

Opinion No. 42-4106

June 26, 1942

BY: EDWARD P. CHASE, Attorney General

TO: Mr. E. D. Trujillo State Auditor Santa Fe, New Mexico. Attention: Ismael Trujillo Assistant Auditor

{*209} In your letter of June 25, 1942 you request our formal opinion as to whether or not the membership of Mr. A. M. Fernandez on the Public Service Commission has become vacant by reason of his having announced himself as a candidate for a seat in the House of Representatives of the Congress of the United States.

In view of the question propounded, we hasten to review the provisions of Chapter 84, Article II, Section 4, Laws of 1941, which reads in part as follows, to-wit:

"No commissioner shall seek nomination or election to **any civil office in the State of New Mexico**, while he is a member of said Commission; and if any member shall, during his term of office, become a candidate for nomination for, or election to, **any civil office in the State of New Mexico**, his office as Commissioner shall forthwith become vacant, and the Governor shall appoint his successor in the manner herein provided." (Emphasis supplied)

In view of the foregoing provisions of the law, we now come to the crux of your question which is this: -- Is Mr. Fernandez seeking nomination or election to "any civil office in the State of New Mexico"? If the answer to this question is in the affirmative, the membership of Mr. Fernandez on the Public Service Commission became vacant by operation of law the very moment that he announced his candidacy, and he would not be entitled to his salary as a member of the Commission subsequent to the time of his avowed candidacy. If, on the other hand, a candidate for the House of Representatives in the Congress of the United States cannot legally be classed as a candidate for a "civil office in the State of New Mexico", then we have no prohibition in our state against a candidate for such office remaining as a member of the Public Service Commission, and Mr. Fernandez may legally, if he deems it advisable, continue performing his duties as an associate commissioner and receive his pay therefor.

Is a duly elected member of the House of Representatives of the United States a "state" or "federal" officer? This question has been squarely answered by the Supreme Court of Missouri in the case of State ex rel. Carrol vs. Becker, 45 S. W. (2d) 533, 329 Mo. 501, wherein the court said:

"A member of Congress is not a state officer. He does not represent the State. He represents the people of the United States in the district from which he is elected. He is a United States officer. The states were in existence before 'We, the people of the United States' adopted the Constitution. Each state in turn chose to accept the

limitations of its sovereignty imposed upon it when it came under the Constitution. Congressmen were the creation of the Constitution -- purely Federal officers over which a state has no control. So far as the State has authority to divide the State into congressional districts it derives that authority from the Federal Constitution and the acts of Congress. Of course when the Constitution assigns to each state the right to elect Representatives, if there is no provision as to how they are to be elected, by necessary implication a state would have the right to choose a method of carrying out the mandate."

The decision reached by the {210} Supreme Court of Missouri in the Carroll case, supra, was affirmed by the Supreme Court of the United States, 285 U.S. 380. Also, see *Provence vs. Lucas*, 107 S. W. 755, *Lamarr vs. U. S.*, 241 U.S. 103, C. J. 1259.

In view of the foregoing authority and other research which I have conducted, I come to the conclusion that a member in the House of Representatives of the Congress of the United States is a "federal" and not a "state" officer. This being true, can it be said that Mr. Fernandez is seeking a "civil office in the State of New Mexico" within the purview of Article II, Section 4, of the act above quoted? I think not. Congressmen are the creation of the United States Constitution and, therefore, strictly federal officers.

I am, therefore, of the opinion that Mr. Fernandez may legally hold his membership on the Public Service Commission and perform the duties thereof while a candidate for a seat in the House of Representatives of the Congress of the United States, if he desires to do so. As the statute above quoted now reads, I am convinced that no other legal conclusion can be reached.

It is entirely within the prerogative of the legislature to restrict a member of the Public Service Commission from becoming a candidate for Congress and at the same time retain his seat as a member of the Public Service Commission, if it desires to do so. Until, however, the legislature sees fit to specifically include congressmen in the statute above quoted, I am of the opinion that the membership of a person on the Public Service Commission is not vacated by his becoming a candidate for a seat in the House of Representatives of the Congress of the United States.

By HOWARD F. HOUK,

Asst. Atty. General