

April 16, 2013 Advisory Letter -- Opinion Request—State Legislator Serving on State Board

The Honorable Mimi Stewart
New Mexico State Representative
313 Moon Street NE
Albuquerque, NM 87123

Re: Opinion Request—State Legislator Serving on State Board

Dear Representative Stewart:

You have requested our advice regarding whether a person who was just elected to the state legislature may serve as a non-ex-officio member of the New Mexico Developmental Disabilities Planning Council (“Council”). According to your letter, there is a need for non-ex-officio members because “the ex-officio members of the council outnumber the non-ex-officio members” even though the Council’s statute, at NMSA 1978, Section 28-16A-4(B), requires a majority of the members to be public members. In addition, the public members “must be people with developmental disabilities or family members” and “it can be difficult, at best, to recruit people ... to volunteer their limited time to serve on the council.”

Previous opinions issued by this office, copies of which are enclosed and discussed below, have explained that the general rule under Article IV, Section 28 of the New Mexico Constitution is that a legislator, absent specific exceptions, cannot serve on a state board. Based on our examination of the relevant constitutional, statutory and case law authorities, and the information available to us at this time, we conclude that the general rule is applicable and therefore a newly-elected legislator may not serve as a non-ex-officio member of the Council.

There have been many opinion requests throughout the years asking whether a legislator could hold two or dual offices, including but not limited to, a state board member, state cabinet secretary, mayor and college president. See N.M. Att’y Gen. Op. No. 06-01 (2006) (legislator can serve as college president); N.M. Att’y Gen. Op. No. 79-01 (legislator cannot serve as state cabinet secretary); N.M. Att’y Gen. Op. No. 77-26 (1977) (legislator can serve as mayor); N.M. Att’y Gen. Op. No. 69-49 (1969) (legislator cannot serve on a state board). There have been different answers based on different applicable constitutional and statutory provisions, but the opinion letters have uniformly provided that, as a general rule, a legislator cannot constitutionally serve on a state board. See N.M. Att’y Gen. Advisory Letter No. 83-11 (1983) (legislator cannot serve on the State Podiatry Board); N.M. Att’y Gen. Op. No. 69-49 (1969) (legislator cannot serve on the State Pecos River Commission); N.M. Att’y Gen. Op. No. 59-140 (1959) (legislator cannot serve on State Fair Board or State Livestock Board); N.M. Att’y Gen. Op. No. 59-79 (1959) (legislator cannot serve on the State Board of Finance). The Council’s history and creation have some unique characteristics, especially when

compared to other state boards. Therefore, a review of the above-stated general rule and an explanation of the two main exceptions are helpful in answering your request.

The general rule is best explained in a 1983 Attorney General Advisory Letter, when then Governor Toney Anaya asked “whether a New Mexico State legislator can serve as a board or commission member.” See N.M. Att’y Gen. Advisory Letter 83-11 (1983). Governor Anaya was specifically interested whether a state senator could serve as a public member on the State Podiatry Board. The letter began by citing to the most relevant section of the New Mexico Constitution: “No member of the legislature shall, during the term for which he was elected, be appointed to any civil office in the state....” N.M. Const. Art. IV, Section 28 (emphasis added). The letter then cited to: “[t]he State Supreme Court in the case of State ex rel. Gibson v. Fernandez, (1936), 40 N.M. 288, 58 P.2d 1197, [which] enumerated the following five criteria for determining whether a particular position was a ‘civil office.’” N.M. Att’y Gen. Advisory Letter No. 83-11 (1983). The five criteria listed in the letter are:

1. The office must be created by the state constitution or by the legislature.
2. The office must possess a delegation of a portion of the sovereign power of the government, to be exercised for the benefit of the public.
3. The power conferred and the duties to be discharged must be defined, directly or impliedly by the legislature.
4. The duties must be performed independently without control of a superior power, unless they are those of an inferior and subordinate office.
5. The office must have some permanency and continuity, and not be only temporary or occasional.

The advisory letter then looked the State Podiatry Board Act and whether it was a “civil office” and found: (1) the Board was created by state statute; (2) the Board possessed “a portion of the sovereign power of the government” through its authority to administer and enforce the Podiatry Act; (3) the Board was authorized with “powers and duties” enumerated in statute; (4) the Board was the state’s primary authority on podiatry practices; and (5) the Board was permanently placed in statute. See id. The advisory letter concluded that the Board was a civil office. This meant: “Under these conditions, it would not be appropriate for a state legislator to be appointed to the Podiatry Board.” Id. The advisory letter added: “it would be inappropriate for a state legislator to be appointed as a member of any board or commission if that office meets the criteria of a civil office as set out above.” Id. (emphasis added).

