Opinion No. 72-61

October 31, 1972

BY: OPINION OF DAVID L. NORVELL, Attorney General Oliver E. Payne, Deputy Attorney General

TO: Honorable Eloy P. Quintana, State Representative, P. O. Box 155, Santa Cruz, New Mexico 87567

QUESTIONS

QUESTIONS

1. May a state legislator be employed by:

(a) the state,

(b) a county,

(c) a municipality, or

(d) the federal government?

2. Explain the Hatch Act and how it might have application to the above question.

3. Is the Hatch Act constitutional?

CONCLUSIONS

1(a). No.

1(b). Yes, if he is an employee rather than one who holds a civil office.

1(c). Yes, if he is an employee rather than on who holds a civil office.

1(d). Yes, if he is an employee rather than one who holds an office.

2. See analysis.

3. At this point in time it must be presumed that it is constitutional.

OPINION

*{*98}* ANALYSIS

1(a). While your question uses the words "employed by," which would tend to denote an employee as opposed to an officer, we deem it appropriate in any event to point out initially that Article IV, Section 28, N.M. Const. 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; . . ." (Emphasis added)

The question of what is a "civil office" was dealt with extensively by our Supreme Court in the case of **State ex rel. Gibson v. Fernandez,** 40 N.M. 288, 58 P.2d 1197. For your convenience we enclose a copy of Attorney General Opinion No. 67-4 which sets forth the test used by the court in making such a determination.

More all-inclusive, since it includes employees as well as officers, is the limitation placed upon legislators by a legislative enactment -- Section 2-1-4, NMSA, 1953 Comp., which provides as follows:

"From and after January 1, 1945, it shall be unlawful for any member of the legislature, during the term for which he is elected to contract for **or receive any compensation for services performed as an officer or employee of the state** except such compensation and expense money as he is entitled to receive as a member of the legislature." (Emphasis added)

The (a) portion of your first question must therefore be answered in the negative. See Opinions of the Attorney General 57-40 and 68-121.

1(b) and (c). There is no prohibition against a legislator being an **employee** of a county or municipality. As we pointed out in Attorney General Opinion 57-93, Section 2-1-4, **supra,** does not apply to employment with a county or municipality. However, Article IV, Section 28, **supra,** does apply to any civil office in the state, be it state, county or municipal. Again, whether the position is a "civil office" will have to be determined by the test enunciated in the **Gibson** case, **supra.** See Opinion of the Attorney General 63-23.

1(d). Your question here is whether a state legislator may be employed by the federal government. Article IV, Section 3(a), N.M. Const. provides in pertinent part 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)

In the case of **Beauchamp v. Campbell,** Civil No. 5778, D. N.M., 1966 (Unreported) portions of Article IV, Section 3, **supra,** were held to be invalid under the Fourteenth Amendment to the Constitution of the United States. The provision in question was not

one of those under attack. However, caution dictated that the legislature express itself in its legislative Reapportionment Acts of 1971 and 1972 and this it did.

Section 2-9-125(c), NMSA, 1953 Comp. (1972 Interim Supp.) provides:

"No person is eligible to serve in the senate, 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."

Section 2-7-123(c), NMSA, 1953 Comp. (1972 Interim Supp.) incorporates exactly the same language applying it to members of the State House of Representatives.

*{*99}* Thus based on the constitutional and statutory provisions heretofore discussed, whether a state legislator may hold a position with the federal government depends upon whether that legislator **at the time of qualifying** holds an "office" or is simply an employee. The latter is permissible, the former is not if the office is one for trust or profit. See Opinion of the Attorney General 70-37.

In summary, the limitations imposed on state legislators by the state constitution and statutes are as follows:

1. A state legislator may not be appointed to a **civil office.** Art. IV, Sec. 28, **supra.**

2. A state legislator may not, at the time of qualifying, hold any **office** of trust or profit with the **state, county** or **national** government. Art. IV, Sec. 3(a), **supra** ; Sections 2-9-125 (c) and 2-7-123 (c), **supra.**

3. A state legislator may not receive compensation for services performed as an **employee** of the **state.** Sections 2-1-4, 2-1-5, 2-1-6, **supra.**

A state legislator may be:

(1) an **employee** of a municipality;

(2) an **employee** of a county; or

(3) an **employee** of the federal government.

2. Since the Hatch Act is a federal law, interpretations concerning it are actually the responsibility of the Civil Service Commission and the U.S. Attorney's Office. Nonetheless, since it does have an effect on the activities of some local officers and employees, we will explain its basic provisions.

The portion of the Hatch Act dealing with political activities of employees of a **federal** executive agency provides in pertinent part as follows in 5 U.S.C. § 7324:

(a) An employee in an Executive agency or an individual employed by the government of the District of Columbia may not --

(1) use his official authority or influence for the purpose of interfering with or affecting the result of an election; or

(2) **take an active part in political management or in political campaigns.** (Emphasis added)

For the purpose of this subsection, the phrase "an active part in political management or in political campaigns" means those acts of political management or political campaigning which were prohibited on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President.

(b) An employee or individual to whom sub-section (a) of this section applies retains the right to vote as he chooses and to express his opinion on political subject and candidates.

