Opinion No. 59-79

July 22, 1959

BY: Hilton A. Dickson, Jr., Attorney General

TO: Hon. Stanley J. Brasher State Representative Bernalillo County P. O. Box 217 Cedar Crest, New Mexico

1. The 1959 Legislature did act lawfully in appropriating $ 300,000 in the general appropriation bill to the State Board of Finance "for emergencies and necessary expenditures affecting the public welfare".

2. This action does not constitute an improper and unlawful delegation of legislative authority to the State Board of Finance.

3. The State Board of Finance is an Executive Agency.

4. The State Board of Finance does not exert legislative power; it makes no appropriations; the emergency appropriation provision states the object thereof in compliance with constitutional requirements.

5. It is not lawful for a legislator to serve on an executive board, agency institution, or department even though his appointment was made in the same manner as are appointments to standing committees in each house of the legislature.

6. A legislator is ineligible to accept appointment to a civil office during the term for which he has been elected; the factor of compensation is immaterial, unless the position is created by the legislature in question.

7. It would not be lawful to have a State Board of Finance composed exclusively of members of the legislature functioning as the present State Board of Finance has functioned during the interim.

OPINION

*{*125}* This is written in reply to your recent request for an opinion on the following questions:

1. Did the 1959 legislature act lawfully in appropriating the sum of $ 300,000 in the general appropriation bill to the State Board of Finance "for emergencies and necessary expenditures affecting the public welfare"?

2. Does this action constitute an improper and unlawful delegation of legislative authority to the State Board of Finance?

3. Is the State Board of Finance an executive agency?

4. Is the State Board of Finance exerting legislative power in granting, disbursing and/or appropriating funds for a purpose not specifically set forth by law?

5. Is it lawful for a legislator to serve on an executive board, agency, institution, or department even though his appointment was made in the same manner as are appointments to standing committees of each house of the legislature?

6. Is it lawful for a legislator to be appointed by the Governor to serve in a policy making capacity, during the term for which he has been elected, on any executive board, agency, institution, or department at the state level even if the position carries no remuneration except for per diem and/or travel expenses?

7. What constitutes a "Civil Office" in the State of New Mexico?

8. Is per diem and/or travel expenses considered remuneration or compensation?

9. Would it be lawful to have a State Board of Finance composed exclusively of members of the legislature functioning as the present State Board of Finance has functioned in the interim?

In answer to these questions, it is my opinion that:

1. Yes, see analysis under part I.

2. No. see analysis under part I.

3. Yes, see analysis under part I.

4. The State Board of Finance does not exert legislative power; it makes no appropriations; the emergency appropriation provisions state the object thereof in compliance with constitutional requirements. See analysis under part I.

5. No, as to the State Board of Finance, see analysis under part II.

*{*126}* 6. A legislator is ineligible to accept appointment to a civil office during the term for which he has been elected; the factor of compensation is immaterial, unless the position is created by the legislature in question; see analysis under part II.

7. See analysis under part II.

8. This question requires no answer in the context of the question request; see analysis under part II.

9. No, see analysis under Part III.

Your first four questions deal chiefly with the validity of the appropriation made by the Twenty-Fourth Legislature at the 1959 regular session to the State Board of Finance for emergency purposes. The provision in the question appears as part of the general appropriation bill, Ch. 288, in Section 2 thereof, dealing with appropriations for executive agencies and departments, and in the portion thereof dealing with the State Board of Finance. The provision, found at p. 829 of the 1959 Session Laws, follows:

"There is also appropriated to the state board of finance the sum of three hundred thousand dollars ($ 300,000) for emergencies and necessary expenses affecting the public welfare. This money may be expended during the forty-seventh, forty-eighth or forty-ninth fiscal years and only as directed by the governor and the state board of finance."

In your questions and in your observations upon them, you suggest several deficiencies in the quoted provision, tested by the Constitution of New Mexico, as follows. First, you suggest a violation of Article IV, Section 16, apparently on the ground (not explicitly stated) that the appropriation is not one for the "expense of the executive, legislative and judiciary departments. . ." as required by that provision. Second, you suggest that the appropriation violates Article IV, Section 30, in failing sufficiently to specify the object thereof. And finally you suggest that it follows from the failure to specify the object of the appropriation sufficiently ". . . that the legislature has granted considerable legislative authority to a non-legislative agency . . ." that there is an unlawful delegation by the legislature of the legislative authority to make appropriations, in violation of Article III, Section 1 of the State Constitution.

