

## Opinion No. 54-5900

February 4, 1954

**BY:** RICHARD H. ROBINSON, Attorney General

**TO:** Mr. Richard R. Spurrier Secretary and Director New Mexico Oil Conservation Commission Santa Fe, New Mexico

{\*339} You have requested an opinion of this office upon the question of whether one member of the Commission properly delegated by a majority of the Commission, may hold a regularly advertised hearing for all purposes or for the purpose of taking a record. Accompanying your request was a brief of legal authorities upon this which has been most useful in preparing the answer to your question.

A review of Chapter 168, Laws 1949, as it amended Chapter 72 of the Laws of 1935, relative to the creation of the Oil Conservation Commission, and the Commission's powers and duties thereunder, has been reviewed and it is the opinion of this office that under the Laws and Constitution of the State of New Mexico, your Commission, by a proper authority may delegate to a member of the Commission the duty of holding a hearing and transcribing the testimony for the submission by a proper report to the Commission for its Order based upon the evidence and material properly in that record.

The original enactment of the Laws 1935, Chapter 72, Section 3, which was re-enacted by the Legislature in 1949 as Laws 1949, Chapter 168, Section 3 (§ 69-204, N.M.S.A., 1941 Compilation, as amended) states that two members of the Commission shall constitute a quorum **for all purposes**. The underlined portion of the prior sentence should not be construed to mean that the Commission can perform no business without the presence of two Commissioners, but that this portion of the law is a statutory requirement that all official acts and determinations of the Commission shall require that no less than two members of the Commission shall enter into an Order to perform such an official Act. Section 5, Laws 1949, Chapter 168 (§ 69-206, N.M.S.A., 1941 Compilation as amended) grants the Commission power to pass rules of Order or procedure. The limitations are, of course, whether such rules would be substantial or procedural, and if procedural, the limitation should be that they should not violate any of the provisions of the Constitution of the State of New Mexico and of the United States as to "due process."

It is interesting to note that the 1949 enactment appearing as Chapter 168, Section 9 (§ 69-310, N.M.S.A., 1941 Compilation, as amended) evidenced the Legislature intent that the delegated power to the Commission should be implemented by a wide authority to do all acts compatible with the law to accomplish the intents and purposes of the delegation of power.

It is also interesting to note that Section 17 of the Laws of 1949, Chapter 168 (§ 68-221, N.M.S.A., 1941 Compilation, as amended) specifies that the hearings of the

Commission shall be public hearings and that they may be held in such a manner as prescribed by the Commission.

Therefore a review of this legislation would indicate a delegation of legislative authority with the additional spelling out of a liberal construction of the enactment to accomplish the purposes thereon set out. In view of this and adopted administrative procedure throughout the {\*340} United States, the Commission is clearly within its authority in duly and properly designating one member to conduct a legal hearing for the purpose of taking a record which would be utilized by the Commission in making a determination of the issues before it. This procedure has been adopted by agencies of the Federal Government and by many other state agencies to implement the increasing burdens of Commissions and administrative bodies.

The Federal Government recognized this procedure as being proper in the Administrative Procedure Act passed by the United States Congress in 1946; Laws of 1948, Chapter 324, Section 70, 60 Stat. 241. The Administrative Procedure Act which is controlling upon most Federal agencies provides that such agencies by proper delegation may designate a hearing officer to:

1. Administer oaths and affirmations
2. Issue subpoenas authorized by law
3. Rule upon presentation of proof and receive relevant evidence
4. Take or cause to be taken depositions
5. Regulate the course of the hearing
6. Hold conferences for the settlement or simplification of the issues by consent of the parties
7. Make decisions or recommend decisions in conformity with Section 1007 of this Title
8. Take any other action authorized by agency rule consistent with this Chapter, Title 5, Section 1006 USA.

Prior to the enactment of this Federal Legislation, our Supreme Court in the famous **Morgan** cases, had this exact question before it in **Morgan § 1**, 298 U.S. 468, 56 S. Ct. 906, 80 L. Ed. 1288. The ultimate outcome of the **Morgan** case is not of assistance here, but in the first **Morgan** case the Supreme Court through Mr. Chief Justice Hughes upheld the right of the Acting Secretary of Agriculture, acting under properly delegated authority from the Secretary to hold a hearing and taking a record for the ultimate determination of the Secretary of Agriculture.

Your Rule No. 1209, if properly enacted, would limit the conduct of such a hearing to the receiving of testimony only. It would be this office's interpretation that the receiving of testimony would include ruling upon the relevancy and the materiality of evidence offered subject to objections by parties to the hearing and final determination or ratification by the Commission upon reviewing the testimony, and prior to the entry of its Order.

In relation to the point which occurred in the Humble trials in Federal Court in Santa Fe in 1951 and Judge Hatch's Opinion from the bench it would appear that the facts involved therein are no wise similar to the problem herein.

It is therefore the opinion of this office that the Laws of the State of New Mexico and the dictates of good Administrative Procedure permit your Commission to delegate one of its members to hold hearings, take testimony, and submit the same to the Commission for its final determination.

By: William J. Torrington

Assist. Attorney General