

**Opinion No. 77-02**

January 20, 1977

**OPINION OF:** Toney Anaya, Attorney General

**BY:** P. J. Turner, Assistant Attorney General

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LEGISLATORS-COUNTY EMPLOYEES-COUNTY MANAGERS-CIVIL OFFICE-ARTICLE IV, SECTION 28, N.M. CONSTITUTION.-A member of the state legislature during the term for which elected may serve as a county manager.

**QUESTIONS**

May a member of the state legislature, during the term for which elected, serve as a county manager?

**CONCLUSIONS**

See analysis.

**ANALYSIS**

Article IV, Section 28 of the New Mexico Constitution provides:

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.)

**OPINION**

The prohibition of Article IV, Section 28 extends only to civil offices. Accordingly, we must determine whether the position of county manager is a "civil office."

The New Mexico courts have often considered the question of whether a position is a "civil office" as opposed to employment. See *State ex rel. Gibson v. Fernandez*, 40 N.M. 288, 58 P.2d 1197 (1936); *Pollack v. Montoya*, 55 N.M. 390, 234 P.2d 336 (1951); *Candelaria v. Board of County Commissioners*, 77 N.M. 458, 423 P.2d 982 (1967); *Lacy v. Silva*, 84 N.M. 43, 499 P.2d 361 (Ct. App. 1972). Although various standards and

tests have been used, it is generally agreed that the determinative criteria for a finding that a position is a "civil office" is whether or not some portion of sovereign power is vested in the position. *State ex rel. Gibson v. Fernandez*, supra; *Lacy v. Silva*, supra.

In *Lacy v. Silva*, supra, the Court of Appeals of New Mexico quoted from Webster's Third New International Dictionary (1966), defining sovereignty as "'supreme power;' 'freedom from external control: autonomy, independence;' 'controlling influence.'" See *Oceanographic Commission v. O'Brien*, 74 Wn.2d 904, 447 P.2d 707 (1968), for a listing of definitions of sovereign power.

Section 15-37-16.1(B), NMSA, 1953 Comp. provides:

A board of county commissioners may employ and set the salary of a county manager to conduct the business of the county, to serve as personnel officer, fiscal director, budget officer, property custodian and to act generally as the administrative assistant to the board, aiding and assisting it in the exercise of its duties and responsibilities.

That a statute may set forth duties to be performed by one occupying a public position does not of itself establish a delegation of sovereign power. *State v. Page*, 98 Mont. 14, 37 P.2d 575 (1934). The functions specified in Section 15-37-16.1(B), supra, do not prescribe any independent, unequaled or superior authority of a sovereign nature. See *State v. Jacobson*, 140 Mont. {79} 221, 370 P.2d 483 (1962). A county manager exercises no powers or duties independent of the county commissioners by virtue of Section 15-37-16.1(B), supra.

Section 15-37-1, NMSA, 1953 Comp. vests sovereign power in a board of county commissioners. It provides that:

The powers of a county as a body politic and corporate shall be exercised by a board of county commissioners.

The independent authority necessary to accomplish the purposes of county government has been delegated by the legislature to a board of county commissioners. The administration of the board's authority by a county manager does not constitute a delegation of that authority. Thus, we conclude that the position of county manager is that of a public employee, and not a civil officer within the prohibition of Article IV, Section 28.

A review of former statutory provisions concerning the position of county manager further supports our conclusion. In the Laws of 1953, Ch. 167, §§ 9 and 10, a board of county commissioners was authorized to employ a chief administrative assistant to be known as a county manager and expressly stated that:

. . . said chief administrative assistant shall not be an officer of the county, but shall be an agent of the Board of County Commissioners. (Emphasis added.)

The present statute, Section 15-37-16.1(B), supra, similarly authorizes the employment of a county manager and specifies, in a more concise manner, duties of a county manager similar to those described in Laws of 1953, Ch. 167, §§ 9 and 10.

While Section 15-37-16.1(B), supra, does not specifically state that the county manager "shall not be an officer of the county," the similarity of specified duties and the identical characterization of the position of county manager as an administrative assistant to the board of county commissioners in both the former and the present statutory provisions lead to the conclusion that the legislative intent expressed in the former statute, i.e., that sovereign power has not been vested in the position and, therefore, a county manager is not an officer of the county, has been retained in the present statute.

Finally, we must consider whether a county manager, while serving as a member of the New Mexico Legislature, may continue to receive the salary set by the board of county commissioners pursuant to Section 15-37-16.1(B), supra.

40A-23-2. PAYING OR RECEIVING PUBLIC MONEY FOR SERVICES NOT RENDERED. -- Paying or receiving public money for services not rendered consists of knowingly making or receiving payment or causing payment to be made from public funds where such payment purports to be for wages, salary or remuneration for personal services which have not in fact been rendered.

{\*80} Nothing in this section shall be construed to prevent the payment of public funds where such payments are intended to cover lawful remuneration to public officers or public employees for vacation periods or absences from employment because of sickness, or for other lawfully authorized purposes.

Whoever commits paying or receiving public money for services not rendered is guilty of a fourth degree felony.

We assume that the duties of a county manager are performed during normal workday hours. The workday of a state legislator extends, likewise, at least throughout the normal working hours during the legislative session. It therefore appears to us that it would be physically impossible for one person to perform the duties of both positions. Thus, we would conclude that it would be violative of Section 40A-23-2, supra, to pay a salary to a county manager during the time he is serving as a state legislator if his duties as a legislator do in fact make it impossible for him to perform the duties for which the salary is paid, unless the salary is lawful remuneration for accrued leave time.

## **ATTORNEY GENERAL**

Toney Anaya, Attorney General