We preface our discussion of these serious constitutional questions with the comment that as a matter of policy, this office is reluctant to conclude that a law of the state is unconstitutional, except in a clear case. As you know, this principle is uniformly applied by courts of last resort in determining constitutional questions. 16 C.J.S., Constitutional Law, Sec. 98. The Supreme Court of New Mexico adheres to this rule. **State v. Thompson,** 57 N.M. 459, 260 P. (2d) 370 (1953). This principle is applied particularly when a statute has been in force for a long time and its construction has been unquestioned. See **Douglas v. Noble,** 261 U.S. 165, 67 L. ed. 590 (1923). In this connection, we note that an appropriation to the State Board of Finance "For emergencies and necessary expenses affecting the public welfare" was included in general appropriation acts as long ago as 1939 (see Ch. 238, Laws 1939, Sec. 7, p. 648). Our consideration of your constitutional questions, then, must apply these same legal principles, since it is even less the function of the Attorney General than that of the court of last resort, to invalidate an act of the legislature, in the absence of clear and compelling grounds.

Nor do we find such grounds here, on consideration of the constitutional objections suggested. To clarify these, we quote the constitutional provisions relied on in relevant part:

Article IV, Section 16.

*{*127}* "General appropriation bills shall embrace nothing but appropriations for the expense of the executive, legislative and judiciary departments, interest, sinking fund, payments on the public debt, public schools, and other expenses required by existing laws; but if any such bill contain any other matter, only so much thereof as is hereby forbidden to be placed therein shall be void. All other appropriations shall be made by separate bills."

Article IV, Section 30

"Except interest or other payments on the public debt, money shall be paid out of the treasury only upon appropriations made by the legislature. No money shall be paid therefrom except upon warrant drawn by the proper officer. Every law making an appropriation shall distinctly specify the sum appropriated and the object to which it is to be applied."

Article III, Section 1.

"The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this Constitution otherwise expressly directed or permitted."

The contention that the appropriation fails to meet the "expense" test prescribed by Article IV, Section 16, is not well taken, in our opinion. The question whether an item of appropriation meets the "expense" test is ordinarily considered in terms of whether or not the proposed expenditure is for a "public", as distinguished from a "private" purpose. On this question, it is generally ruled that the legislature is vested with a large discretion, and its determination will not be disturbed unless clearly arbitrary. Compare **Hudson v. Higgins,** 299 S. W. 1000 (Ark. 1927) with **Humphrey v. Garrett,** 218 Ark. 418, 236 S. W. 2d 569 and see 81 C.J.S., States, Sec. 133, p. 1149. It might be that some particular determination by the State Board of Finance could be challenged as improper on this basis; but this would be a challenge to the application of the provision in particular circumstances, not a challenge to the constitutionality of the provision. It is clear from the face of the provision that the Legislature intended the expenditure of the amount appropriated for proper public purposes only.

We turn to the inter-related questions of whether the appropriation sufficiently specifies the object thereof, and whether there is involved an unlawful delegation of legislative power. Our consideration convinces us that the object is sufficiently specified, and there is no unlawful delegation of legislative power.

The purpose stated by the Legislature for this appropriation is ". . . for emergencies and necessary expenses affecting the public welfare." Does this meet the requirement of Article IV, Section 30, that the appropriation ". . . distinctly specify . . . the object . . ."? We think it does.

In so concluding, we read the relevant phrase of the statute as a whole. The Legislature did not specify, in the disjunctive, 'emergencies **or** necessary expenses affecting the public welfare.' We think that the key word here is "emergencies", and that the additional language is by way of explanation, to assure some degree of liberality (rather than strictness) in the construction of the term "emergencies."

So construed, we find that the Legislature itself has in fact performed the legislative duty of making *{*128}* the appropriation, and has delegated to the State Board of Finance, an executive and administrative agency, the power to make the factual determination on which disbursement of the appropriated fund hinges.

In reaching the conclusions just indicated, we recognize that there is a conflict of authorities relating to the effectiveness of "emergency" appropriations. The case of **Peabody v. Russell,** 134 N.E. 150, 20 A.L.R. 972 (Ill. 1922), for example, construing a more restrictive constitutional provision, basically supports a conclusion contrary to that which we have reached.

