

Opinion No. 69-28

April 11, 1969

BY: OPINION OF JAMES A. MALONEY, Attorney General Justin Reid, Assistant Attorney General

TO: Harold Bibo, Director, State Personnel Office, 130 South Capitol, Santa Fe, New Mexico 87501

QUESTIONS

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1. Is the position of delegate to the forth-coming constitutional convention a political office within the meaning of Section 5-4-42 B, N.M.S.A., 1953 Compilation?
2. Is the position of delegate to the forth-coming constitutional convention a public office within the meaning of Section 5-4-42 C, N.M.S.A., 1953 Compilation?

CONCLUSIONS

1. No.
2. No.

OPINION

{*42} ANALYSIS

Section 5-4-42 B, supra, provides:

"No person in the personnel office, or employee in the service, shall hold **political office** or be an officer of a political organization during his employment. For the purpose of the Personnel Act [5-4-28 to 5-4-46], being a member of a local school board shall not be construed to be holding political office, and being an election official shall not be construed to be either holding political office, or being an officer of a political organization. Nothing in the Personnel Act shall deny employees the right to vote as they choose or to express their opinions on political subjects and candidates."
(Emphasis added.)

While delegates to the forthcoming constitutional convention will be elected from candidates filing for the position by petition, it is our opinion that the position of delegate is not a "political office" within the meaning of the above quoted provision. The word "political" can, in some contexts be broadly interpreted to include all governmental functions, but prohibitions of this sort contained in personnel or civil service acts are

generally held to apply to offices which are either clearly partisan or which in practice are so closely related to partisanship that there is a fundamental inconsistency in one person holding both the status of a public employee and that of an elective office which has continuing political overtones. **Heidtman v. City of Shaker Heights**, 99 O. App. 415, 119 N.E.2d 644, affd. 126 N.E.2d 138 (1954).

We see no such inconsistency between the positions of public employee covered by the State Personnel Act and that of delegate to the constitutional convention. We do not believe the legislature intended that "political office" included delegates to a constitutional convention.

As to question No. 2, Section 5-4-42 C, supra, provides as follows:

"Any employee who becomes a candidate for **public office** must, upon filing or accepting the nomination and during the campaign, take a leave of absence. This subsection does not apply to those employees of a grant-in-aid agency, {⁴³} whose political activities are governed by federal statute." (Emphasis added.)

It is clear that the position of delegate to the constitutional convention is not a "public office". In the case of **State v. Quinn**, 35 N.M. 62, 290 P.2d 786 (1930), the Supreme Court specifically ruled that for a position to constitute a "public office" it must, among other features, "have some permanency and continuity, and not be only temporary or occasional". We see nothing in the State Personnel Act to indicate that the legislature intended any different meaning for the words "public office". It follows that a candidate for the position of delegate to the constitutional convention, which is both a temporary and occasional position, is not a candidate for "public office" and need not take a leave of absence.

As to state employees of agencies supported by federal funds, Section 1503 of Title 5, U.S.C.A., specifically permits political activity relating to elections for constitutional amendments; however, Section 1502 (a) (1), forbids the use of official authority or influence to affect the result of "an election or nomination for office".

This means, of course, that a public employee may not use his position or duty hours to further his candidacy for the position of delegate, nor to perform the duties of delegate should he be elected. Time for such activity must be arranged either after hours or by the use of annual leave time or through some other lawful arrangement with the employing agency.

We consider there to be nothing inconsistent in what we have said above with Opinions 1961-62, Nos. 61-53, 62-37 and 62-116 of this office.