

## Opinion No. 59-167

October 20, 1959

**BY:** HILTON A. DICKSON, JR., Attorney General

**TO:** Mrs. Helen Wells State Representative Mountainair, New Mexico

{\*259} This opinion is in response to your recent request on the following question:

"May a State Representative be appointed to serve the unexpired portion of a term of office of a Justice of the Peace when a vacancy is created in that office?"

In our opinion the answer is no.

This question is precipitated by the language in Article 4, Section 28 wherein it is provided that a legislator may not be appointed to any civil office in the state during the term for which he was elected. Therefore, your question is directed to determining whether a Justice of the Peace is a Civil Officer.

There is a dearth of case law in determining whether a Justice of the Peace is a civil officer. New Mexico has not decided the question. However, some authority has been found which has determined that such is the case. 51 C.J.S. Justices of the Peace, Section 1 (b); **Ballentyne v. Bower, Sheriff**, 17 Wyo. 356, 99 Pac. 869.

The case entitled **State ex rel Gibson v. Fernandez**, 40 N.M. 288 P. 2d 1197 established the tests in New Mexico for ascertaining whether any particular public office is a "civil office". These tests are as follows:

{\*260} "1. It must be created by the constitution or by the legislature or created by a municipality or other body through authority conferred by the legislature.

2. It must possess a delegation of a portion of the sovereign power of the government to be exercised for the benefit of the public.

3. The powers conferred and the duties to be discharged must be defined, directly or impliedly, by the legislature or through legislative authority.

4. The duties must be performed independently and without control of a superior power, other than the law, unless they be those of an inferior or subordinate office created or authorized by the legislature and by it placed under the general control of a superior officer or body.

5. It must have some permanency and continuity and not be only temporary or occasional. In addition, in this state, an officer must take and file an official oath, hold a

commission or other written authority, and give an official bond if the latter be required by proper authority."

In applying the above tests to the duties, qualifications and authority of the office of Justice of the Peace, it becomes clear that that office is a civil office under the laws of the State of New Mexico. See, generally, Chapter 36, Volume 6, New Mexico Statutes Annotated, 1953 Compilation.

We conclude, therefore, that a Legislator is not qualified during his term in office to also serve as a Justice of the Peace.

Thomas O. Olson

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