In that case, the general appropriation act included an appropriation of $ 500,000 to the department of finance "For reserve . . . To be apportioned between the executive, judicial and military departments of the state government and allotted as emergencies arise by the director of finance with the approval in writing of the governor. The Illinois court invalidated this provision as in violation of Section 16 of Article 5 of the Illinois Constitution, providing that "bills making appropriations of money out of the treasury shall specify the objects and purposes for which the same are made, and appropriate to them respectively their several amounts in distinct items and sections." The real ground of the majority decision appeared to be that the appropriation was not an "item" in the constitutional sense, but ". . . a general amount, to be apportioned into items among a number of possible objects which are in no way specified . . . (20 A.L.R. 976)." In other words, the majority found an unlawful delegation of legislative authority.

Study of this opinion discloses several grounds which render it inapplicable in the present case. First, there is no similar requirement for itemization in the New Mexico Constitution. Second, as the dissent points out, the majority conveniently overlooked the purpose of the constitutional amendment which added the language relied on to the constitutional provision in question. Finally, the majority found no effective answer to the argument adopted by the dissent, and which we find persuasive, that "emergencies" constitute a specified object and purpose to which a distinct item has been appropriated.

The majority and dissenting opinions in the case cited illustrate the analysis and approaches applied in invalidating and in upholding such "emergency" appropriations. We concur in the analysis which considers the existence or non-existence of an emergency to be a bona fide question of fact, the determination of which may properly be delegated by the legislature to an executive or administrative agency.

What is an "emergency"? In **Le Febvre v. Callaghan,** 263 Pac. 589 (Ariz., 1928), the court referred to "the generally accepted definition" and quoted it as follows (263 Pac. 589 at pp. 591-592):

"'An unforseen occurrence or combination of circumstances which calls for immediate action or remedy.' * * *"

By definition, that which is "unforeseen" cannot be specified in terms which admit of no surprise. Yet nothing is more certain, in fact, than that such "unforeseen" occurrences will require prompt treatment. See, e.g., **Le Febvre v. Callaghan,** supra, quoting Ch. 35, Laws 1922 Arizona, Sec. 10, which, with reference to "an emergency fund for state purposes" specified:

"In the event of invasions, riots or insurrections, epidemics of disease, acts of God which result in invasion, damage or disaster to the works, buildings or property of the state, or which menace the health, lives or property of any considerable number of persons in any community of the state, and confined to contingencies as to which no other funds are appropriated, or in *{*129}* the event appropriations have been made for similar contingencies, then, confined, to amounts which may be necessary in addition to such appropriation, to meet the emergency in each case, the Governor of the state may authorize the incurring of liabilities and expenses to be paid from the emergency fund created in this section."

It is doubtful whether such attempts to delineate in detail that which constitutes an "emergency" will forward the legislative purpose beyond that stated in the legislation herein considered, for example. The term itself provides a concrete standard for the guidance of the executive or administrative agency concerned.

This view is supported by some of the authorities. In **Commonwealth ex rel Meredith v. Johnson,** 166 S. W. (2d) 409 (Ky., 1942), the court in upholding the validity of such "emergency" appropriations, cut through the camouflage of semantic objection, and said this (166 S.W. (2d) 409, at p. 414):

"It could scarcely be contended that the Governor's finding in respect to an emergency would not be reviewable by the courts in the event that the delegated discretion should be abused; and certainly the Legislature would not be required to anticipate every item for which it might become necessary to expend money in the course of the operation of the affairs of the State. It might be that the word 'emergency' was erroneously employed in the Act. Perhaps it would have been better to have designated the fund 'miscellaneous expense' (anticipated but undefined). **It is a matter of common knowledge that even household budgets must contain an anticipation of miscellaneous expenses, most of which are created by unforeseen emergencies. To hold that the state government could not take the precaution of anticipating such miscellaneous items would be to retard the progress and operation of public affairs.** (Emphasis added)."

The court went on to deal with the objection that legislative authority was unlawfully delegated, and ruled (166 S.W. (2d) 409, at p. 415):

"This court has heretofore recognized the right of the legislative branch of the government to delegate to executive officers the power to determine some fact upon which the act of the Legislature made or intended to make its own action to depend, Ashland Transfer Co. v. State Tax Commission, 247 Ky. 144, 56 S.W. 2d 691, 87 A.L.R. 534, and that is all the Legislature has done in the Acts under consideration. It has conferred upon the Governor, and in some instances other officers, the power to determine from a state of facts, whether an emergency exists for which public funds may be expended, and upon such determination make the expenditures from a fund appropriated for the purpose.

