Opinion No. 88-71

November 10, 1988

OPINION OF: HAL STRATTON, Attorney General

BY: Frank Murray, Assistant Attorney General

TO: The Honorable Jerry Lee Alwin, New Mexico State Representative, P.O. Box 23278, Albuquerque, NM 87192-1278

QUESTIONS

May a New Mexico state representative serve in the New Mexico State Defense Force?

CONCLUSIONS

No.

ANALYSIS

Article V, Section 4 of the New Mexico Constitution states:

The supreme executive power of the state shall be vested in the governor, who shall take care that the laws be faithfully executed. He shall be commander in chief of the military forces of the state, except when they are called into the service of the United States. He shall have power to call out the militia to preserve the public peace, execute the laws, suppress insurrection and repel invasion.

Section 20-3-1 NMSA 1978 creates a department of military affairs to act on behalf of the governor in commanding the State's military forces. Pursuant to Section 20-3-2 NMSA 1978, the state defense force is one of three military divisions within the department of military affairs. See also Sections 20-2-1, 20-5-1 and 20-5-3 NMSA 1978 (state defense force is part of the militia).

1. Separation of Powers

Article III, Section 1 of the New Mexico Constitution states:

The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted.

New Mexico courts have not addressed the issue of a legislator's service in the executive department. Courts in other states have concluded under constitutional provisions similar to Article III, Section 1 that a legislator may not exercise powers of the executive branch. For example, the Connecticut Supreme Court has held that a legislator's employment as a state college faculty member violated the separation of powers doctrine. Stolberg v. Caldwell, 175 Conn. 586, 402 A.2d 763 (1978). The court explained the reasons for the doctrine:

It is a basic principle of constitutional law that one department cannot interfere with or encroach on either of the other departments. State v. Stoddard, 126 Conn. 623, 627, 12 A.2d 586. The division of governmental powers among the three departments, the legislative, the executive and the judicial, each separate from the others but subject to regulations by law touching upon the discharge of duties required to be performed, is one of the fundamental principles of the American constitutional system. Evans v. Gore, 253 U.S. 245, 40 S. Ct. 550, 64 L. Ed. 887. This means that the general functions of government fall into the three departments outlined. Such provisions have as their primary purpose the prevention of a commingling of essentially different powers of government in the same hands; O'Donoghue v. United States, 289 U.S. 516, 530-31, 53 S. Ct. 740, 77 L. Ed. 1356; so that the principle of the separation of powers operates in a broad manner to confine the legislative, executive and judicial powers to each department within the limits set forth by the constitution. Norwalk Street R. Co's Appeal, 69 Conn. 576, 587, 37 A. 1080, 38 A. 708.

. . . .

Our concern is not with what has been done but rather what might be done, directly or indirectly, if one person is permitted to serve two different departments at the same time. The constitutional prohibition is designed to avoid the opportunities for abuse arising out of such dual service whether it exists or not.

Id. at 770, 772, 402 A.2d at 770, 772. See also State v. Burch, 226 Ind. 445, 80 N.E.2d 294 (1948) (separation of powers doctrine prohibits a legislator from being employed as a state barber inspector); Saint v. Allen, 169 La. 1046, 126 So. 548 (1930) (prohibiting state highway department from employing legislators).

Article IV, Section 1 and the aforementioned provisions of Chapter 20 NMSA 1978 place the state defense force within the executive branch of our state government. Consequently, a legislator's service in the force would violate Article III, Section 1.

2. Incompatibility of Offices.

New Mexico recognizes the common law principle that certain public offices may be incompatible. In Haymaker v. State ex rel. McCain, 22 N.M. 400, 403-04, 163 P. 248, 250 (1917), the court stated:

In legal contemplation, incompatibility between two offices is an inconsistency between the functions of the two. The offices must subordinate, one to the other, and they must, per se, have the right to interfere with the other before they are incompatible .... [citations omitted]

The incompatibility between two offices, which upon the acceptance of the one by the incumbent of the other operates to vacate the latter, is not simply a physical impossibility to discharge the duties of both offices at the same time, but it is an inconsistency in the functions of the two offices, as where one is subordinate to the other, or where a contrariety and antagonism would result in the attempt by one person to faithfully and impartially discharge the duties of both.

Accord, Haskins v. State ex rel. Harrington, 516 P.2d 1171, 1178 (Wyo. 1973).

The court in Wilson v. Moore, 346 F. Supp. 635, 643-644 (D. W. Va. 1982), spoke of the potential evil and conflict of legislators holding public employment over which they legislate:

It takes no great imagination for one to envision the potential harm inevitably to result to efficient and responsible government from the actions of a state employee who, as a legislator, is required to pass on bills affecting his own private interests or the particular branch or agency of government to which he belongs or by which he is employed. Such conflict, and the potential for harm inherent therein, indeed are very nearly unavoidable if public servants are permitted to serve the state in more than once capacity. The problem is not peculiar to West Virginia. It is widespread and is justly under attack by the people at all levels of government throughout the nation.... Moreover, we find the restraints imposed by the amendment to be in consonance with the ancient and well-established common law rule that a public officer cannot hold two incompatible officers at the same time.... [citations omitted] This common law rule, at the present, has been refined and expanded by the constitutions and statutes of the great majority of the states. See generally 34 A.L.R.2d 155, 89 A.L.R.2d 632, 94 A.L.R.2 557. Statutory and constitutional prohibitions include not only the holding of incompatible officers, but the holding of more than one public office or employment whether or not the offices held would be considered incompatible under the old common law rule.

Courts in other states have concluded that legislative and military offices are incompatible. For example in Wimberly v. Denton, 195 Okla. 561, 144 P.2d 447, 453 (1944), the court stated:

Did Hunt's membership on the Board of Regents ipso facto become vacant by his entry upon active military duty as a commissioned officer, without the necessity of a judicial determination of the fact that a vacancy existed? Under the overwhelming weight of authority this question should be answered in the affirmative.

Accord, Perkins v. Manning, 59 Ariz. 60, 122 P.2d 857 (1942).[1]

A legislator's service in the state defense force inevitably would present a conflict of interest. He would act on legislative matters that directly and indirectly would affect his service and pecuniary interest as a member of the force. For example, the Legislature appropriates funds to the military affairs department and state armory board. See, e.g., 1988 N.M. Laws, ch. 13, § 4(G); 1987 N.M. Laws, ch. 355, § 4(G). The legislator as an officer in the force would benefit from these appropriations funds in the equipment he utilized, in the per diem and mileage he received, if his duties require travel, and in the salary he received if the force was called into active service. The Legislature's ability to establish the laws governing and controlling the force and its appropriations would place the legislator in the position of voting on matters directly affecting his position in the force. Moreover, it would put him in the position of being subordinate and subject to discipline and orders by officers whose salary and benefits he has and will act upon and over whose budget he will exercise control. We therefore conclude that the offices of legislator and state defense force member are incompatible.

ATTORNEY GENERAL

HAL STRATTON Attorney General

GENERAL FOOTNOTES

n1 Under federal separation-of-powers and incompatibility doctrines, federal authorities have concluded that members of Congress may not serve in the United States Armed Services. See, e.g., 40 Op. Att'y Gen. 1943 (Dec. 23, 1943).