

Opinion 06-01

January 26, 2006

OPINION OF: PATRICIA A. MADRID Attorney General

BY: Sally Malavé Assistant Attorney General

TO: The Honorable Pete Campos State Senator 500 Raynolds Las Vegas, New Mexico 87701

QUESTION PRESENTED:

May a legislator serve as president of Luna Vocational-Technical Institute without resigning office and without running afoul of Article 4, Sections 3 or 28 of the New Mexico Constitution, NMSA 1978, Section 2-1-3, or any other provision of law regarding incompatibility?

CONCLUSION:

A legislator may serve as president of Luna Vocational-Technical Institute without violating the relevant constitutional and statutory prohibitions of New Mexico law.

DISCUSSION:

Your question requires a three-part analysis: (a) whether the new position is a “state” office as contemplated in Article III, Section 1 and Article IV, Section 3 of the New Mexico Constitution and NMSA 1978, Section 2-1-3; (b) whether the new position is a “civil office” as contemplated in Article IV, Section 28; and (c) whether the two positions are incompatible. Based on our examination of the relevant New Mexico constitutional, statutory and case law authorities, and on the information available to us, we conclude the position of president of Luna Vocational Technical Institute does not appear to be a civil office or a state office and does not appear to create an issue of incompatibility. Therefore, a current legislator may assume this new position without violating the relevant constitutional and statutory prohibitions of New Mexico law.

1. Constitutional Limits on A Legislator’s Ability to Serve as President of a Technical Vocational Institute.

a. Separation of Powers: Article III, Section 1

Article III, Section 1 of the New Mexico Constitution states in pertinent part:

The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of

persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers belonging to either of the others . . .

This constitutional provision raises the question whether the office of president of a technical and vocational institute is part of the executive or judicial departments of the state, thereby precluding a member of the legislative department from occupying it.

New Mexico case law supports the view that the constitution's framers did not intend to include political subdivisions such as school districts in the term "state" and, therefore, that Article III, Section 1 should not preclude a legislator from holding office on a local school board. See N.M. Att'y Gen. Op. 91-02 (1991) (citing State ex rel. Stratton v. Roswell Independent Schools, 111 N.M. 495, 502 (Ct. App. 1991)). In Roswell Independent Schools, the appellate court surmised that political subdivisions are not synonymous with "state." 111 N.M. at 502. The court further stated that when the Constitution either grants or prohibits certain powers, the affected subdivisions are specifically enumerated. See id., (citations omitted).

A political subdivision is formed or maintained for the more effectual or convenient exercise of political power within certain boundaries or localities, to which the electors residing therein are, to some extent, granted powers to govern themselves. See Gibbany v. Ford, 29 N.M. 621, 626 (1924). Because technical and vocational districts are established for the creation and administration of technical vocational institutes, very much in the same way public school districts are established for the creation and administration of public schools, we believe technical and vocational districts, like school districts, are also political subdivisions of the state and not part of the state's executive or judicial departments.¹ See NMSA 1978, §§ 21-16-2 and -3; and see Roswell Independent Schools, 111 N.M. at 502. Moreover, because technical and vocational districts would not be included in the term "state," we also believe Article III, Section 1 would not preclude a legislator from serving as president of a technical and vocational institute. Neither technical and vocational district boards nor the president of a technical and vocational institute exercise the powers of the executive department for purposes of Article III, Section 1. See N.M. Att'y Gen. Op. 91-02 (1991).

b. Article IV, Section 3.

Article IV, Section 3 of the state constitution provides that "[n]o person shall be eligible to serve in the legislature who, at the time of qualifying, holds any office of trust or profit with the state, county or national governments . . ." As stated in a previous opinion discussing Article III, Section 1 and discussed above, we believe that, by specifying particular governments in Article IV, Section 3, its drafters intended to exclude local governments or political subdivisions not listed therein. See N.M. Att'y Gen. Op. 91-02 (1991). In New Mexico Attorney General Opinion 91-02, this office concluded that because a local school board member does not hold a state, county or national government office, he is not prohibited from serving as a legislator by Article IV, Section 3. Similarly, a legislator would not be precluded by Article IV, Section 3 from serving as

president of a technical and vocational institute because said position is not one of a state, county or national government office.

c. Article IV, Section 28.

Article IV, Section 28 of the New Mexico Constitution provides in relevant part that:

No member of the legislature shall, during the term for which he is elected, be appointed to any civil office in the state

A legislator may not serve as president of a vocational technical institute if the position constitutes an appointed “civil office” within the meaning of the constitution.

In Gibson v. Fernandez, 40 N.M. 288, (1936), the New Mexico Supreme Court enumerated the characteristics of a “civil office” for Article IV, § 28 purposes as follows:

1. it is created by the constitution, the legislature, or other governmental body through authority conferred by the legislature;
2. it possesses a delegation of a portion of the government’s sovereign power;
3. its powers and duties are defined by the legislature or through legislative authority;
4. its duties are performed independently and without control of a superior power, other than the law, except for certain “inferior or subordinate” offices; and
5. it has some permanency and continuity in the sense the law requires that it be occupied.”

See 40 N.M. at 292-4 (1936).

Of these characteristics, the most significant is the vesting of some portion of sovereign power in the position. See id., at 292-293; see also Pollock v. Montoya, 55 N.M. 390, 394 (1951). In the absence of sovereign power, a government position is merely one of public employment and not an office covered by Article IV, Section 28. See 40 N.M. at 297. The Gibson court concluded that the position of special tax attorney, which was not required by law and not vested with any sovereign power, constituted ordinary public employment rather than a public office. See id.

