

Opinion No. 79-34

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OPINION OF: Jeff Bingaman, Attorney General

BY: Jill Z. Cooper, Deputy Attorney General

TO: Representative Gary Robbins, 124-A Yucca Drive, Portales, New Mexico 88130

LEGISLATURE AND LEGISLATORS

A state legislator during a legislative term for which he was elected may be elected as a member of the Peanut Commission.

QUESTIONS

May a state legislator, during a term for which he was elected, be elected by the peanut producers to serve as a member of the Peanut Commission?

CONCLUSIONS

Yes.

ANALYSIS

Pursuant to the Peanut Act, Sections 76-17-1 et seq. NMSA 1978, members of the Peanut Commission are elected by the peanut producers of the state and serve for terms of five years. They receive no compensation but are reimbursed for per diem expenses and mileage. The question of whether a state legislator may serve as such a commissioner is initially determined by Article IV, Section 28 of the New Mexico Constitution, which provides that: "No member of the legislature shall, during the term for which he was elected, be appointed to any civil office in the state. . . ."

OPINION

Thus a legislator may not serve as a member of the Peanut Commission if the position of peanut commissioner constitutes a "civil office" and if the person elected by the peanut producers is "appointed" to that office.

The test for determining what constituted a civil office has been well-stated in **State ex rel. Gibson v. Fernandez**, 40 N.M. 288, 292, 58 P.2d 1197 (1936):

"(1) It must be created by the Constitution or by the Legislature or created by a municipality or other body through authority conferred by the Legislature; (2) it must possess a delegation of a portion of the sovereign power of government, to be

exercised for the benefit of the public; (3) the powers conferred, and the duties to be discharged, must be defined, directly or impliedly, by the Legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power, other than the law, unless they be those of an inferior or subordinate office, created or authorized by the Legislature and by it placed under the general control of a superior officer or body; (5) it must have some permanency and continuity, and not be only temporary or occasional."

Applying these elements to the position of peanut commissioner, it would appear that the position is a civil office. That is:

(1) the peanut commission is established by the legislature, Section 76-17-3, **supra**; (2) a portion of the sovereign power of the government is {83} delegated to the commission in that the commission is generally authorized to "do anything necessary to effectuate the purposes of the Peanut Act;" Section 76-17-4, **supra**; (3) the powers and duties of the Commission are defined by the Legislature, Sections 76-17-4 to 76-17-8, **supra**; (4) the duties of the commission are performed independently and without the control of any superior authority although the commission is attached to the New Mexico department of agriculture for "coordinative purposes" only, Section 76-16-5, **supra**; and (5) the commission is a continuous and permanent body whose members serve for a period of five years, Section 76-17-3, **supra**.

A similar analysis has been applied by this office to conclude that state legislators are precluded from appointment to the Pecos River Compact Commission, Opinion of the Attorney General No. 69-49, dated May 21, 1969, and from appointment to a county planning and zoning commission, Opinion of the Attorney General No. 72-14, dated March 23, 1972. In addition, this office has also found that Article IV, Section 28 prohibits the appointment of state legislators to the Board of Educational Finance and the boards of regents of the various state educational institutions, Opinion of the Attorney General No. 59-93, dated August 10, 1959; to the Cattle Sanitary Board, the State Police Board, the Capitol Buildings Improvements Commission, the Board of the New Mexico Boys School, the Board of the Miners Hospital, the State Fair Board and the Sheep Sanitary Board, Opinion of the Attorney General No. 59-140, dated September 14, 1959; and to the Mine Safety Advisory Board, Opinion of the Attorney General No. 69-5, dated January 31, 1969.

A distinguishing factor in this instance, however, is the manner in which the members of the peanut commission are chosen. Section 76-17-3, **supra**, provides that "[m]embers of the commission shall be elected by all producers, in elections conducted under regulations promulgated by the commission."

Such an election is not necessarily an "appointment" for purposes of Article IV, Section 28. Absent a clear intent to the contrary, statutory words are to be given their ordinary, usual meanings. See, e.g., **Tafuya v. New Mexico State Police Board**, 81 N.M. 710, 472 P.2d 973 (1970). Commonly, "appoint" is used to mean "designate" or "nominate." See, **Black's Law Dictionary**, 128 Revised 4th ed. (1968). In **Board of Education of**

Boyle County v. McChesney, 235 Ky. 692, 32 S.W.2d 26, 27 (1930), the Court distinguished "appointment" from "election" by stating:

"'Election' to office usually refers to a vote of the people whilst 'appointment' relates to the designation of the officer by some individual or group."

Article IV, Section 28 uses both the term "elected" and the term "appointed," and it may be assumed that the people chose each word advisedly to express its common meaning. See, e.g., **State v. LaBadie**, 87 N.M. 391, 534 P.2d 483 (Ct. App. 1975). The people intended what they said and Article IV, Section 28 should be applied "as it plainly reads." **State ex rel. Anaya v. McBride**, 88 N.M. 244, 250, 539 P.2d 1006 (1975).

While there is "no reason or authority to suggest the view that appointment under Article IV, Section 28 was meant to be restricted {^{*84}} to appointment by the Governor or any other individual," Opinion of the Attorney General No. 70-2, dated January 15, 1970, neither is there any reason or authority to suggest that appointment under Article IV, Section 28 was meant to extend to election. In **State ex rel. Anaya v. McBride**, the Court commented, in the context of that case, that Article IV, Section 28 "applies only to appointments and not elections." 88 N.M. at 251-2.

Thus, as the position of peanut commissioner is elected rather than appointed, Article IV, Section 28 does not operate to prevent a state legislator from serving in that capacity during a term for which he was elected.

Nor is a legislator prevented from serving as a member of the Peanut Commission by any other law. With respect to state legislators, the Conflict of Interest Act, provides at Section 10-16-9 NMSA 1978 that:

"A state agency shall not enter into any contract of purchase with a legislator or with a business in which such legislator has controlling interest, involving services or property in excess of one thousand dollars (\$1,000) where the legislator has disclosed his controlling interest, unless the contract is made after public notice and competitive bidding. As used in this section contract shall not mean a "lease"."

Thus, that act's restrictions extend only to a state legislator contracting with a state agency and do not prohibit his serving as a commissioner.

ATTORNEY GENERAL

Jeff Bingaman, Attorney General