity, and not be only temporary or occasional; and its powers and duties must be derived from legislative authority and be performed independently and without the control of a superior power, other than the law, except in case of inferior officers specifically placed under the control of a superior officer or body, and be entered upon by taking an oath and giving an official bond, and be held by virtue of a commission or other written authority." (35 N.M. at 64-65)

See also **State ex rel. Gibson v. Fernandez**, 40 N.M. 288, 58 P.2d 1197 (1936).

We must now determine whether membership on the Mining Safety Advisory Board meets all the requirements established in **Quinn**, *supra*. Our review of the Mining Safety Act leads us to the conclusion that all of the conditions specified in **Quinn**, *supra*, are met. The only serious question seems to be whether the Board is exercising part of the "sovereign power" of the State.

The purpose of the Board as specified in the Act is to formulate and propose rules and regulations for safety in the mining industry and then to submit these proposed rules and regulations to the State Inspector of Mines, Section 63-31-4, *supra*. While the ultimate authority for promulgating rules and regulations is in the office {*\*10*} of the State Mining Inspector with the written approval of the Governor (Section 63-31-6), the Inspector is limited in his rulemaking authority to making recommendations to the Board (Section 63-31-5) and to acting on proposals of the Board. It is thus seen that the Board functions as an integral part of validly delegated lawmaking functions. This is clearly an exercising of part of the sovereign power of the State and places the Board within the definition of "civil office" contemplated by the **Quinn** case. Cf. Opinion of the Attorney General No. 67-4 (1967 Vol., p. 5) relating to the Office of Uniform State Law Commissioner.

We therefore conclude that membership on the Mining Safety Advisory Board is by appointment and that such a position is a "civil office" as contemplated by Article IV, Section 28, supra. In our opinion, there is a constitutional prohibition against appointing a member of the Legislature to the Mining Safety Advisory Board.