* * *

"Foreseeing such possible emergencies, but, being unable to determine at the time of its regular session what specific situation might arise, the Legislature wisely delegated to the Governor the right in his administrative capacity to determine the fact that such an emergency has arisen. This authority is strictly administrative and does not violate sections 27, 28, 29 or 230 of the Constitution."

Other authorities support the views expressed in the case just cited. Of particular interest is the opinion expressed in **In re Opinion of the Justices,** 19 N.E. (2d) 807 (Mass., 1939), apparently an advisory opinion to the Senate of the Commonwealth under the practice *{*130}* in that jurisdiction. The analysis deals with various aspects of the situation called to our attention by your opinion request, and deals with some force with the question whether such emergency appropriation constitutes an unlawful delegation of legislative power. The court said, in that opinion (19 N.E. (2d) 807, at pp. 814-815):

"The General Court cannot constitutionally confer such a power of choice upon the Governor acting with the consent of such a recess body if this power amounts to a power of appropriation. The legislative power to appropriate money of the Commonwealth cannot be delegated by the General Court to any of its members, or to any executive or administrative officer, officers, or board.

* * *

"We are of the opinion, however that the power conferred by the bill on the Governor acting with the consent of the recess body is not the legislative power of appropriation but rather is an executive or administrative power of expenditure. These powers are not mutually exclusive. Undoubtedly the General Court in the exercise of its legislative power could appropriate money of the Commonwealth to meet 'unforseen conditions' arising in connection with specific objects of appropriation and determine the particular objects for which the money so appropriated should be used. Indeed an intention that appropriations shall be itemized is clearly shown by the Constitution . . .

* * *

"It is clear that, however minutely appropriations are itemized, some scope is left for the exercise of judgment and discretion by executive or administrative officers or boards in the expenditure of money within the limits of the appropriation. And it is also clear that the General Court in the exercise of its legislative power of appropriation has a broad scope for determining whether it will prescribe in detail the particular purposes for which money appropriated shall be expended or, on the other hand, will permit executive or administrative officers or boards to exercise judgment and discretion within a wide field in the expenditure of money appropriated for **a given object** to accomplish the general purposes of the appropriation. The choice of the latter alternative has been made frequently. * * * Such a choice -- at least within reasonable limits -- does not amount to an unconstitutional delegation of legislative power. (Emphasis added)"

To the same effect is **Wells v. Childers,** 165 P. (2d) 358 (Okla., 1945). See also **Raymond v. Christian,** 74 P. (2d) 536 (Cal. App. 1938), holding the provision of an emergency fund in the general appropriation bill to constitute an "appropriation" within the meaning of the state constitution and statutes; and 81 C.J.S., States, Sec. 161, at p. 1204.

Although the New Mexico Supreme Court has not been called upon to decide the precise question, we consider the expressions by our Court to be consistent with the conclusions above expressed. In **McAdoo Petroleum Corporation v. Pankey,** 35 N.M. 246, 294 Pac. 322 (1930), the Court directed discharge of a writ of mandamus to require the Commissioner of Public Lands to refund to the petitioner amounts allegedly paid erroneously as rentals on an oil and gas lease. Although such refunds were provided for by statute, the Court viewed the statute as violative of Article IV, Section 30 of the Constitution, in failing to provide for the appropriation of a specific amount or a specific object. As the Court said (294 Pac. 322 at p. 324):

*{*131}* "In so far as that statute assumes to authorize repayments of moneys covered into the treasury and funded, as the property of the state, on the mere say-so of an administrative officer, we hold it unconstitutional."

Since the decision concludes (or at least assumes) that the administrative officer involved would exercise an uncontrolled discretion, it is not in point here. In any event, a similar question evoked illuminating analysis in **Gamble v. Velarde,** 36 N.M. 262, 13 P. (2d) 559 (1932), in which the Court upheld a gasoline tax refund statute against the challenge of Article IV, Section 30, emphasizing that the constitutional provision relied on had as its purpose to insure legislative control, and to exclude executive control, over the purse strings: that is, it is an assertion of legislative power, and a limitation upon executive power. In that case, the Court found that the statute questioned established sufficient standards for the guidance of the administrative officer involved.

As we read these cases, we find them wholly consistent with the conclusions above expressed; and we find that our conclusions accord particularly with the fundamental

point expressed in **Gamble v. Velarde,** supra, that the provisions of Article IV, Section 30, should be viewed as an assertion (not a limitation) upon legislative power.

