

Opinion No. 79-28

July 6, 1979

OPINION OF: Jeff Bingaman, Attorney General

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TO: Al Romero, Director, Local Government Division, Department of Finance and Administration, Lamy Building, Santa Fe, New Mexico 87503

FACTS

PUBLIC OFFICERS AND EMPLOYEES

The manager, clerk, police or attorney of a municipality is not an officer of the municipality for purposes of Article V, Section 13 of the New Mexico Constitution which requires officers to reside in the municipality for which they are appointed.

QUESTIONS

Are the following persons "municipal officers" for purposes of Article V, Section 13 of the New Mexico Constitution which provides that all municipal officers "shall be residents of the political subdivisions for which they are elected or appointed."

- (1) Municipal Manager
- (2) Municipal Clerk
- (3) Municipal Police
- (4) Municipal Attorney?

CONCLUSIONS

- (1) No.
- (2) No.
- (3) No.
- (4) No.

ANALYSIS

The New Mexico Constitution does not define municipal or public office. Nor have the courts defined a public office for purposes of Article V, Section 13. Compare, **State ex rel. Gilbert v. Board of Commissioners of Sierra County**, 29 N.M. 209, 222 P. 654 (1924). Nevertheless, New Mexico courts have, on various occasions, had the opportunity to consider the elements which constitute a civil or public office as opposed to public employment.

OPINION

In **State v. Quinn**, 35 N.M. 62, 290 P. 786 (1930), the Court held that an equipment engineer with the state highway department was not an officer for purposes of a law which made it a crime for public officers to accept bribes. The Court noted a public office is distinguished from public employment when it (1) is created by law, (2) is vested with some portion of the sovereign power of government, (3) has some permanency and continuity, (4) derives independent powers and duties from legislative authority without superior control and (5) is entered upon by taking an oath and posting bond.

In **State ex rel. Gibson v. Fernandez**, 40 N.M. 288, 58 P.2d 1197 (1936), the Court held that the position of special tax attorney for the state tax commission was not a civil office for purposes of Article IV, Section 28, N.M. Const., which prohibits legislators from being appointed to a civil office during the term for which they were elected. The Court found that all the elements defining a public office, as substantially stated in **State v. Quinn, supra**, "may exist in the case of an ordinary employment except the distinctive one that sovereign power {*68} must be vested in the position by the Legislature else it is not a public office." 40 N.M. at 297.

In **Pollack v. Montoya**, 55 N.M. 390, 234 P.2d 336 (1951) the Court held that the chief of Division of Liquor Control was a state officer for purposes of venue provisions which required suits against state officers to be brought in the county where their offices were located. The Court found that in order to constitute a public office, a position must be created by law, have certain definite duties imposed on the incumbent by law, and involve the exercise of some portion of the government power. See also **Candelaria v. Board of Commissioners of Valencia County**, 77 N.M. 458, 423 P.2d 982 (1967). The Court again concluded, however, that "the overweening and decisive test is the vesting of some portion of the sovereign power in the holder of the office." 55 N.M. at 394.

In **Lacy v. Silva**, 84 N.M. 43, 499 P.2d 361 (Ct. App. 1972), the Court of Appeals held that a district director of the Bureau of Revenue was not a state officer for purposes of the venue statute governing suits against state officers. The Court of Appeals noted first that from **State ex rel. Gibson v. Fernandez, supra**, and **Pollack v. Montoya, supra**, the only clear requirement was that some sovereign power be vested in the position by the legislature and then defined sovereignty in terms of supreme power, freedom from external control, autonomy and independence.

The municipal positions in question here are defined by statute. Except for those home rule municipalities chartered pursuant to Article X, Section 6, N.M. Const., municipalities are established by the legislature and may only exercise those powers and duties as are specifically defined by law. See, e.g., **Sanchez v. City of Santa Fe**, 82 N.M. 322, 481 P.2d 401 (1971). Although a particular statute may refer to a position as an office, such reference is not sufficient to establish the position as an office for purposes of Article V, Section 13. Consideration of the relevant statutes in the context of the cases discussed above leads us to conclude that none of the positions in question constitute a public office.

(1) MUNICIPAL MANAGER

The position of municipal manager is established by Section 3-14-13 NMSA 1978, which essentially states that he be employed or appointed by the governing body of the municipality for an indefinite term to serve as "the chief administrative officer." His duties are defined at Section 3-14-14 NMSA 1978, which provides that:

"A. The manager shall:

- (1) enforce and carry out all ordinances, rules and regulations enacted by the commission;
- (2) employ and discharge all persons engaged in the administrative service of the municipality;
- (3) prepare and submit an annual budget; and
- (4) make recommendations to the commission on all matters concerning the welfare of the municipality.

