

Opinion No. 69-49

May 21, 1969

BY: OPINION OF JAMES A. MALONEY, Attorney General Mark B. Thompson, III,
Assistant Attorney General

TO: Honorable Davir F. Cargo, Governor of New Mexico, Legislative Executive Building,
Santa Fe, New Mexico 87501

QUESTIONS

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May a member of the legislature be appointed to serve as the Commissioner for the State of New Mexico on the Pecos River Compact Commission during the term for which elected to the legislature and even if he has resigned the legislative position?

CONCLUSION

No.

OPINION

{*72} ANALYSIS

This question raises the proper construction of New Mexico Constitution Article IV, Section 28, which reads in part:

"No member of the legislature {*73} shall, during the term for which he was elected, be appointed to any civil office in the state * * *"

The phrase "during the term for which he was elected" has long been construed to mean the entire term, unaffected by a resignation from the legislative office. Opinion of the Attorney General No. 60-139, dated August 5, 1960. Hence, the fact that the legislator has resigned his position makes no difference under this constitutional provision.

The key problem is whether or not the Pecos River Compact Commissioner is a **civil office** within the meaning of Article IV, Section 28. In order to determine what constitutes a civil office we look for guidance to **State ex rel., Gibson v. Fernandez**, 40 N.M. 288, 58 P.2d 1197 (1936). Under that decision five elements are included in the definition of a public office:

"(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."

How does the position of a Pecos River Compact Commissioner compare with the **Gibson** requirements? (1) It was created by the legislature by ratification of the Pecos River Compact, New Mexico Laws 1949, Chapter 6, and by an independent act providing for the appointment of the commissioner, New Mexico Laws 1949, Chapter 128. (2) It is delegated the administration of the Pecos River Compact, a portion of the power delegated the Interstate Streams Commission, Section 75-34-3, N.M.S.A., 1953 Compilation. (3) The powers conferred upon the office and the duties of the office are defined in the Pecos River Compact, which was created under the authority granted by the legislature in Section 75-34-3, N.M.S.A., 1953 Compilation and ratified by New Mexico Laws 1949, Chapter 6. Additional duties are conferred by New Mexico Laws 1949, Chapter 128. (4) The duties are performed independently and without control of a superior power. See Pecos River Compact Article V. (5) The Office of Commissioner is a permanent and continuous office.

With regard to the "additional" requirements listed in **Gibson**, the statutes creating the position of Commissioner are not clear. There does not appear to be a requirement for a bond but such is not required by **Gibson**. The Governor does give the Commissioner written authority of his appointment, but the document only establishes title to the office. See New Mexico Constitution. Article V, Section 11, and **Conklin v. Cunningham**, 7 N.M. 445, 38 P. 170 (1894).

There is no requirement for the Commissioner taking and filing an oath, but we do not see how this alters our opinion. The **Gibson** requirements were quoted directly from a Montana case, and Montana's oath requirements are slightly different from New Mexico's. In New Mexico, a person elected or appointed to **any** office **takes and subscribes** to an {*74} oath or affirmation supporting the state and federal constitutions. New Mexico Constitution, Article XX, Section I. We interpret the constitution to mean that if the position is a civil office under Article IV, Section 28, and it conforms to the five substantive requirements of **Gibson**, then the person appointed to the office must take the required oath. The requirement of the oath does not define the position as an office. To the extent that the Opinion of the Attorney General, No. 67-4, dated January 9, 1967, implies otherwise, that opinion is expressly rejected. Finally, we can not see how compensation or the refusal of compensation by the Commissioner can have any bearing on the question of whether or not the position is a civil office.

We conclude that the position of the New Mexico Commissioner on the Pecos River Compact Commission is a civil office within the terms of the New Mexico Constitution and, therefore, a legislator may not be appointed to that office during the term of his legislative position.