To summarize: Those who would challenge the 1959 deficiency appropriation on constitutional grounds can show, at best, a conflict of authority. In view of the sound and well-reasoned bases for upholding such appropriations, as set forth above, and in view of the presumption of constitutionality with which this office must view the work of the Legislature, we conclude that the constitutional objections to the 1959 emergency appropriation to the State Board of Finance must fail.

If the foregoing analysis should leave any doubt upon the question, this office is satisfied, for reasons already stated, that the State Board of Finance, established by Section 11-1-1, N.M.S.A., 1953 (originating in Laws 1923, Chapter 76, Section 3; amended Laws 1925, Ch. 85, Sec. 1, Laws 1953, Ch. 161, Sec. 1 and Laws 1957, Ch. 47, Sec. 1), is an executive agency, charged with the execution of the laws passed by the Legislature in the ". . . general supervision of the fiscal affairs of the state . . .", and vested with no powers and no duties which can be deemed legislative in their nature.

In like manner, we state unequivocally that the State Board of Finance exerts no legislative power. In authorizing expenditure of any part of the "emergency" appropriation, it acts to make a factual determination. It makes no "grant", and no "appropriation", as your fourth question might suggest. And, most emphatically, it takes no action relating to the expenditure of funds "for a purpose not specifically set forth by law", as your fourth question would also suggest. These conclusions require no elaboration in view of that which has already been said in the above analysis.

Finally, to the extent that the questions presented on this point may be said to encompass the objection that an appropriation is constitutionally deficient in that it permits an administrative or executive agency to apportion a lump sum, we are satisfied that this objection is not well taken, based upon the analysis already stated. See, e.g., **Sibel v. State Board of Public Affairs,** 244 P. (2d) 307 (Okla. 1952.)

The foregoing analysis compels the conclusion that the 1959 "emergency" appropriation to the State Board of Finance is valid.

PART II

Within the context of your opinion request, including your comments on the questions asked, the group of questions quoted above *{*132}* deal primarily with the question of the eligibility of a member of the legislature to serve on the State Board of Finance, or, more generally, in any policy-making capacity on any executive agency. You indicate in your comments that it is your opinion that ". . . it is morally and constitutionally wrong for a legislator to serve in an executive, policy-making capacity, especially when the appointing power lies in the executive branch of government.", and you refer to Article IV, Section 28 of the Constitution, as well as to Article III, Section 1.

In this analysis, your inquiries are discussed chiefly in terms of the context of your request, i.e., the composition of the State Board of Finance. Only secondary consideration is given to questions not directly related to the subject matter of your principal request.

However, this office is satisfied that the clear meaning and intent of Article IV, Section 28 of the Constitution of New Mexico are to render ineligible for appointment to the State Board of Finance any member of the Legislature. This conclusion is strengthened by consideration of the provisions of Article III, Section 1, relating to the separation of powers, quoted above.

The former provision, which is in fact determinative of your inquiry, is as follows:

"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; . . ."

The State Board of Finance is constituted pursuant to Section 11-1-1, N.M.S.A., 1953, which originated in Laws 1923, Ch. 76, Section 3. Although the principal function of the Board, since that first enactment, has been ". . . the general supervision of the fiscal affairs of the state . . .", the organization and composition of the Board has been changed from time to time; and Laws 1953, Ch. 161, Section 1, for the first time provided for legislative members of the Board. The statute, as currently effective, provides for a Board of seven members: The Governor, the Auditor, and three members appointed by the Governor with the advice and consent of the senate, no more than two from the same political party; and

"D. One (1) member of each house of the state legislature to be appointed in the same manner and at the same time standing committees of the respective houses are appointed."

The statute cited goes on to provide for the functions of the Board, which relate to the general supervision of the state's fiscal affairs, and the safekeeping and depositing of the state's moneys and securities, with several incidental powers explicitly stated. As you know, various other statutes impose specific duties on the Board with reference to particular matters.

The question whether it is lawful for a legislator to serve on the Board -- as provided explicitly by the legislature -- depends upon the consideration of Article IV, Section 28 of the Constitution, quoted above, and chiefly upon the question whether or not such appointment constitutes appointment to a "civil office."

We conclude, on careful consideration, that membership upon the Board does constitute "civil office", and that the authorities clearly render legislators ineligible for such appointment.

