Opinion No. 74-05

January 24, 1974

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Mr. Eloy Francis Martinez City Attorney, City of Santa Fe City Hall Santa Fe, New Mexico 87501

QUESTIONS

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Does Section 5-4-42(B), NMSA, 1953 Comp. (1973 P.S.), create "additional restrictions" on the right to hold office as specifically prohibited by the New Mexico State Constitution?

CONCLUSION

No.

OPINION

*{*7}* **ANALYSIS**

Gibbany v. Ford, 29 N.M. 621, 225 P. 277 (1924), holds that pursuant to the New Mexico Constitution, the "only restriction" against the right of every citizen of the United States who is a resident of and a qualified voter within this State to hold any public office is that all district, county, precinct, and municipal officers shall reside within the political subdivision for which they were elected or appointed. The Legislature has no power to make added restrictions to such right to hold public office. The question presented here, then, is whether Section 5-4-42(B), NMSA, 1953 Comp. (1973 P.S.), creates an additional restriction on the constitutionally defined right to hold office.

Section 5-4-42(B), provides as follows:

"No person in the personnel office, or employee in the service, shall hold political office or be an officer of a political organization during his employment. For the purposes of the Personnel Act [5-4-28 to 5-4-46], being a member of a local school board shall not be construed to be either holding political office, or being an officer of a political organization. Nothing in the Personnel Act shall deny employees the right to vote as they choose or to express their opinions on political subjects and candidates."

The term "political office," as used in the law, has been held to apply to "every elected public office within the State including, but not limited to state elected positions, county elected positions and municipal elected positions, even if conducted along nonpartisan

lines." See Opinion of the Attorney General No. 61-53, dated June 28, 1961, and authorities cited therein. We are still of the same opinion. Expression of legislative intent to include nonpartisan municipal officers within the requirement of Section 5-4-42(B), is the specific exclusion of the offices of school board member and election official. If the intent of the law was to also exclude nonpartisan municipal elections it appears that the Legislature performed a futile act in providing the two listed exemptions. We cannot attribute such a futile action to the Legislature.

Article VII, Section 2 of the New Mexico Constitution delineates the "qualifications for holding office." The word "qualification" is defined as "the possession by an individual of the qualities, properties, or circumstances, natural or adventitious, which are inherently or legally necessary to render him eligible to fill an office or perform a public duty or function." **Black's Law Dictionary** (4th Ed. 1957). However, Section 5-4-42(B) does not set forth further requisites for holding office as specifically prohibited under **Gibbany v. Ford, supra,** but stipulates the conditions under which an employee may work for the State of New Mexico under its personnel system. As such it is a reasonable and constitutionally permissible requirement.

Similar legislation has been upheld in several recent cases. **Elder v. Rampton,** 41 Law Week 3508 (USDC Utah, 1972), involved a test of the Utah Merit System Act as applied to nonpartisan activities of employees. The court held in an affirmed decision, 41 Law Week 3668, that the law, which is nearly identical to that under discussion here, is sufficiently express to withstand claims of vagueness. Further, the classification involving a distinction between classified, exempt and judicial employees, is reasonable and does not violate the Equal Protection Clause of the United States Constitution.

Two important decisions in this area are **United States Civil Service Commission v. National Association of Letter Carriers,** U.S. , 37 L. Ed. 2d 796, 93 S. Ct. (1973); and **Broadrick v. Oklahoma,** U.S. , 37 L. Ed. 2d 830, 93 S. Ct. (1973). The Letter Carriers case was a class action on behalf of all federal employees attacking provisions *{*8}* of the Hatch Act enacted into positive law in 5 USC Sec. 7324(a)(2), which among other prohibitions forbids federal employees to take an active part in political management or in political campaigns or becoming a partisan candidate for, or campaigning for an elective public office. The court in upholding the constitutionality of the Hatch Act stated that such a decision no more than confirms the "judgment of history, a judgment made by this country over the last century that it is in the best interest of the country, indeed essential, that federal service should depend upon meritorious performance rather than political service, and that the political influence of federal employees on others and on the electoral process should be limited." 37 L. Ed. 2d 796, at 804.

In its argument showing historical justification for such a holding the court said that:

"A related concern, and this remains as important as any other, was to further serve the goal that employment and advancement in the government service not depend on political performance, and at the same time to make sure that government employees would be free from pressure and from express or tacit invitation to vote in a certain way

or perform political chores in order to curry favor with their supervisors rather than to act out their own beliefs." 37 L. Ed. 2d 796, at 809.

Broadrick v. Oklahoma, supra, more pertinent to the issue here, involves a challenge against the Oklahoma state merit system act by state employees charged by the Oklahoma State Personnel Board with actively engaging in partisan political activities. The United States Supreme Court held that like the Hatch Act, the Oklahoma law is not impermissibly vague since there is little doubt that "men of common intelligence must necessarily guess at its meaning."

"In the plainest language, [the Oklahoma statute] prohibits any state classified employee from being 'an officer or member' of a 'partisan political club' or a candidate for 'any paid public office.'" 37 L. Ed. 2d 830, at 837. The court further held that "there is no question" that the Oklahoma law is valid at least insofar as it forbids classified employees from soliciting political contributions, becoming members of national, state or local committees of political parties, or candidates for any paid public office. 37 L. Ed. 2d 830, at 843.

Because, with but few exceptions, the holding of a federal civil office and holding **any office** under a State, Territorial or municipal government results in incompatibility of office, the holding of two such offices is prohibited by an Executive Order of January 17, 1873, as amended by Executive order of August 37, 1933. 37 L. Ed. 2d 796, at 824. We are of the opinion that the holding of a state civil office and any other office under a state, county or municipal government by the same person will also, with but few exceptions, be imcompatible with a due and faithful discharge of the duties of either office; that it frequently gives rise to great inconvenience, and often results in detriment to public service.

We further note that 54 Stat 767 Sec. 12(a) extends the provisions of the Hatch Act to officers and employees of state and local agencies whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States.

Under nearly every interpretation, Section 5-4-42(B) is a permissible regulation by the State of New Mexico as an employer of the political activities of its employees.

By: Leila Andrews

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