

Opinion No. 72-10

March 7, 1972

BY: OPINION OF DAVID L. NORVELL, Attorney General Oliver E. Payne, Deputy Attorney General

TO: The Honorable Bruce King, Governor of New Mexico Executive-Legislative Bldg., Santa Fe, New Mexico 87501

QUESTIONS

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1. Is a legislator who served in the recent legislative session which enacted the law creating a new court of appeals judicial seat qualified for appointment by the Governor to fill that particular vacancy?
2. Would the answer to question one above be any different if the particular legislator abstained from voting on the legislation that created the judicial seat?

CONCLUSIONS

1. No.
2. No.

OPINION

{*12} ANALYSIS

Both questions seem to assume that the answers thereto depend upon the fact that the legislation creating the new judicial position was enacted while a potential legislator-appointee was serving in the Legislature. But under the factual situation here presented, the answers to your questions are dictated by the first portion of Article IV, Section 28, New Mexico Constitution, quoted below:

"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; nor shall any member of the legislature during the term for which he was elected nor within one year thereafter, be interested directly or indirectly in any contract with the state or any municipality thereof, which was authorized by any law passed during such term." (Emphasis added.)

The above constitutional provision has three areas of disqualification for legislators, namely, (1) that he shall not be appointed to any civil office during the term for which he was elected, (2) that he is ineligible for such appointment for one year after his term of office has expired if the office was created or its emoluments increased during his term of office, and (3) a limitation on his power to contract with the state.

Number one above is applicable here {**13*} since there is no question but that the constitutional office of judge of the court of appeals is a civil office within the purview of Article IV, Section 28, **supra. Harvey v. Ridgeway**, Ark., 450 S.W.2d 281. The criteria for determining what is a "civil office" were laid down by our Supreme Court in **State ex rel. Gibson v. Fernandez**, 40 N.M. 288, 58 P.2d 1197. Suffice it to say that each of the five essential elements is inherent in the office of court of appeals judge. It is an office created by the Constitution and the Legislature. N.M. Const., Art. VI, § 28; §§ 16-7-1, et seq., N.M.S.A., 1953 Comp. It possesses a delegation of a portion of the sovereign power of government. The powers and duties have been provided by law. The duties are performed independently subject only to superintending control by the Supreme Court. It is an office which has permanency and continuity.

We need to also mention that a legislator cannot, by resigning his office, remove himself from the ban of Article IV, Section 28, **supra**, since the Constitution phrased the restriction in the language "during the term for which he was elected." Attorney General Opinion No. 63-23.