

**Opinion No. 77-03**

January 27, 1977

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

**BY:** Robert A. Engel, Assistant Attorney General

**TO:** Dennis Luna, Department of Finance and Administration, State Capitol, Santa Fe, New Mexico 87503

**PER DIEM-MILEAGE-PAYMENT TO LEGISLATORS ON ADVISORY COUNCIL-**  
Legislator appointed to advisory council to DHI may receive per diem and mileage as provided by statute.

**FACTS**

A New Mexico state representative was appointed by Governor Apodaca to serve on the Advisory Council to the Department of Hospitals and Institutions. To date, the representative has attended several meetings of the Council and has requested reimbursement for his per diem and mileage expenses by authority of Section 4-20-5, NMSA, 1953 Comp.

**QUESTIONS**

1. Does a state representative's appointment to an executive advisory council violate Article III, Section 1 of the New Mexico Constitution providing for the separation of powers?
2. Does the appointment of a state representative violate Article IV, Section 28 of the New Mexico Constitution which prohibits the appointment of a legislator to a civil office during the term to which he was elected as a legislator?
3. Is the payment of per diem and mileage prohibited by Article IV, Section 10 of the New Mexico Constitution, concerning compensation of legislators?

**CONCLUSIONS**

1. No.
2. No.
3. No.

**ANALYSIS**

Section 4-20-5, NMSA, 1953 Comp., provides that the Governor may establish advisory committees representing among other interests those of government for the sole purpose of advising and assisting the Governor in his duties. The members of the committee do not exercise executive power, but only make suggestions to the Governor in respect to his duties. Article III, Section 1 of the New Mexico Constitution forbids the exercise of powers belonging to one department by members of another department. Since the members of the Governor's Advisory Committees do not exercise executive powers, we believe that the appointment of a state representative does not violate Article III, Section 1.

## OPINION

Article IV, Section 28 of the New Mexico Constitution provides that no member of the legislature shall during the term for which he was elected be appointed to any civil office in the State. The term "civil office" has been defined by the Supreme Court of New Mexico in the case of *State ex rel. Gibson v. Fernandez*, 40 N.M. 288, 58 P.2d 1197 (1936). In that case the Court stated the five elements of a civil office, all of which must be present to constitute a violation of Article IV, Section 28. The second element is that the office must possess a delegation of a portion of the sovereign power of government. In the instant case, since the state representative and the other members of the advisory committee may only advise the Governor as to his duties, the members not having any power to exercise executive functions as such, no delegation of sovereign power has been made. Thus it becomes unnecessary to consider the other four elements of the definition of a "civil office" and we conclude that the appointment of a state representative does not violate Article IV, Section 28 of the New Mexico Constitution.

{\*82} Article IV, Section 10 of the New Mexico Constitution provides for per diem and mileage for legislators. It seems clear from the wording of this constitutional provision that the intent of the framers was to limit the compensation to legislators for services performed as legislators. Thus, if a person who happens to be a legislator is entitled, pursuant to a separate statute, to per diem and mileage for services performed in a capacity other than as a legislator, such compensation would not be forbidden by Article IV, Section 10 of the New Mexico Constitution.

Other Authorities: Opinions of the Attorney General Nos. 5363 and 5364, dated May 2 and May 3, 1951 respectively, held that a legislator could be appointed to the "Little Hoover Commission" and that he could receive per diem and mileage for his expenses while serving as a member of the commission. The Little Hoover Commission was established by Chapter 140, Laws 1951 for the purpose of studying the re-organization of the executive branch of the New Mexico State Government. The commission was to investigate the functions of the executive branch and to report findings of its investigation and its recommendations to the Governor, the Attorney General and the Secretary of State. The Little Hoover Commission and the advisory committee in the instant case are quite similar in that their sole function is to advise the Governor rather than to make policy or to exercise any other executive function.

In Opinion of the Attorney General No. 59-79 dated July 22, 1959, this office concluded that Section 11-1-1, NMSA, 1953 Comp., was unconstitutional in that it provided for the appointment of two legislators to the Board of Finance. There the legislative members of the Board of Finance had full power to vote on all matters before the board and to perform all of the statutory functions of the Board of Finance in conjunction with the other members of the board. It was clear that the legislators were exercising executive functions such as supervising the State's fiscal affairs, safekeeping and depositing of the State's moneys and securities and several incidental powers. That opinion may be distinguished from the instant case in that members of the advisory committees as established by Section 4-20-5 only have the power to advise. They have no power to perform executive functions, to vote on executive matters or to establish policy.

In Opinion of the Attorney General No. 70-2, dated January 15, 1970, this office concluded that since Section 11-1-1 supra, had been amended to state that the two legislative members served only in an advisory capacity, their membership on the board was not a "civil office" within the prohibition of Article IV, Section 28 of the New Mexico Constitution. Therefore, we concluded that the legislators could be paid per diem and mileage.

#### **ATTORNEY GENERAL**

Toney Anaya, Attorney General