(c) Subsection (a) of this section does not apply to an individual employed by an educational or research institution, establishment, agency, or system which is supported in whole or in part by the District of Columbia or by a recognized religious, philanthropic, or cultural organization."

Another portion of the Hatch Act deals with the political activity of state or local officers and employees who are "employed by a state or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a federal agency." 5 U.S.C. § 1501. The phrase "loan or grants" has been construed so broadly as to include almost any program or activity that is wholly or partially federally funded. **Englehardt v. U.S. Civil Service Commission,** D.C. Ala. 1971, 197 F. Supp. 806, **aff'd,** 304 F.2d 882. However, a person is not subject to the Act if his principal employment is collateral to a federally financed activity. It is required that it be in connection with such projects rather than merely in association with them. But it is not a prerequisite to coverage under the Hatch Act that the employee of the state or local agency derive his salary, either in whole or in part from federally contributed funds. **Englehardt *{*100}* v. U.S. Civil Service Commission, supra.**

The prohibition for such persons is the same as that for federal officers and employees. They may not "take an active part in political management or in political campaigns." 5 U.S.C. § 1502. This phrase is defined the same way in 5 U.S.C. § 1501 as it is in 5 U.S.C. § 7324, quoted previously herein.

Unless a state legislator who is a **federal** employee (which is permissible under state law as noted in the answer to question 1 (d) comes within some exemption in the Hatch

Act itself, he is subject to its provisions. He is not exempt simply because he is a state legislator. 5 U.S.C. § 7324.

The exemptions in the Hatch Act for employees of a city or county in a program covered by the Act because of federal funding are different than those for federal employees. 5 U.S.C. § 1502 (c) makes the Hatch Act inapplicable to

"(1) The Governor or Lieutenant Governor of a State or an individual authorized by law to act as Governor;

(2) The mayor of a city;

(3) The duly elected head of an elective department of a state or municipality who is not classified under a state or municipal merit or civil-service system; or

(4) **An individual holding elective office."** (Emphasis added)

It would not be unreasonable for a state legislator who is an employee of a city or county in a federally funded program to believe that he is exempt from the Hatch Act by virtue of his holding an elective office. However, two recent federal court decisions have held to the contrary. The United States Court of Appeals, Third Circuit (**In Re Higginbotham,** 340 F.2d 165 (1965)) held that this exemption for those "holding elective offices" is limited to persons **elected to their positions in a federally assisted agency,** not to some other elective office. The Court said:

". . . it would seem to follow that the fourth sentence was intended to exempt a small but important number of state officers and employees whose official duties involve in part the administration of federally assisted projects -- an elected state highway commissioner, for example -- whose political activities would otherwise be banned . . ."

The Court went on to say that neither the Hatch Act nor any logical interpretation thereof showed any intent on the part of Congress to exempt "those officers and employees whose employment gives them the opportunity to use the prestige of their position and their control of federal funds, directly or indirectly, for political advantage merely because they might have concurrent or incidental employment as holders of state elective office." Thus the fact that the individual in question was an elected city alderman who was employed by a local federally funded agency did not exempt him from the Hatch Act.

The Fourth Circuit Court of Appeals held the same way in the 1971 case of **Northern Virginia Regional Park Authority v. United States Civil Service Commission,** 307 F. Supp. 888, **aff'd** 437 F.2d 1346. In that case the individual was employed as director of a Regional Park Authority. He was also a member of the state legislature. When he ran for reelection to the legislature he was challenged for violating the Hatch Act. His contention was that since he held an elective office, i.e., member of the legislature, he

was exempt from the Act under 5 U.S.C. 1502 (c)(4). The Civil Service Commission and the Court held otherwise, saying:

"It was far from the purpose of the exemption provision to tolerate political activity by an employee of an agency administering federal funds merely because he happens to have been elected to an entirely unrelated office."

Accordingly, this very limited exemption applies only to those few who are elected to the position in the federally funded agency.

3. Thirdly, you ask whether the Hatch Act is constitutional. The most serious challenge to the Hatch Act's constitutionality in twenty-five years *{*101}* (since the case of **United Public Workers v. Mitchell,** 330 U.S. 75 (1947) which upheld its constitutionality) has been mounted in a case before a three-judge court for the District of Columbia (Nat'l. Ass'n. of Letter Carriers, **AFLCLO v. United States,** 41 LW 2069, decided on July 31, 1972. A two to one majority in that case held that Section 15 of the Act, which is the foundation of the entire Act since it is the one defining the phrase "an active part in political management or in political campaigns," is unconstitutional since its application has a "chilling effect" unacceptable under the First Amendment. But, knowing the tremendous inpact that its decision would have, the court stayed the effect of its decision "pending determination by the Supreme Court of the United States". Because of the stay provision incorporated in the Court's Opinion and Order, the Hatch Act continues to be presumed constitutional under the Supreme Court's decision in **United Public Workers of America [C.I.O.] v. Mitchell, supra,** unless and until that Court rules otherwise in the **Nat'l. Ass'n. of Letter Carriers** case, **supra,** which it is scheduled to decide in this Term of Court.