There are two main exceptions to the general rule. The first exception is found in a 1967 Attorney General Opinion when a state representative asked whether a legislator might serve as the State Director of Selective Service. See N.M. Att’y Gen. Op. No. 67-46 (1967). We have enclosed a copy for your review. The letter began its analysis by

looking at Article IV, Section 28 and the Gibson criteria and focusing on the first criteria - whether the office was created by the state legislature. In this matter, the State Selective Service Director position was created in federal law as a "federal office" and it was created to ensure that each state had a point person available to handle military draft matters for the Vietnam War. "It is an office of record for [federal] Selective Service only and no other records may be kept there.... This again is a federal and not a state function." Id. The State Selective Service Director position was also subject to presidential appointment. All of this was relevant because "the constitutional ban [in Article IV, Section 28] applies only to a civil office created by the state and would not apply to one created by the federal government." Id. The letter concluded the position did not fall within the Gibson criteria and was not a "civil office" subject to the Article IV, Section 28 prohibition. Accordingly, Article IV, Section 28 did not preclude the legislator from serving in this position. See id.¹

Based on the information provided in your request, the Council may fall within the exception discussed in the 1967 Attorney General Opinion. Your request states: "[t]he council is created in state law (Section 28-16A-4 NMSA 1978) pursuant to federal law." It is our understanding that federal law, 42 U.S.C. § 15001 et seq., titled the "Developmental Disabilities Assistance and Bill of Rights Act," permits the creation of state councils. The federal law requires each state that wishes to receive certain funding for developmental disabilities programs to: "establish and maintain a Council to undertake advocacy ... that contribute[s] to a coordinated ... family-directed, comprehensive system of community services...." 42 U.S.C. § 15025 (1984, amended through 2000).

The New Mexico legislature created the Council in 1993 and expressly listed the Council as an "adjunct agency" of the state's executive branch. See NMSA 1978, § 28-16A-4 (1993). Adjunct agency means: "boards [and] commissions ... of the executive branch, not assigned to the elected constitutional officers ... which retain policymaking and administrative autonomy separate from any other instrumentality of state government." NMSA 1978, § 9-1-6 (1977) (emphasis added). The legislature also gave the head of the state's executive branch, the governor's office, the power to appoint the members. See NMSA 1978, § 28-16A-4(C) (1993). Therefore, in contrast to the federally created position at issue in the 1967 Attorney General Opinion, it appears the Council is a state creation under the first Gibson criteria and the exception in the 1967 Attorney General Opinion does not apply in this matter.

The second exception is found in a 1970 Attorney General Opinion when a state representative asked whether a legislator might serve on the Western Interstate Nuclear Board. See N.M. Att'y Op. No. 70-37 (1970). We have enclosed a copy for your review. The Opinion began its analysis by looking at Article IV, Section 28 and the Gibson criteria, focusing on the second criteria regarding the authority to exercise state power. The Western Interstate Nuclear Board is a board made up representatives from several western states organized to plan for and encourage the science and economic use of nuclear power. See NMSA 1978, § 11-9-1 (1969). Its primary power is to provide advice and "make reports and recommendations annually to" the members' state legislatures

on any needed “changes, amendments or additions to laws.” N.M. Att’y Op. No. 70-37 (1970). The Opinion stated: “Nowhere in [state law] ...is it intimated that the board possesses a delegation of a portion of the sovereign power of [New Mexico] government.... [I]t is not necessary to consider the remaining three [Gibson] tests.” Id. The Opinion concluded: “the office ... is not a civil office” and “[t]hus ... a legislator may serve as a delegate to the ... Board.” Id.

Unlike the Western Interstate Nuclear Board, the Council exercises the sovereign power of New Mexico government in its work regarding the developmental disabilities state plan (“State Plan”). The State Plan is a planning and analysis document used to determine “the extent to which services, supports, and other assistance are available to individuals with developmental disabilities and their families, and the extent of unmet needs for services ... in the State.” 42 U.S.C. § 15024 (1984, amended through 2000). The Council possesses the state sovereign power to “work with ... state agencies to develop the ... [State Plan]...” NMSA 1978, § 28-16A-5(A)(3) (1993). It shall “monitor and evaluate the implementation of the [State Plan].” See id. § 28-16A-5(A)(4). Its other duties include providing “statewide advocacy systems for persons with developmental disabilities” and acting as the “coordinating body for persons with developmental disabilities.” See id. § 28-16A-5(A)(1), (2). It appears the Council does exercise the sovereign powers of the state under the second Gibson criteria and the exception in the 1970 Opinion does not apply in this matter.

Therefore, we conclude the general rule applies to this matter and a legislator cannot constitutionally serve as a non-ex-officio member on the New Mexico Developmental Disabilities Council.²

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,

Zachary Shandler
Assistant Attorney General

Enclosures

(N.M. Att’y Gen. Advisory Letter No. 83-11)

(N.M. Att’y Gen. Op. No. 70-37)

(N.M. Att’y Gen. Op. No. 67-46)

[1] The opinion letter went on to discuss another constitutional provision, Article IV, Section 3, regarding the prohibition of dual payment from the federal government and state government and concluded that under this provision the legislator would have to resign from the legislature to accept the Director position.

[2] There are several other constitutional and statutory provisions and case law requirements that may also bar a legislator from serving in dual offices, but we do not have to review them at this time since Article IV, Section 28 is determinative for purposes of resolving your request.