In New Mexico Attorney General Advisory Letter to Senator Pete Campos from Assistant Attorney General Pat Simpson (August 14, 2002), this office concluded that the office of president of New Mexico Highlands University is not a civil office upon comparing the authority vested in a position on the university board of regents with the authority vested in the office of president. If the president of New Mexico Highlands University is merely executing the sovereign prerogative of the board, then the president

is not a civil officer. See id. If, however, the president has supervisory control over a university's affairs, fiscal and policy, then the president is a civil officer. See id. A review of the statutes governing New Mexico Highlands University made clear that the situation there is more the former than the latter. See id.

Likewise, the office of president of Luna Vocational Technical Institute does not qualify as a "civil office" for several reasons. While the position of president of a technical and vocational institute is created by the legislature, a review of the statutes governing technical and vocational institutes reveals that an institute president does not possess legislative authority to exercise any sovereign powers. See NMSA 1978, § 21-16-6A (2005). The Legislature has vested such powers in the district board, not the president.

Section 21-16-6(A) provides in pertinent part:

the district board shall determine the financial and educational policies of the technical and vocational institute and provide for these policies by selecting a competent president for the institute, and upon the president's recommendation, shall employ other administrative personnel, instructional staff or other personnel as may be needed for the operation, maintenance and administration of the institute.

The president's duties consist of administering the financial and educational policies adopted by the district board exclusively. Said duties are performed under the supervision, and not independent, of the district board. The district board, and not the president, determines what duties the president of a technical vocational institute performs. There are no separate statutory provisions conferring upon the president of a technical vocational institute any express or implied powers to perform any of the above in the absence of directives from the district board. See id. Thus, we conclude that the position of president of a technical vocational institute is one of public employment rather than a civil office.

2. Statutory Restrictions on A Legislator's Ability to Hold Another Office.

NMSA 1978, Section 2-1-3 precludes a state legislator from receiving "any compensation for services performed as an officer or employee of the state, except such compensation and expense money he is entitled to received as a member of the legislature." See also NMSA 1978, § 2-1-4 (making it unlawful for any state officer to pay legislators any compensation for state service other than what to are entitled to for service in the legislature). Section 2-1-3, however, does not prevent a member of the legislator from serving as president of a technical vocational institute because the president of a technical vocational institute is not a state employee within the statute's meaning, and Sections 2-1-3 and -4 do not include employees of other enumerated political subdivisions, such as counties, municipalities, or school districts. See Roswell Independent Schools, 111 N.M. at 502.

Moreover, many statutes also differentiate between state and political subdivisions, including local schools boards. See id., (citations omitted). For example, in NMSA 1978, Sections 10-6-1 through 10-6-4 (2003) relating to abandonment of public office or employment, the legislature addressed vacancies at the state, county, municipal, and school district level. For the same reasons, we believe technical and vocational districts also would not be included in the term “state.”

Finally, we do not believe the positions of state legislator and president of a technical vocational institute are necessarily physically and/or functionally incompatible so as to prevent a legislator from serving as president of an institute. There is no physical incompatibility so long as the same person can hold both positions without failing for thirty or more successive days to devote his time to the usual and normal extent to the performance of the duties of both positions. See NMSA 1978, §§10-4-1, 10-6-3 and 10-6-5. If a technical vocational district board grants the president leave of absence in accordance with its own administrative procedures, thereby allowing the president to perform his legislative duties during a legislative session, physical incompatibility may not be an issue.

There also is no functional incompatibility if the functions of the two positions are not inconsistent, as where one is subordinate to the other, or where a “contrariety and antagonism would result in the attempt of one person to faithfully and impartially discharge the duties of both.” Haymaker v. State, 22 N.M. 400, 403-4 (1917) (holding that same person could not be member of school board and its clerk, where she voted herself into office, fixed her salary and approved her salary warrants). The legislature has no authority to oversee the activities of technical vocational district boards or to supervise, hire, or discharge district board members or the technical vocational institute personnel, including the president. See N.M. Atty. Gen. Op. No. 91-02 (1991) (the legislature has no inherent authority to oversee local school boards or to supervise, hire, or discharge school board members.) Although the legislature may appropriate funds to support technical vocational institutes, and the president of an institute serving as a legislator might experience a “contrariety and antagonism” in trying to objectively allocate the state’s money, this type of potential conflict is not sufficient to preclude the president of a technical vocational institute from serving as a legislator in a state such as New Mexico with a citizen legislature.² See id. We therefore conclude that incompatibility principles did not preclude a legislator from serving as president of a technical vocational institute.

[1] Technical and vocational institutes are governed by district boards composed of five or seven members who shall reside in and be elected from single-member districts. See NMSA 1978, § 21-16-5.1 (1998). Among the statutory powers and duties vested in them, district boards are authorized to determine the financial and educational policies of the institute and provide for the execution of these policies by selecting a competent president for the institute. See NMSA 1978, § 21-16-6 (2005). Upon the president’s recommendation, district boards shall employ other administrative personnel, instructional staff or other personnel as may be needed for the operation, maintenance and administration of the institute. See id. District boards also are authorized by statute

to fix fee rates and tuition rates for students; to issue certificates of proficiency, associate of arts, associate of science and associate of applied science degrees; accept gifts, receive federal aid or other aid and purchase, hold, sell and rent property and equipment on behalf of the institute; and promote the general welfare of the technical and vocational instate for the best interest of educational service to the people of the institute district. See id.

[2] In any event, a legislator would have to comply with all statutory and legislative directives relating to voting on matters in which s/he may have a pecuniary or direct interest in order to avoid potential conflicts of interest.