"B. The manager shall have a seat, but no vote, at every meeting of the commission. Except when clearly undesirable or unnecessary, the commission shall request the opinion of the manager any proposed measure."

{*69} In a commission-manager form of municipal government, "all powers of the municipality are vested in the commission" which shall appoint a manager to be responsible for "the proper and efficient administration of the municipal government." Section 3-14-12 NMSA 1978. In addition, any municipality with a population greater than 3,000 may provide for a manager in accordance with Sections 3-14-13 and 3-14-14, **supra**. In either case, the sovereign power of a municipality is vested in its governing body by the legislature. The manager is employed to perform administrative functions and his duties, as defined by law, do not require the delegation of any portion of the sovereign power of the municipality. The manager does not exercise his duties autonomously or independently in that he functions under the superior power or control of the governing body. Therefore, under the "decisive" test for proving public office, the municipal manager is not an officer of the municipality. On the same grounds, this office

concluded in Opinion of the Attorney General No. 77-2, dated January 20, 1977, that a county manager was not a civil officer for purposes of Article IV, Section 28, N.M. Const.

It should be noted, however, that Section 3-14-13, **supra**, provides that the selection of a municipal manager "shall not be limited by reason of former residence." While that language does not necessarily imply that a municipal manager be required to reside in the municipality, the legislature could impose such a requirement notwithstanding the fact that Article V, Section 13 does not do so.

(2) MUNICIPAL CLERK

Section 3-12-4 NMSA 1978 states that "the governing body of each municipality shall provide for the office of clerk . . ." Section 3-13-1 NMSA 1978 provides that:

"The clerk of the municipality shall:

- A. keep in custody all minutes, ordinances and resolutions approved by the governing body;
- B. attend all meetings of the governing body;
- C. record all proceedings, ordinances and resolutions of the governing body; and
- D. upon request, furnish copies of municipal records. The clerk may charge a reasonable fee for the cost of furnishing copies of municipal records."

In addition, Section 3-8-5 NMSA 1978 defines the duties of a municipal clerk in administering a municipal election and Sections 3-30-7 and 3-30-8 NMSA 1978 require a municipal clerk to certify the results of a bond election and sign bonds issued by the municipality.

These duties are essentially ministerial and do not involve the delegation of any of the sovereign power of the municipality. As the Court noted in **State ex rel. Gibson v. Fernandez, supra**, citing with approval the reasoning of a New York Court, ". . . 'it can hardly be contended that a clerk, performing routine duties in strict subordination to a public officer, and with no authority under the statute to do anything except where it is authorized and directed by such officer, is exercising any of the sovereign powers.'" 40 N.M. at 296. Thus, despite the reference to "office" in Section 3-12-4, **supra**, and opinions concerning questions of incompatibility of office, see, **e.g.**, Opinion {*70} of the Attorney General No. 68-111, dated November 7, 1968, the necessary element to establish the position of municipal clerk as an officer of the municipality is not present.

(3) MUNICIPAL POLICE

The position of municipal police officer is also authorized by Section 3-12-4, **supra**. Section 3-13-2 NMSA 1978 defines his duties by providing that:

"A. The police officer of a municipality shall:

- (1) execute and return all writs and processes as directed by the municipal judge;
- (2) serve criminal writs and processes in any part of the county wherein the municipality is situated; and
- (3) within the municipality,
 - (a) suppress all riots, disturbances and breaches of the peace;
 - (b) apprehend all disorderly persons;
 - (c) pursue and arrest any person fleeing from justice; and
 - (d) apprehend any person in the act of violating the laws of the state or the ordinance of the municipality and bring him before competent authority for examination and trial.

"B. In the discharge of his proper duties, a police officer shall have the same powers and be subject to the same responsibilities as sheriffs or constables in similar cases."

The reasoning and conclusions discussed above with respect to a municipal clerk could be applied to municipal police as well. However, in **Abeyta v. Town of Taos**, 499 F.2d 323 (10th Cir. 1974), the United States Court of Appeals specifically found that police officers were employees of a municipality and that authority would resolve the question of the status of municipal police.

(4) MUNICIPAL ATTORNEY

In addition to providing for a municipal clerk and municipal police, Section 3-12-4, **supra**, states that the governing body of a municipality "may also provide for the office of an attorney." No statutory duties are defined for that position and none of the indicia of public office attach to this position. It is neither fixed nor permanent and may be filled by an independent contractor or employee as determined by the governing body. No sovereign power of the municipality is delegated to this position. See, **State ex rel. Gibson v. Fernandez, supra**.

ATTORNEY GENERAL

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