

Opinion No. 34-711

January 8, 1934

BY: E. K. NEUMANN, Attorney General

TO: Mr. Carl F. Whittaker, Member House of Representatives, Eleventh Legislature, Albuquerque, New Mexico.

{*104} Your letter of January 8th inquires as to the legality of acceptance of proposed employment of yourself, by the State Tax Commission, for the performance of certain duties concerning the Income Tax Law passed by the 1933 Session of the Legislature.

You were a member of the legislature which enacted the Income Tax Law and which is now cited as Chapter 85 of the Laws of 1933, and your employment would be by the State Tax Commission whose duty it is to enforce the Act and collect the taxes specified therein.

You are interested in determining if you as a member of such legislature, may now rightfully accept this employment by the Income Tax Commission in view of the provisions of Section 28, Article IV of the State Constitution, which reads as follows:

"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 the 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."

The answer to your question then depends upon whether you would be accepting employment in a "civil office" created during the term of the legislature of which you were a member, or whether the clause in the Constitutional limitation "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 by such term" is applicable to your case.

The Act in question, Chapter 85, Laws of 1933, contains the following provision in Section 47.

"The State Treasurer shall also create a fund to be designated as the "Income Tax Administration Fund," and to which fund he shall pay and carry ten per cent of all income taxes finally paid over for distribution and from which funds the costs of the administration of this Act shall be paid by the Tax Commission upon voucher as all other accounts are paid."

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

The term "Civil officers" 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 vs. City of New Orleans*, 39 So. 792; 800; 115 La. 645.

In our belief we can safely dispense with a consideration of whether your employment for purposes of administering and enforcing Chapter 85 would constitute you a "Civil officer". Under the above we doubt if you would be considered as holding a "civil office" and, for the purpose of this argument, we concede that such is not the case.

This brings us to an interpretation of that part of the Constitutional section which relates to interest in contracts with the state.

By Chapter 85, the administration and enforcement of the Act is vested in the State Tax Commission. It is provided that ten per cent of the income taxes collected be set aside for this purpose. Certainly it cannot be honestly contended that the State Tax Commission has no power to employ the necessary clerks, typists, accountants and other assistants {**105*} necessary to the enforcement and administration of the Act.

We think such power is implied by virtue of the administration and enforcement being placed in the hands of the Commission, and from the fact that funds are to be set aside for such purpose.

An employee, to aid in such administration and enforcement, would be employed by reason of the Act itself, and the authority to so employ would be derived from the provisions of the law.

Such employment would constitute a contract between a state agency and the employee in which such employee would have a direct financial interest. This contract of employment is authorized by said Chapter 85 and, therefore, a member of the legislature which enacted this law is not eligible to accept such employment during his term as a member of the legislature, nor can he accept such employment within one year after his term expires.

By: FRANK H. PATTON,

Asst. Attorney General