

## **Opinion No. 69-111**

September 19, 1969

**BY:** OPINION OF JAMES A. MALONEY, Attorney General Jeff Bingaman, Assistant Attorney General

**TO:** Thomas C. Donnelly, President, New Mexico Highlands University, Las Vegas, New Mexico 87701

### **QUESTIONS**

#### QUESTIONS

Is there any New Mexico Constitutional prohibition or legal objection to the payment of the salary to a faculty member who is on an annual contract which requires 11 month service and provides for 30 days of annual leave and who will be absent from his university duties for 30 days beyond his annual leave while he serves as a delegate to the Constitutional Convention?

#### CONCLUSION

Yes, see analysis.

### **OPINION**

#### {\*178} ANALYSIS

Before stating the considerations that cause us to conclude that the question asked must be answered in the affirmative, we think it advisable to distinguish the question involved here from the question of whether a state legislator can hold another state job during a legislative session. This latter question involving legislators has been dealt with in at least eight opinions of the Attorney General. (Ops. No. 4645 (Jan. 24, 1945), 4711 (May 10, 1965), 6530 (Oct. 15, 1966), 57-11 (Jan. 16, 1957), 57-40 (March 4, 1957), 57-93 (May 8, 1957), 58-39 (Feb. 20, 1958), 60-24 (Feb. 15, 1960)). The discussion in these opinions revolves around Article IV, Section 3 and Article IV, Section 28 of the New Mexico Constitution, and Sections 2-1-4 and 2-1-5, N.M.S.A., 1953 Compilation. These constitutional and statutory provisions explicitly apply to the legislature and are consequently not in point in the question presented here. It should also be noted that these provisions are concerned primarily with the issue of a conflict of interest involved in serving in the legislature while receiving other compensation. This opinion will not deal with that aspect of the problem. We will limit this opinion to a discussion of the legal difficulties which arise as a result of the time requirements imposed by the two jobs.

The question of the incompatibility of two jobs caused by conflicting duty hours, etc. was dealt with in Opinion of the Attorney General No. 66-32 issued March 16, 1966. That

opinion specifically answered the question of whether a school employee could "also be employed by a community action" group to render services for a Federal program at the same time he is supposed to be rendering a service to the school district and receive compensation from both. Because of the relevance of the discussion in that opinion we will quote from it extensively at this point.

During that period of time when the employee of the school board is employed under a contract, and when he is required by the terms of that contract to work full time for the school board, it is understood that he is employed by a community action group to render services in a Federal program which is supervised by that group. The time and hours during which the employee must work for the school board are the same time and hours that he is required to perform his duties for the community action group.

It is our opinion that the employee could not be employed by both agencies and receive compensation from both the positions since the positions are incompatible.

There have been many opinions from this office dealing with questions of incompatibility of two positions. See Attorney General's Opinions, 58-38, 58-237, 58-228, 58-221. Each of these opinions relied to a large extent on the case of **Haymaker v. State**, 22 N.M. 400. In that case the Court considered the issue of incompatibility and determined that incompatibility could result from any of the following factors:

"The incompatibility between two offices, which upon the acceptance of the one by the incumbent of the other operates to vacate the latter, is not simply a physical impossibility to discharge the duties of both offices at the same time, but it is an inconsistency in the functions of the two offices, as where one is subordinate to the other, or where a contrariety and antagonism would result in the attempt by one person to faithfully and impartially discharge the duties of both."

{\*179} From the language contained in the **Haymaker** case supra, it is apparent that if it is physically impossible for the employee to perform both jobs due to the fact that the requirements for working time are the same under both jobs the positions would be incompatible. Such being the case a person may not be employed in both positions at the same time and consequently cannot be paid for both jobs.

Based upon the reasoning and authority quoted above from Opinion of the Attorney General No. 66-32, we conclude that it would be contrary to law to pay salary to a faculty member during the time he is serving as a delegate to the Constitutional Convention if his duties as a delegate make it impossible for him to perform the duties for which the salary is paid. The determination of whether he is able to perform these duties serving as a delegate is not for this office to make.