The question of what is, or is not, a civil office, within the meaning of constitutional and statutory provisions, was considered by the Supreme Court of New Mexico in **State ex rel Gibson v. Fernandez,** *{*133}* 40 N.M. 288, 58 P. 2d 1197 (1936), and the Court there quoted with approval (without approving the entire opinion, 40 N.M. 288, 297) what might be termed the orthodox test on this point, quoting the Montana court, at 40 N.M. 288 at p. 292, as follows:

"'(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 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.' "

See also **State of Montana ex rel Barney v. Hawkins,** 257 Pac. 411, 53 A.L.R. 583 (Mont. 1927), anno. p. 595, and supplemental annotations, 93 A.L.R. 333 and 140 A.L.R. 1076, also stating the accepted rule.

Judged by this standard, we are compelled to the conclusion that the exercise of the functions of a member of the State Board of Finance clearly meet the test of a "civil office" and cannot be viewed otherwise.

The fact that the exercise of the functions of a member of the State Board of Finance by a legislator meets the tests set out above is fatal to the eligibility of a legislator for the office, and therefore fatal to the constitutionality of the relevant portion of Section 11-1-1, N.M.S.A., 1953, quoted above, on the ground stated.

In this instance, the presumption of constitutionality, and the reluctance of this office to declare a statute unconstitutional unless clearly so, are of no assistance. The governing constitutional provision is clear. Furthermore, the authorities which construe similar provisions are clear.

For example, the decision in **Padron v. People of Puerto Rico ex rel Castro,** 142 F. (2d) 508 (CCA 1, 1944) is in point. In a quo warranto proceeding, the circuit court there held invalid the assumption by a legislator of the civil office of secretary of the capital, in view of a statutory provision which stated, in relevant part:

"No senator or representative so elected or appointed shall, during his term of office, be appointed to any civil office under the Government of Puerto Rico . . ."

In so holding, the court stated (142 F. (2d) 508 at p. 509):

"The prohibition in the Act is twofold. It runs directly against the appointing power and denies it the authority to appoint a Senator or Representative in the Insular Legislature to a 'civil office under the Government.' But it also means that the members of the Legislature are ineligible for appointment during their term to any such civil office."

Another case to similar effect, construing a constitutional provision virtually identical with ours, is **State ex rel Nagle v. Kelsey,** 55 P. (2d) 685 (Mont. 1936). The court there issued its writ of quo warranto, ousting from office a state senator who purportedly held forth also as member of the state relief commission.

*{*134}* The constitutional provision there construed was section 7, article 5 of the Montana Constitution, which provided in relevant part:

"No senator or representative shall, during the term for which he shall have been elected, be appointed to any civil office under the state; . . ."

Other cases reach the same result. See **In re Opinion of the Justices,** 19 N.E. 2d 807 (Mass. 1939) and **People v. Tremaine,** 168 N.E. 817 (N.Y. 1929); and see 67 C.J.S., Officers, Sec. 23 (b) (3), p. 141 et seq.

Indeed, under several of the cases cited, a statute which provides for the appointment of executive or administrative officers by the Legislature would be of doubtful validity both under a constitutional provision like Article IV, Section 28 (**Padron v. People of Puerto Rico ex rel Castro,** supra), because the appointment itself is viewed as invalid, and under the separation of powers provision, because the power of appointment is viewed as basically an executive power. **In re Opinion of the Justices** and **People v. Tremaine,** supra. See also 67 C.J.S., Officers, Sec. 28, p. 157. On this point, however, compare, e.g., **Cox v. State,** 78 S.W. 756 (Ark., 1904), and **Gillespie v. Barrett,** 15 N.E. (2d) 513 (Ill. 1938), both upholding the power of the legislature to appoint, on the ground that such is not **solely** an executive power. Such analysis seems to apply here, since our Constitution, like that of Illinois, confers the appointive power on the Governor as to ". . . all officers whose appointment or election is not otherwise provided for . . . (Article V, Section 5)." However that may be, the opinion request presents no situation which requires an answer to this question -- the validity of the appointment itself and statutory provision therefore as distinguished from the disqualification of the legislator to accept such appointment -- at this time, in view of the premises from which this office considers constitutional questions, as earlier above indicated, and in view of the fact that the ineligibility to office of a legislator, in this situation, is determinative.

