

Opinion No. 77-25

September 20, 1977

OPINION OF: Toney Anaya, Attorney General

BY: Patricio M. Serna, Assistant Attorney General

TO: Mr. John Anderson, Staff Attorney New Mexico Legislative Council 334 State Capitol Santa Fe, New Mexico 87501

LEGISLATOR; LEGISLATURE; RESIGNATION; STATE EMPLOYMENT; TERM OF OFFICE,-A state legislator can resign from the legislature and legally accept state employment during the term for which elected.

QUESTIONS

Pursuant to the provisions of Laws 1977, Chapter 336, Sections 1 through 3, can a state legislator resign from the legislature and legally accept state employment?

CONCLUSIONS

Yes.

ANALYSIS

The provisions of Laws 1977, Chapter 336, Sections 2 and 3 which amend Section 2-1-4, NMSA, 1953 Comp., and Section 2-1-5 NMSA, 1953 Comp. state:

2-1-4. COMPENSATION AS STATE OFFICER OR EMPLOYEE OTHER THAN THAT RECEIVED AS A LEGISLATOR PROHIBITED. -- It is unlawful for any member of the legislature to 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.

2-1-5. PAYMENT OF OTHER COMPENSATION TO LEGISLATOR FOR ACTING AS OFFICER OR EMPLOYEE OF STATE PROHIBITED. -- It is unlawful for any officer of the State of New Mexico to pay to any member of the legislature compensation for services rendered the State of New Mexico as an officer or employee thereof except such compensation and expense money which such member is entitled to receive as a member of the legislature.

OPINION

Prior to the 1977 legislative amendment, Section 2-1-4, NMSA, 1953 Comp., and Section 2-1-5, NMSA, 1953 Comp., stated:

2-1-4. COMPENSATION AS STATE OFFICER OR EMPLOYEE OTHER THAN THAT RECEIVED AS A LEGISLATOR PROHIBITED. -- 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)

2-1-5. PAYMENT OF OTHER COMPENSATION TO LEGISLATOR FOR ACTING AS OFFICER OR EMPLOYEE OF STATE PROHIBITED. -- 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)

2-1-5. PAYMENT OF OTHER COMPENSATION TO LEGISLATOR FOR ACTING AS OFFICER OR EMPLOYEE OF STATE PROHIBITED. -- From and after January 1, 1945, it shall be unlawful for any officer of the State of New Mexico to pay to any member of the legislature compensation for services rendered the State of New Mexico as an officer or employee thereof during the term for which such legislator was elected except such compensation and expense money which such member is entitled to receive as a member of the legislature. (Emphasis added)

Article IV, Section 28 of the New Mexico Constitution 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; 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. (Emphasis added)

{*158} In construing statutes, courts seek only legislative intent. *Trujillo v. Romero*, 77 N.M. 79, 419 P.2d 456 (1966). Legislative intent is to be determined primarily by the language of the act *State v. Ortega*, 77 N.M. 312, 422 P.2d 353 (1966); *Winston v. New Mexico State Police Board*, 80 N.M. 310, 454 P.2d 967 (1969) and by the object sought to be accomplished and the wrong to be remedied. *Chavez v. State Farm Mutual Auto., Ins. Co.*, 87 N.M. 327, 533 P.2d 100 (1975).

It is a well established rule of statutory construction that attention should be paid to the prior condition of the law to aid in determining the full meaning of any statutory change. *James v. Board of Commissioners of Socorro County*, 24 N.M. 509, 174 P.2d 1001 (1918). In addition, the adoption of statutory amendments is evidence of intention to change the provisions of the original law. *Martinez v. Research Park, Inc.*, 75 N.M. 672, 410 P.2d 200 (1965).

The relevant changes to Section 2-1-4 and 2-1-5, NMSA, 1953 Comp., affected by the 1977 legislative amendments were the deletion of the term "during the term for which he is elected." Numerous Opinions of the Attorney General have concluded that "term of office" means the full term to which a legislator is elected, regardless of whether he resigns his office. More specifically, Opinion of the Attorney General No. 68-121, dated December 17, 1968, concluded that pursuant to Section 2-1-4, supra, a member of the twenty-ninth legislature who resigned his position as a member of the legislature could not be legally employed by the Construction Industries Commission during the term for which he was elected. See also Opinion of the Attorney General No. 58-39, dated February 20, 1958.

