

Opinion No. 70-02

January 15, 1970

BY: OPINION OF JAMES A. MALONEY, Attorney General

TO: Mr. Clay Buchanan, Director Legislative Council Service 334 State Capitol Santa Fe, New Mexico 87501

QUESTIONS

FACTS

The Legislative Council is authorized to reimburse members of the Council as well as other members of the legislature for per diem and mileage while engaged in the performance of official duties for the Council (Section 2-3-9, N.M.S.A., 1953 Compilation). This law has been considered the authority to reimburse individual legislators who traveled on an assigned mission of the Council, either for the purpose of gathering information for the Council for the benefit of the legislature or representing the viewpoint of the Council in conferences or meetings. The legislature, since 1959, has for such purposes appropriated to the Council a specific amount of money to reimburse such non-council appointees. For the period in question, this appropriation amounted to five thousand dollars (\$ 5,000) and is contained in Laws of 1968, Chapter 1, Section 7 (B).

The State Board of Finance law (Section 11-1-1, N.M.S.A., 1953), until ruled invalid by Attorney General's Opinion No. 59-79, required two of the board's members to be legislators. Shortly after this opinion was rendered, the Governor requested the two members then serving to continue to attend meetings in an advisory capacity. Two legislators have attended such meetings ever since. In April 1965, the Legislative Council formally recognized that Council business required attendance of these advisory members and that such attendance was in the interest of the legislature by authorizing the reimbursement of per diem and mileage of such legislators.

Mr. Harold Thompson, State Auditor, has requested repayment from two members of the legislature for the per diem and mileage paid to them by the Legislative Council for attendance as advisory members at State Board of Finance meetings during the 57th Fiscal Year. The auditor questions the legality of such payments on the basis of his interpretation of an opinion of the Attorney General (59-79, July 22, 1959), holding it unlawful for a legislator to serve on an executive board.

QUESTIONS

Is it unlawful for the Legislative Council to pay per diem and mileage to a legislator who serves as a member of the State Board of Finance in a non-voting advisory capacity pursuant to Section 11-1-1, N.M.S.A., 1953 Compilation (1969 Supp.)?

CONCLUSION

No.

OPINION

{*4} ANALYSIS

The question of whether a legislator may legally serve on an executive board or commission in New Mexico involves an interpretation of Article IV, Section 28 of the New Mexico Constitution. That Section reads as follows:

"Sec. 28.

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."

Specifically, the question raised by this Section is whether the legislators in question by virtue of their service as advisory members of the State Board of Finance, have been "appointed to any civil office in the state." In order to answer the question, we must determine, first, whether the legislators in question are appointed to their position on the board, and second, whether each of these positions constitutes a "civil office" within the meaning of Article IV, Section 28 of the New Mexico Constitution.

It seems obvious from the legislation establishing the State Board of Finance that the members of the legislature who serve on that board are "appointed." Section 11-1-1, N.M.S.A., 1953 Compilation (1969 Supp.) states in part:

"The state board of finance shall consist of seven [7] members:

* * *

(4) one [1] member from each house of the legislature appointed in the same manner and at the same time standing committees of the respective houses are appointed."

We can find no reason or authority to suggest the view that appointment under Article IV, Section 28 of the New Mexico Constitution was meant to be restricted to appointment by the Governor or any other individual. We therefore conclude that the members of the legislature who serve on the state board of finance are "appointed" as that term is used in Article IV, Section 28.

The next question is whether service by a legislator as a member of the state board of finance constitutes holding a "civil office" within the meaning of the meaning of Article IV, Section 28 of the New Mexico Constitution. For the reasons discussed below we conclude that it does not.

The definition of "civil office" as that term is used in Article IV, Section 28 has been stated and applied several times by the New Mexico Supreme Court. First discussed in the case of **State v. Quinn**, 35 N.M. 62, 290 Pac. {*5} 786 (1930) and later elaborated upon in the case of **State ex rel Gibson v. Fernandez**, 40 N.M. 288, 58 P.2d 1197 (1936), the New Mexico Supreme Court quoted the following five elements as necessary parts of the definition of "public office":

"(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."

In order to determine if the position under consideration constitutes "civil offices" we must test them against these five elements.

As stated above, the authority for the two members of the legislature to serve on the state board of finance is found in Section 11-1-1, N.M.S.A., 1953 Compilation (1969 Supp.). For purposes of this question, the pertinent part of that section reads:

"A. The state board of finance shall consist of seven [7] members:

(4) one [1] member from each house of the legislature appointed in the same manner and at the same time standing committees of the respective houses are appointed. If a vacancy occurs in the board when the legislature is not in session because of the death or resignation of a member chosen from either house, it shall be filled by another member of the predecessor's house appointed by the speaker of the house or the president pro tempore of the senate. He shall be appointed to serve the remainder of the unexpired term. **The two [2] legislative members are nonvoting advisory members of the board.**"

This authority definitely satisfies requirement (1) as stated in the quotation above from the **Gibson** case. Likewise, requirements (3), (4) and (5) appear to be satisfied on the basis of the language of Section 11-1-1. However, our understanding of requirement (2)

leads us to conclude that the position held by the legislative members of this board do not "possess a delegation of a portion of the sovereign power of government," * * *

The New Mexico Supreme Court in **State v. Fernandez**, supra, states: "All authorities agree that some portion of sovereignty must be vested in the occupant of a position, to constitute it a public office." In our opinion the provision at the end of Section 11-1-1, N.M.S.A., 1953 Compilation (1969 Supp.) that, "The two legislative members are non-voting advisory members of the board", prevents this requirement from being fulfilled in this case. Opinion of the Attorney General No. 59-79 (July 22, 1959) is clearly distinguishable in that the positions under the controlling legislation at that time were not for "non-voting advisory members of the board." A much more relevant authority for the question presented here is Opinion of the Attorney General No. 67-4 (January 9, 1967). In holding that a member of the Commissioners for the Promotion of Uniformity of Legislation in the United States did not hold a civil office for purposes of Article IV, Section 28, that opinion stated:

"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 {*6} 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."

In our opinion, the non-voting advisory nature of the positions held by the members of the legislatures who serve on the state board of finance likewise prevents these positions from being "civil offices." Consequently, in our opinion the State Auditor's request for repayment by the legislators in question, based on the contrary legal conclusion, is not valid.