Since we have concluded that a legislator is ineligible under our Constitution to appoint to the State Board of Finance, it becomes important to consider the consequences of acceptance of such civil office by incumbent legislators. The applicable principle of law is stated thus in 67 C.J.S., Officers, Section 23 (c), at p. 149:

"Where the constitution or statutes declare that persons holding one office shall be ineligible for election or appointment to another office, either generally or of a certain kind, the prohibition has been held to incapacitate the incumbent of the first office to hold the second so that any attempt to hold the second is void. Where, however, it is the holding of two offices at the same time which is forbidden by the constitution or statutes, a statutory incompatibility is created similar in its effect to that of the common law, and as in the case of the latter, it is well settled that the acceptance of a second office of the kind prohibited operates ipso facto absolutely to vacate the first without the necessity of judicial proceedings prior to the appointment of another to such office . . ."

We have carefully considered Article IV, Section 28 of our Constitution in connection with the principles of law quoted and the constitutional or statutory provisions involved in the cases cited in footnotes to the text above quoted (including cases above discussed), and we are satisfied that the effect of Article IV, Section 28 is to render the appointment to the State Board of Finance subject to attack, rather than the status of the appointee as a legislator.

The foregoing analysis serves to indicate the basis for our answer *{*135}* to your fifth question and related questions.

In connection with your sixth question, the foregoing discussion points out that the test of eligibility by a legislator to service in a policy-making capacity on any executive agency hinges upon whether or not such function constitutes a "civil office" under the State Constitution as construed by our Supreme Court. We cannot undertake to state any broad general conclusion in response to this question, since such situation would require separate consideration based upon its own facts. The definition of a "civil office", sought in your seventh question, has been answered also by the discussion above. Since the test is that of "civil office", the presence or absence of remuneration other than per diem and/or travel expense, referred to in your sixth question, is wholly immaterial. As you may be aware, the law is that public officers have no right to compensation except as may be specifically provided by law. 67 C.J.S., Officers, Sec. 83, p. 319 et seq.; **State ex rel Delgado v. Romero,** 17 N.M. 81, 124 Pac. 649 (1912); **State ex rel Baca v. Montoya,** 20 N.M. 104, 146 P. 956 (1915); **Fancher v. Board of Com'rs of Grant Co.,** 28 N.M. 179, 210 Pac. 237 (1922).

The compensation test would become material only in the event of appointment of a legislator to an office created by the legislature in which he serves, bringing into play the relevant portion of Article IV, Section 28. No such situation is presented by your opinion request. There is some indication in the cases, however, that per diem and expenses might not be viewed as resulting inviolation of such a constitutional provision. See **Gillespie v. Barrett,** 15 N.E. 2d 513 (Ill, 1938).

PART III

It follows from that which has been said in the analysis under Part I of this Opinion that the functions of the State Board of Finance are executive, and not legislative.

Accordingly, such a board, composed exclusively of legislators, would be unconstitutional in view of the separation of powers provided for in Article III, Section 1, of the Constitution. In **People v. Tremaine,** 168 N.E. 817 (N.Y. 1929), the court said, with respect to a similar question, at p. 822:

"Should the question arise whether the appointments under consideration are legislative or administrative, a dilemma presents itself, either side of which is fatal to the contention of the respondent. If they are legislative in character, the appointment amounts to a delegation of the legislative power over appropriations. The Legislature cannot secure relief from its duties or responsibilities by a general delegation of legislative power to some one else.

* * *

"If, on the other hand, the power is administrative, it has no real relation to legislative power. The head of the department does not legislate when he segregates a lump sum appropriation. The legislation is complete when the appropriation is made. The Legislature might make the segregation itself, but it may not confer administrative powers upon its members without giving them, unconstitutionally, civil appointments to administrative offices."

Accordingly, any attempt by the legislature to provide for a State Board of Finance, exercising the functions of the present Board, but composed of legislators only, must fail as unconstitutional.

CONCLUSION

The net effect of this opinion is to uphold the powers of the State Board of Finance, but to invalidate the statutory provision pursuant to which two legislators serve on the Board by reason of the ineligibility of legislators to serve as provided, *{*136}* in view of Article IV, Section 28. Although this ruling is made because compelled by the law as we understand it, and the result is to leave in operation a five-man State Board of Finance, we suggest that the importance of a final ruling in the matter from the viewpoint of the public interest, is such that a ruling in the matter should be obtained, if possible, from the Supreme Court of New Mexico, in order to set the matter to rest.