

Opinion No. 57-40

March 4, 1957

BY: OPINION OF FRED M. STANDLEY, Attorney General Santiago E. Campos,
Assistant Attorney General

TO: Honorable Didio B. Salas, State Senator, Socorro County, State Senate, Santa Fe,
New Mexico

QUESTIONS

QUESTIONS

"Is a member of the State Legislature prohibited from accepting employment as an Administrative Assistant in one of the state educational institutions set forth in Section 11, Article 12, of the Constitution"

ANSWER

Yes.

OPINION

ANALYSIS

It is indicated in your request that the question

". . . arises in connection with the prohibitions (sic.) contained in Section 28, Article 4 of the New Mexico Constitution; and the case of State ex rel Gibson vs. Fernandez, 40 N.M. 288 decided in connection therewith."

Article 4, Section 28, may or may not control the answer to your question. For the reasons stated hereafter, it is not necessary to determine whether this Section of our Constitution applies to the position which you have asked about. That section of our Constitution, as you know, prohibits, among other things, a member of the Legislature, during the term for which he is elected, from being

". . . . appointed to **any civil office** in the State, (Emphasis supplied.)

State ex rel Gibson vs. Fernandez, supra, dealt with the problem of what constituted a "civil office" within the meaning of Article 4, Section 28, the point being that if the position considered in that case did not constitute a "civil office" then article 4, Section 28, was no impediment to the employment of Mr. Fernandez. Put in a different fashion: If Mr. Fernandez was an "employee" of the State rather than a "civil officer" then it would matter not that he was also a Legislator, since the prohibition of Article 4, Section 28,

would not reach an "employee" of the State as distinguished from one seeking to occupy a "civil office."

However, after *State ex rel Gibson vs. Fernandez* was decided, Section 2-1-4, N.M.S.A., 1953 Compilation, was enacted. It provides:

"From and after January 1, 1945, it shall be unlawful for any member of the legislature, during the term for which he is elected to contract for or receive any compensation for services performed as an officer or employee of the state, except such compensation and expense money as he is entitled to receive as a member of the legislature."

Thus, now it is not necessary to decide whether a particular position is one which may be filled by an "employee" or is one which constitutes a "civil office." In this regard, we think that "service performed as an officer" within the meaning of Section 2-1-4 is that which would be performed by one occupying a "civil office" within the meaning of Article 4, Section 28 of the Constitution.

Thus, for all practical purposes, it is immaterial whether the position of Administrative Assistant in one of the state educational institutions in question is a "civil office" within the meaning of Article 4, Section 28, and Section 2-1-4, or whether it is one which may be filled by an "employee" within the meaning of that term as used in Section 2-1-4.

Article 4, Section 28, prohibits appointment to it if it is a "civil office." Section 2-1-4 prohibits compensation if it is a position which may be filled by an "employee."

The more basic inquiry is whether or not one who fills the position of Administrative Assistant is an "officer or employee **of the State**" within the meaning of Section 2-1-4. We think he is for the following reasons.

Article 12, Section 11, provides that these institutions are ". . . confirmed as state educational institutions. . . ."

The Governor by and with the consent of the Senate appoints the boards of regents of these institutions, and the Legislature provides by law for their general control and management. Article 12, Section 13, New Mexico Constitution.

And, foremost, the State provides by direct appropriation much of the money with which to operate these institutions and pay their personnel, whether "officers" or "employees." This money comes from general State revenues. See Chapter 287, Laws 1955 (General Appropriations Act).

And,

". . . Payment of particular persons by the state is a very strong circumstance showing that they are state employees, . . ." 81 CJS 973.

From the above, we conclude that the position in question is that of an ". . . officer or employee **of the state.** . ." and therefore Section 2-1-4 prohibits compensation to one seeking to occupy it who is also a State Legislator.

Attorney General's Opinion No. 4645, holding that a teacher in the public schools is not an "officer or employee of the State" within the meaning of Section 2-1-4, is, in our opinion, distinguishable, and not in conflict with this one. It is enclosed for your information.