

Opinion No. 92-01

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OPINION OF: TOM UDALL, Attorney General

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TO: Honorable Emilio Naranjo, State Senator, P.O. Box 1256 Espanola, NM 87532

QUESTIONS

May a county commissioner hold employment as a state employee¹ in the state personnel service? May a state employee run for any county office?

CONCLUSIONS

County commissioners may not serve as state employees unless they are from Los Alamos County, currently the only county in the state with nonpartisan offices. County commissioners from Los Alamos may be employed in the state personnel service if the two positions are not incompatible. A state employee may seek election to any county office anywhere in the state if the employee takes a leave of absence from the state job while a candidate and, if elected, the employee resigns from the state job.

ANALYSIS

The New Mexico Personnel Act, NMSA 1978, §§ 10-9-1 to -25 (Repl. Pamph. 1990 & Supp. 1991), restricts the ability of state employees in the state personnel service² to seek hold public office:

No person in the personnel office or employee in the service shall hold political office except for a non-partisan county or municipal office or be an officer of a political organization during his employment.

....

Any employee who becomes a candidate for public office shall, upon filing or accepting the nomination and during the campaign, take a leave of absence.

NMSA 1978, § 10-9-21(B), (C) (Supp. 1991).³ Accordingly state employees covered by the Personnel Act may hold a county office only if it is nonpartisan.⁴ According to the New Mexico Association of Counties, all county offices in this state except those in Los Alamos County currently are partisan; therefore, state employees are precluded from serving as county commissioners outside of Los Alamos County.

The Personnel Act does not preclude state employees from running for public office, however, including partisan county offices. They must take a leave of absence from their state employment once they have filed or been nominated as a candidate and during the campaign. See also State Personnel Board Rule 20.3(C) (permitting state employees not covered by the Hatch Act to be candidates for any public office if the employees are granted leave without pay).⁵ Of course, if elected they would have to resign their state employment.

Even if a state employee is elected to a nonpartisan county office, the employee may be prevented from being a county official if the two positions are incompatible under either state statutes (physical incompatibility) or common law (functional incompatibility).⁶ Physical incompatibility occurs when a public employee holds another compensated public or private position which prevents the employee for thirty successive days from devoting time to the usual and normal extent during ordinary working hours to the duties of the public position. NMSA 1978, §§ 10-6-3, 10-6-5 (Repl. Pamp. 1990). This effectively prevents a state employee from holding county office if both positions must be performed during the same hours. AG Op. No. 70-74 (1970). Cf. AG Op. No. 68-111 (1968) (no physical incompatibility where a person served as municipal judge after his working hours as a city clerk). Functional incompatibility exists when the powers or duties of two positions are inconsistent. This may occur when one position is subordinate to another, has the ability to override the other's actions or otherwise when a "contrariety and antagonism would result in the attempt by one person to faithfully and impartially discharge the duties of both." *Haymaker v. State*, 22 N.M. 400, 403-04, 163 P. 248 (1917). Therefore, whether a particular state position is functionally incompatible with the position of county commissioner will depend on the powers and duties of each position and how they interact, if at all.

ATTORNEY GENERAL

TOM UDALL Attorney General

GENERAL FOOTNOTES

[n1](#) For purposes of this opinion, we assume that a state employee is a person employed by the state who does not hold state office. Thus, we do not address particular statutory and constitutional provisions that apply to specific state offices. See, e.g., AG Op. No. 91-02 (1991) (discussing provisions applicable to dual-office holding by state legislators).

[n2](#) The state personnel service includes all positions covered by the Personnel Act. Certain positions are exempt from the Personnel Act's coverage, including those in the attorney general's office, NMSA 1978, § 8-5-5 (Repl. Pamp. 1991), and those in educational institutions, public schools, the governor's office, heads of executive branch agencies and agency divisions, the judicial branch of government and the legislative branch of government. NMSA 1978, § 10-9-4 (Repl. Pamp. 1990).

[n3](#) With some exceptions, including employees of state-supported educational institutions, state employees principally employed in connection with federally-funded activities are prohibited by the Hatch Act from holding any elective office and from being a candidate for partisan political office. 5 U.S.C. §§ 1501(4), 1502(a)(3), 1503. See also State Personnel Board Rule 20.3(A),

(B) (codifying Hatch Act requirements for state employees covered by the Act).

[n4](#) Rules promulgated by the Personnel Board define a nonpartisan election as "any election for public office when the candidate's party affiliations are neither indicated nor required." SPB-20.3(A). See also State ex rel. Bonner v. District Court, 206 P.2d 166, 172 (Mont. 1949) (a nonpartisan is a person not controlled by parties or party spirit or interests); Webster's Third New International Dictionary 1538 (1986) (defining "nonpartisan" as "composed, appointed, or elected without regard to the political party affiliations of members").

[n5](#) Although Article X, Section 1 of the New Mexico Constitution (which provides that "no county officer shall receive to his own use any fees or emoluments other than the annual salary provided by law") could be read as preventing a county officer from holding any other paid position, this office has stated that it applies only to those situations where extra compensation is received for performing duties that arise from the county office. AG Op. No. 58-238 (1958) (county commissioner can accept salary for teaching in a state institution of higher learning). See also AG Op. No. 91-09 (1991) (judge cannot accept additional compensation for performing marriage ceremony).

[n6](#) Previous Attorney General Opinions have discussed in detail the criteria for physical and functional incompatibility. See, e.g., AG Op. No. 91-02 (1991); AG Op. No. 90-14 (1990); AG Op. No. 89-10 (1989).

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