

**December 1, 2010 Advisory Letter---Employment of Former Legislator by
Governor's Office**

November 22, 2010

The Honorable Thomas C. Taylor
New Mexico State Representative
5909 Rinconada
Farmington, New Mexico 87402

Re: Opinion Request – Employment of Former Legislator by Governor's Office

Dear Representative Taylor:

You requested our advice regarding the constitutionality of a former legislator's service as an employee in the governor's office. Specifically, you asked whether certain positions in the governor's office, such as chief of staff, legislative affairs director, press secretary and policy advisor, are covered by the prohibitions of Article IV, Section 28 of the New Mexico Constitution and whether a legislator may resign from the legislature to take such a position. As discussed below, we believe it is legally permissible for a legislator to resign from the legislature and accept an employment position with the governor's office, as long as the position is not a "civil office" subject to the restrictions of Article IV, Section 28.

Article IV, Section 28 provides, in pertinent part:

No member of the legislature shall, during the term for which he was elected, be appointed to any civil office in the state....

Under this provision, a legislator is precluded from accepting an appointment to a "civil office" during the term for which he or she was elected, regardless of whether the legislator remains in office during the term. Consequently, a legislator does not become eligible for appointment to a civil office by resigning from the legislature. See N.M. Att'y Gen. Op. No. 77-25 (1977) (Art. IV, § 28 creates a disability that lasts throughout the term for which the legislator is elected, regardless of whether the legislator resigns).

The prohibition in Article IV, Section 28 applies to appointments to a "civil office." The New Mexico Supreme Court has identified the following characteristics of a civil office in this context:

1. it is created by the constitution, the legislature, or other governmental body through authority conferred by the legislature;
2. it possesses a delegation of a portion of the government's sovereign power;
3. its powers and duties are defined by the legislature or through legislative authority;

4. its duties are performed independently and without control of a superior power, other than the law, except for certain “inferior or subordinate” offices; and
5. it has some “permanency and continuity, in the sense that the law requires that it be occupied.”

See State ex rel. Gibson v. Fernandez, 40 N.M. 288, 292-94, 58 P.2d 1197 (1936).

Of the characteristics listed above, the most significant is the vesting of some portion of sovereign power in the position. See State ex rel. Stratton v. Roswell Indep. Sch., 111 N.M. 495, 505, 806 P.2d 1085 (Ct. App. 1991) (“New Mexico has differentiated an ‘employee’ from a ‘public officer’ based on the exercise of ‘sovereign power’”). See also Pollack v. Montoya, 55 N.M. 390, 392, 234 P.2d 336 (1951); Gibson, 40 N.M. at 297, Lacy v. Silva, 84 N.M. 43, 45, 499 P.2d 361 (Ct. App.), cert. denied, 84 N.M. 37, 499 P.2d 355 (1972).

Under the criteria identified in Gibson, a position in the executive branch of government is a “civil office” for purposes of Article IV, Section 28 if the position is created or authorized by statute and has been delegated independent and discretionary authority to accomplish the purposes and functions of state government. Examples of civil offices include cabinet secretaries and similar positions that head state agencies, see N.M. Att’y Gen. Op. No. 79-1 (1979); Att’y Gen. Advisory Letter to the Honorable Andrew “Andy” Nuñez (Apr. 23, 2003) (Art. IV, § 28 prohibited a legislator from resigning to serve as director of the agriculture department), and the members of state governing boards and commissions. See N.M. Att’y Gen. Advisory Letter to the Honorable Toney Anaya (Dec. 27, 1983) (Art. IV, § 28 prohibited legislator from serving as a member of the podiatry board).

In contrast, Article IV, Section 28 does not apply to positions of public employment. See N.M. Att’y Gen. Op. No. 77-25 (1977) (a state legislator is not prevented by Art. IV, § 28 from resigning from the legislature and accepting state employment). In general, a public employment position is not created by statute and the duties of the position are defined by the public employer rather than by law. A public employee does not act independently and is not vested with the government’s sovereign power. See, e.g., Lacy, 84 N.M. at 45 (district director for bureau of revenue was not vested with sovereign power because the district director was under the control of the commissioner of the bureau of revenue, was not autonomous and was not independent), Gibson, 40 N.M. at 296-297 (position of special tax attorney, which carried out duties only with the consent and under the authority of the state tax commission, was held at the pleasure of the commission and was not vested with any sovereign power, constituted ordinary public employment rather than a public office); N.M. Att’y Gen. Op. No. 77-2 (1977) (position of county manager was not a civil office where the position did not possess any independent, unequaled or superior authority of a sovereign nature and exercised no powers or duties independent of the county commission).

Positions in the governor's office like those you describe are generally considered employment positions rather than civil offices covered by Article IV, Section 28. The positions of chief of staff, legislative affairs director, press secretary and policy advisor are not created by the legislature. The governor creates the positions, controls their actions and defines their duties. A person serving in one of the positions is responsible for administering and implementing the business of the governor's office and, most importantly, is not vested with any independent or sovereign authority of the government. Based on the typical characteristics of the positions you describe, we conclude that they are not civil offices and that a legislator may resign his or her legislative seat and accept appointment to one of those positions or a similar employment position in the governor's office without violating Article IV, Section 28.[1]

If we may be of further assistance, please let us know. Your request to us was for a formal Attorney General's Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Sincerely,

Elizabeth A. Glenn
Deputy Attorney General

[1] Although Article IV, Section 28 does not prohibit a legislator from holding an employment position with the state during the legislator's term of office, state law requires a legislator to resign from the legislature in order to be compensated for his or her services as a state employee. See NMSA 1978, §§ 2-1-3, 2-1-4 (making it unlawful for a legislator to receive or be paid for services as an officer or employee, except the compensation the legislator is entitled to receive as a member of the legislature).