

## Opinion No. 79-01

January 22, 1979

**OPINION OF:** Jeff Bingaman, Attorney General

**BY:** Jill Z. Cooper, Director, Civil Division

**TO:** Mr. Clay Buchanan, Director, New Mexico Legislative Council, 334 State Capitol, Santa Fe, New Mexico 87503

### LEGISLATURE AND LEGISLATORS

Article IV, Section 28 of the New Mexico Constitution would prohibit the appointment of the position of secretary of a cabinet department of a person who served in the legislature during the session in which the reorganization bills were enacted creating the cabinet departments.

### QUESTIONS

Can an elected member of the legislature, whose term expired on December 31, 1978, and who was not reelected for the thirty-fourth legislative session, be constitutionally appointed as a secretary of a cabinet level position in 1979?

### CONCLUSIONS

No.

### ANALYSIS

The Governor's cabinet was created pursuant to the Executive Reorganization Act [Laws 1977, Chapter 248], Sections 9-1-1 **et seq.** NMSA 1978. That Act provided that "the secretaries of such departments as are hereafter created" would be included in the executive cabinet.

In 1977, the legislature created the Departments of Commerce and Industry, Sections 9-2-1 **et seq.** NMSA 1978; Criminal Justice, Sections 9-3-1 **et seq.** NMSA 1978; Educational Finance and Cultural Affairs, Section 9-4-1 **et seq.** NMSA 1978; Energy and Minerals, Sections 9-5-1 **et seq.** NMSA 1978; Finance and Administration, Sections 9-6-1 **et seq.** NMSA 1978; Health and Environment, Sections 9-7-1 **et seq.** NMSA 1978; Human Services, Sections 9-8-1 **et seq.** NMSA 1978; Natural Resources, Sections 9-10-1 **et seq.** NMSA 1978; Taxation and Revenue, Sections 9-11-1 **et seq.**, NMSA 1978; and Transportation, Sections 9-12-1 **et seq.** NMSA 1978. The new laws provided for a secretary to administer each department and defined the duties of the various secretaries. It does not appear that any of these secretaryships existed as such

under prior law and it may be fairly stated that each was a position created during the 1977 legislative session.

Article IV, Section 28, New Mexico Constitution, provides that:

"No member of the legislature shall, during the term for which he was elected, . . . nor shall he within one year thereafter be appointed to any civil office created, or the emoluments of which were increased during such term. . . ."

In the context of this provision, the Supreme Court, in **State ex rel. Gibson v. Fernandez**, 40 N.M. 288, 292, 58 P.2d 1197 (1936), listed the elements distinguishing a civil office from employment: (1) the office must be created by law; (2) the office must have delegated to it a portion of the sovereign power; (3) the powers and duties of the office must be defined by law; (4) the duties must be performed independently of any superior control {\*2} except as established by law; and (5) the office must have permanence and continuity. The Court noted that "of these elements, any or all may exist in the case of an ordinary employment except the distinctive one that the sovereign power must be vested in the position by the Legislature, else it is not a public office." 40 N.M. at 297.

In **Pollack v. Montoya**, 55 N.M. 390, 392, 234 P.2d 336 (1951), the Supreme Court "summed up" the elements of a public or civil office, and stated that the "specific position must be created by law[s]; there must be certain definite duties imposed by law on the incumbent, and they must involve the exercise of some portion of the government[al] power." As in **State ex rel. Gibson v. Fernandez, supra**, the Court in **Pollack v. Montoya** noted that "the overwhelming and decisive test is the vesting of some portion of the sovereign power in the holder of the office." 55 N.M. at 394. See also **Lacy v. Silva**, 84 N.M. 43, 499 P.2d 361 (Ct. App. 1972).

The position of department secretary is a civil office within the meaning of Article IV, Section 28. The Executive Reorganization Act essentially structures the executive branch into departments, each administered by secretaries appointed by the governor and responsible to the governor for the operation of the departments. The executive authority of the state, which vests in the governor pursuant to Article V, Section 4, New Mexico Constitution, is thus delegated, subject to the pleasure of the governor, to the cabinet secretaries. It is the secretary's duty to manage the operations of a department and administer and enforce the laws with which he or the department is charged. See, e.g., Section 9-8-6, **supra**. As he performs these duties "independently and without the control of a superior power other than the law[s]," a secretary exercises some portion of the sovereign power. **State ex rel. Gibson v. Fernandez**, 40 N.M. at 296.

An elected member of the legislature whose term expired on December 31, 1978, would normally have been elected for a term commencing January 1, 1977 or January 1, 1975. See Article XX, Section 3, New Mexico Constitution; Section 2-7-9 NMSA 1978; Section 2-8-9 NMSA 1978. Accordingly, a member of the legislature whose term expired on December 31, 1978, would have been elected for a term during which the

civil offices of department secretaries were created. We conclude, therefore, in response to your question, that under the plain language of Article IV, Section 28, such a person cannot be appointed as a secretary of a cabinet department in 1979, the year following the term in which the position of secretary was created.

### **ATTORNEY GENERAL**

Jeff Bingaman, Attorney General

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