

Opinion No. 31-282

September 25, 1931

BY: Frank H. Patton, Asst. Attorney General

TO: Honorable Emmett Patton, Attorney at Law, Roswell, New Mexico.

{*109} Your letter of September 24th in which you request an opinion from this office as to whether or not your employment as counsel for the Commissioners appointed under Sec. 13 of Chapter 97 of the 1931 Session Laws, is in violation of the provisions of Section 28, Article 4 of the State Constitution, has been received.

The constitutional provision above cited reads as follows:

MEMBERS NOT TO BE APPOINTED TO CIVIL OFFICE NOR INTERESTED IN CONTRACTS.

Sec. 28. No member of the legislature shall, during the term for which he was elected, be appointed to any civil office in the state, nor shall he within one year thereafter be appointed to any civil office created, or to emoluments of which were increased during such term; nor shall any member of the legislature during the term for which he was elected nor within one year thereafter, be interested directly or indirectly in any contract with the state or any municipality thereof, which was authorized by any law passed during such term."

Section 13 of said Chapter 97 provides briefly for the appointment of three commissioners by the district after the entering of the decree declaring the district organized. Among other powers the said commissioners are vested with full power and authority to employ, with the approval of the court, legal counsel, for the purpose of aiding in carrying out the duties of the said commissioners.

Upon the completion of the performance of the duties of the commissioners, if we construe the entire Act correctly, the district will then continue to function under the direction of a board of directors, the said commissioners being appointed in the first instance, in order that the district may be properly launched upon its career.

Under Section 11 of the Act, the organized district becomes a political sub-division of the State and a body corporate with all the powers of a public or municipal corporation.

Under the constitutional provision if you are prohibited from accepting employment as legal advisor of the commissioners, it must be because of the fact that you are a member of the Legislature and that your appointment is to a "civil office" created during your term as a member of the Legislature or because of the fact that you as such member of the Legislature are interested either directly or indirectly in a contract with

the state or municipality thereof, which was authorized by a law passed during your term in the Legislature.

"Civil office" is one that pertains to the exercise of the powers and authority of the civil government of the state. Advisory Opinion to the Governor, 113 So. 913, 915.

The term "civil officer" embraces only those officers in whom the portion of the sovereignty is vested and in whom the enforcement of the municipal regulations or the control of the general interests of society is confided. *Benedict v. City of New Orleans*, 39 South. 792, 800, 115 La. 645.

We do not believe under the foregoing definitions that it can be successfully contended that your employment as legal advisor to the commissioners would constitute you a civil officer within the meaning of the constitutional provision, and that you would not be holding a civil office.

{*110} The question then depends upon whether or not you as a member of the Legislature would by such employment as attorney, become interested in a contract with the state, by a law passed during your term of office in the Legislature.

There can be no doubt but that the law authorizing such employment was passed during your term as a member of the Legislature, and there can be no doubt that you as such member are interested and from a financial standpoint, in the contract of employment.

We are therefore presented with this question. Is the contract of employment as attorney, a contract with the state or a municipality thereof?

As heretofore stated, the organized district is a political sub-division of the state, and we believe a contract with a political sub-division would also be a contract with the state within the meaning of the constitutional provision. However, it would appear from a study of all the provisions of said Chapter 97, that the commissioners having been appointed by the court, merely act as agents, or rather as an arm of the court, and that their appointment of a legal advisor for a temporary period of time would not constitute a contract with the state or with a legal sub-division thereof.

If after the commissioners have completed their duties, and if the law provided that the board of directors had the power to employ legal counsel, then our answer would be entirely different and we would be constrained to hold that such employment constituted a contract with a legal sub-division of the state.

The distinction, no doubt, is closely drawn and perhaps the courts might take a different view, but it is the opinion of this office in view of all the foregoing that your employment by the commissioners as legal counsel, would not be contrary to the constitutional limitations above quoted.