Other Opinions of the Attorney General have addressed interpretation of the phrase "during the term for which he was elected" in Article IV, Section 28 of the New Mexico Constitution. Article IV, Section 28, is similar to Section 2-1-4 and 2-1-5 supra, in its prohibitions and the construction of "term of office." See Opinions of the Attorney General No. 72-10, dated March 7, 1972, No. 60-139, dated August 5, 1960, No. 63-23, dated March 27, 1963 and No. 74-17 dated May 13, 1974 wherein it is stated:

In a consistent series of Opinions, the Attorney General has concluded that this language [Art. IV, Sec. 28] creates a disability which lasts throughout the term for which the legislator is elected, regardless of whether the legislator resigns.

Furthermore, case law supports the proposition that "term of office" means a fixed and definite tenure of office. *State v. Board of Commissioners of Sierra County*, 29 N.M. 209, 222 P. 654 (1924); *State v. Knight*, 76 Mont. 71 245 P.267 (1926); *Bayley v. Garrison*, 190 Cal. 690, 214 P.871 (1923).

It is clear that under Section 2-1-4 and 2-1-5, before it was amended in 1977, legislators could not lawfully resign their membership in the legislature and assume duties as state employees during the term of office for which they were elected. However, it is equally clear that the 1977 amendment to Section 2-1-4 and 2-1-5 deleted the "term of office" prohibition. Therefore, {**159*} under present law, a state legislator can resign from the legislature and legally obtain state employment during the term for which he was elected.

It is noted that the prohibition of Article IV, Section 28 of the New Mexico Constitution extends only to civil offices and not to state employment. The New Mexico Courts have often considered the question of whether a position is a "civil or public office" as opposed to a position of "public employment." See *State ex rel. Gibson v. Fernandez*, 40 N.M. 288, 58 P.2d 1197 (1936) (held that a special tax attorney position was a "public employee" position as distinguished from a "public officer" position); *Pollack v. Montoya*, 55 N.M. 390, 234 P.2d 336 (1951) (held that the Chief of Division of Liquor Control was a "public officer"); *Candelaria v. Board of County Commissioners*, 77 N.M. 458, 423 P.2d 982 (1967) (held that election judge was not an "employee" but was a "public officer"); *Lacy v. Silva*, 84 N.M. 43, 499 P.2d 361 (Ct. App. 1972) (held that a district director of Bureau of Revenue was not a "state officer"); see also Opinion of the

Attorney General No. 77-2, dated December 17, 1968, which concluded that a member of the state legislature may serve as a county manager during the term for which elected inasmuch as the position of county manager is not a "civil office." Opinion of the Attorney General No. 77-2, supra, at page 2 states:

Although various standards and tests have been used, it is generally agreed that the determinative criteria for a finding that a position is a "civil office" is whether or not some portion of sovereign power is vested in the position. [citations omitted]

In *Lacy v. Silva*, supra, the Court of Appeals of New Mexico quoted from Webster's Third New International Dictionary (1966), defining sovereignty as 'supreme power,' 'freedom from external control; autonomy, independence;' 'controlling influence.'" See *Oceanograph Commission v. O'Brien*, 74 Wn. 2d 904, 44 P.2d 707 (1968) for a listing of definitions of sovereign power.

Therefore, in view of the foregoing, a state legislator can resign from the legislature -- thereby terminating his membership therein -- and legally accept state employment during the term for which elected. It is noted that Section 2-1-1, NMSA, 1953 Comp., which provides for resignation of members of the legislature, states:

Any member of the legislature of the state of New Mexico may resign his office by filing a written statement of such resignation with the secretary of state of New Mexico, and upon filing of such resignation, the office of senator or representative filled by the person so resigning shall become vacant.

ATTORNEY GENERAL

Toney Anaya, Attorney General