

**Opinion No. 77-26**

October 12, 1977

**OPINION OF:** Toney Anaya, Attorney General

**BY:** Patricia Turner, Assistant Attorney General

**TO:** Honorable David Rusk State Representative District 19, Bernalillo County 1020 Idlewilde Lane, S.E. Albuquerque, New Mexico

STATE LEGISLATORS-MAYOR-INCOMPATIBILITY OF OFFICE.-A member of the state legislature may also serve as the elected mayor of the City of Albuquerque.

**QUESTIONS**

May a member of the state legislature also serve as the elected mayor of the City of Albuquerque?

**CONCLUSIONS**

Yes, but see analysis.

**ANALYSIS**

The prohibitions against dual office-holding contained in the New Mexico Constitution and statutes are inapplicable to the question posed in this inquiry.

**OPINION**

Article IV, Section 28 of the New Mexico Constitution precludes a member of the Legislature from being appointed to a civil office. The office of Mayor is an elective. See Article V, Section 1, Albuquerque City Charter, not an appointive position, and therefore this particular prohibition does not apply. Article IV, Section 3 of the New Mexico Constitution prohibits a member of the Legislature, at the time of qualifying, from holding an office of trust or profit with either the State, a county or the national government. See also Sections 2-7-123 and 2-9-125, NMSA, 1953 Comp. This prohibition does not include an office of trust or profit with a municipality, such as the office of Mayor.

Further, the New Mexico Supreme Court held in *State ex rel. Chapman v. Truder*, 35 N.M. 49, 289 P. 594 (1930), that Article III, Section 1, of the New Mexico Constitution, regarding the separation of governmental powers does not relate to municipal offices. Sections 2-1-4 and 2-1-5, NMSA, 1953 Comp., make unlawful the payment to, or receipt by, a legislator of compensation for services performed as an officer or employee of the State. Since the position of Mayor is a municipal office, as opposed to

a State office or employment, it is apparent these statutes have no application to our present inquiry.

{\*161} In short, we have not found any constitutional or statutory provision which prohibits a State Legislator from serving as an elected Mayor of a municipality. Accordingly, we conclude that such dual office-holding is not enjoined by the laws of New Mexico.

We have also considered whether the offices of Legislator and Mayor are incompatible with one another. See *Haymaker v. State ex rel. McCain*, 22 N.M. 400, 163 P. 248, L.R.A. 1917D 210 (1917). These offices are not functionally incompatible in that neither office is subordinate to the other, nor are their functions or duties inconsistent, contrary or antagonistic.

Sections 5-3-40 and 5-3-42, NMSA, 1953 Comp. refer to incompatible offices in the following manner:

5-3-40. Permanent abandonment of office, what constitutes. -- Any incumbent of any public office or employment of the state of New Mexico, or of any of its departments, agencies, counties, municipalities or political subdivisions whatsoever, who shall accept any public office or employment, whether within or without the state, other than service in the armed forces of the United States of America, for which a salary or compensation is authorized, or who shall accept private employment for compensation and who by reason of such other public office or employment or private employment shall fail for a period of thirty (30) successive days or more to devote his time to the usual and normal extent during ordinary working hours to the performance of the duties of such public office and employment, shall be deemed to have resigned from and to have permanently abandoned his public office and employment. (Emphasis added)

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5-3-42. Definition of incompatible office, service and employment. -- Any public office or service, other than service in the armed forces of the United States of America, and any private employment of the nature and extent designated in section 3 [5-3-40] hereof is hereby declared to be incompatible with the tenure of public office or employment.

The Albuquerque City Charter provides in Article V, Section 3 that:

The Mayor shall be the chief executive officer of the City and the official head of the City for all ceremonial purposes. The Mayor shall devote full time and attention to the performance of the duties of office and shall hold no other paid public or private employment. . . (Emphasis added).

The position of State Legislator is a state office and not paid public or private employment prohibited by the City Charter. Given the responsibilities and duties of a Legislator during a legislative session, however, a Mayor may be rendered unable to

devote the full time and attention to the performance of his mayoral duties as required by the City Charter. Nevertheless, in the absence of a factual showing that the duties of both offices are not actually {\*162} being performed "to the usual and normal extent," we cannot conclude that the two offices are incompatible as defined in Section 5-3-42, supra, and Article V, Section 3 of the City Charter.

Finally, consideration must be given to Section 40A-23-2, NMSA, 1953 Comp. which provides:

Paying or receiving public money for services not rendered consists of knowingly making or receiving payment or causing payment to be made from public funds where such payment purports to be for wages, salary or remuneration for personal services which have not in fact been rendered.

Nothing in this section shall be construed to prevent the payment of public funds where such payments are intended to cover lawful remuneration to public officers or public employees for vacation periods or absences from employment because of sickness, or for other lawfully authorized purposes.

Whoever commits paying or receiving public money for services not rendered is guilty of a fourth degree felony.

As with Sections 5-3-40 and 5-3-42, supra, we cannot determine at this time whether payment will be made for services "which have not in fact been rendered." If the legislator-mayor does not, in fact, perform his mayoral duties while serving in the Legislature, payment of his salary would violate this statute unless, of course, that payment constituted lawful remuneration for duly authorized absences.

### **ATTORNEY GENERAL**

Toney Anaya, Attorney General