

Opinion No. 70-37

April 7, 1970

BY: OPINION OF JAMES A. MALONEY, Attorney General

TO: The Honorable E.R. Grilly New Mexico State Representative 1467 - 42nd Street
Los Alamos, New Mexico 87544

QUESTIONS

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May a legislator legally serve as a delegate or alternate delegate from New Mexico to the Western Interstate Nuclear Board?

CONCLUSION

Yes.

OPINION

{*66} ANALYSIS

Your question is substantially similar to the ones submitted in Opinion of the Attorney General, No. 67-4, dated January 9, 1967 and Opinion of the Attorney General, No. 69-49, dated May 21, 1969.

The analysis in both opinions is identical, as is the analysis which follows:

Under the provisions of New Mexico Constitution, Article IV, Section 3,

"No 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, except notaries public and officers of the militia who receive no salary." (Emphasis added.)

And under the provisions of New Mexico Constitution, Article IV, Section 28,

"No member of the legislature shall, during the term for which he was elected, be appointed to any **civil** office in the state . . ." (Emphasis added.)

The question of what is, or is not, a civil officer, within the meaning of constitutional and statutory provisions was considered at length in the case of **State ex rel. Gibson v. Fernandez**, 40 N.M. 288, 58 P.2d 1197 (1936).

The test according to the Court is as follows:

"(1) it must be created by the Constitution or by the Legislature or created by a municipality or other body through authority conferred by the Legislature; (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers conferred, and the duties to be discharged, must be defined, directly or impliedly, by the Legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power, other than the law, unless they be those of an inferior or subordinate office, created or authorized by the legislature, and by it placed under the general control of a superior officer or body; (5) it must have some permanency and continuity and not be only temporary or occasional. In addition, in this state, an officer must take and file an official oath, hold a commission or other written authority, and give an official bond, if the latter be required by proper authority."

The first question is whether the office of delegate to the Western Interstate Nuclear Compact is a civil office within the meaning of Article IV, Section 28. Five elements laid down in the **Gibson** case, **supra**, must be met before the office of delegate to the Western Interstate Nuclear Compact may be considered a civil office.

The comparison of the Western Interstate Nuclear Compact with the five elements of the **Gibson** case is as follows:

(1) It was created by the Legislature, title of act, "An Act entering the Western Interstate Nuclear Compact. Laws 1969, Ch. 40, Sec. 1."

(2) The board does not have a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public. On the contrary, according to Section 4-34-1, Art. 2, Sec. K, N.M.S.A., 1953 Comp. (1969 P.S.) the board shall make reports and recommendations annually to the Legislature, for the Legislature to act upon. Further in Section 4-34-1, Art. 5, Sec. J, *supra*, the powers of the board are those of recommendation to the respective legislatures for changes, amendments or additions to laws. Nowhere in Section 4-34-1, Art. 5, *supra*, is it intimated that the board possesses a delegation of a portion of the sovereign power of government.

In view of this determination it is not necessary to consider the remaining {*67} three tests. We conclude that the office of delegate to the Western Interstate Nuclear Compact is not a civil office.

Since your question asks if a legislator may serve as a delegate to the Western Interstate Nuclear Board, there is no conflict with New Mexico Constitution, Article IV, Sec. 3 in that the prohibition is directed at a person holding an office of trust or profit at time of qualifying for the Legislature. Nonetheless, since no provision is made in Section 4-34-1, et seq., *supra*, for payment to delegates to the Western Interstate Nuclear Board, we conclude that this is not an office of trust or an office of profit.

Thus we conclude that a legislator may serve as a delegate to the Western Interstate Nuclear Board.

By: Frank N. Chavez

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