

Opinion No. 57-20

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BY: OPINION OF FRED M. STANDLEY, Attorney General Santiago E. Campos,
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TO: Senate Rules Committee, c/o Senator Gene Lusk, New Mexico State Senate,
Santa Fe, New Mexico

QUESTIONS

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1. Did the acceptance by the people of this State, on September 20, 1955, of Art. V, § 14, as an amendment to our Constitution create thereby a new highway Commission and abolish the highway commission existing under the same article and section prior to September 20, 1955?
2. Considering that Mr. Forrest Atchley was a member of the House of Representatives during the 22nd Legislature, is he prohibited from serving as a highway commissioner by the provisions of Art. IV, § 28 of the New Mexico Constitution?

CONCLUSIONS

1. No.
2. No.

OPINION

ANALYSIS

Question 1.

Art. V, § 14 is that part of our Constitution which at present controls the manner of appointment of the State Highway Commission and defines its powers. § 14 was not in our original Constitution. This section of Art. V was proposed as an amendment to the Constitution by HJR 2 of the 1949 Session of the Legislature. It was adopted by the people of this State on September 20, 1949 and by its terms became effective on January 1, 1950.

Prior to January 1, 1950, the manner of appointment of the Highway Commission and the powers delegated to it were contained, not in the Constitution, but in the various legislative enactments. See L. 1917, Ch. 38; L. 1931, Ch. 124; L. 1935, Ch. 34.

Thus, until 1950, the Commission existed by the grace of statute, so to speak. And since that time, under that of Constitutional provision.

Now to better understand the result of this opinion and the rules of statutory construction employed to achieve that result, it may be well to examine the original Art. V, § 14 and the changes made upon this Article by its latest amendment.

As originally enacted, Art. V, § 14 provided:

"State highway commission-Members-Appointment-Term-Removal from office. -- A permanent commission to consist of five (5) members is hereby created, which shall be known as the 'State Highway Commission.'

"A. The state highway commission is empowered and charged with the duty of determining all matters of policy relating to state highways and public roads. It shall have general charge and supervision of all the highways and bridges which are constructed or maintained in whole or in part with state aid. It shall have complete charge of all matters pertaining to the expenditure of state funds for the construction, improvement and maintenance of public roads and bridges. It shall have charge of all matters pertaining to highway employees. It shall have the power to institute any legal proceedings deemed necessary to the exercise of its powers. It shall have all powers which are now or which may hereafter be conferred on it by law.

'B. There are hereby created five (5) highway commission districts as follows, to-wit:

District No. 1 which shall be composed of the counties of Catron, Socorro, Grant, Sierra, Dona Ana, Luna and Hidalgo.

District No. 2 which shall be composed of the counties of Lea, Eddy, Chaves, Roosevelt, Curry, De Baca, Lincoln and Otero.

District No. 3 which shall be composed of the counties of San Juan, McKinley, Valencia, Sandoval and Bernalillo.

District No. 4 which shall be composed of the counties of Colfax, Union, Mora, Harding, San Miguel, Quay and Guadalupe.

District No. 5 which shall be composed of the counties of Rio Arriba, Taos, Santa Fe and Torraine.

The State legislature in the event of the creation of any new county or counties, shall have the power to attach any such county or counties to any of the above districts to which said county or counties may be contiguous.

"C. The members of the commission shall be appointed by the governor with the advice and consent of the senate for overlapping terms of six (6) years each. One member

shall be appointed from each of the five (5) aforesaid highway commission districts and such member shall reside in the the district from which he shall be appointed. Change of residence of a highway commissioner to a place outside of the highway district from which he was appointed shall automatically terminate the term of such commissioner. No more than three (3) of the said commissioners shall belong to the same political party. Each of the said commissioners, in order to qualify as such, shall take the usual oath and execute in favor of the state a surety company bond in a form approved by the attorney general, in the amount of twenty-five thousand dollars (\$ 25,000.00) conditioned upon the faithful performance of his duties.

The governor shall submit the appointment of commissioners to the state senate for confirmation not later than the 5th day of each regular session of the legislature. A three-fifths (3/5's) vote of the senate shall be required for confirmation. The appointment of such commissioner or commissioners shall become effective upon the date of confirmation by the senate and no commissioner shall be appointed in any event without confirmation by the senate except that commissioners may be appointed by a majority of the remaining members of the highway commission, to fill vacancies until the next regular session of the legislature at which time an appointment shall be made for the balance of the unexpired term.

In the event the governor should refuse or fail to submit the highway commissioners to the senate for confirmation in the manner above provided, the senate shall appoint and confirm the highway commissioners.

The members first appointed shall determine by lot from among their group two (2) members to serve two (2) year terms, two (2) members to serve six (6) year terms, and one (1) member to serve a four (4) year term.

"D. Highway commissioners shall not be removed except for incompetence, neglect of duty or malfeasance in office. Provided, however, no removal shall be made without notice of hearing and an opportunity to be heard having first been given such commissioner. The supreme court of the state of New Mexico is hereby given exclusive original jurisdiction over proceedings to remove highway commissioners under such rules as it may promulgate and its decision in connection with such matters shall be final.

The state highway commission shall appoint a competent chief highway engineer, who shall be chief administrator of the highway commission and shall have charge of the hiring and firing of employees of the highway commission subject to the control and supervision of the highway commission. (As added September 20, 1949, effective January 1, 1950.)"

Art. V, § 14 was amended on September 20, 1955. The amendment was proposed by SJR 11 and accepted by the people on the latter date. The amendments are as follows:

To subsection 'A' was added that language underlined hereafter and there was deleted therefrom the word within the bracket.

"A. The state highway commission is empowered and charged with the duty of determining all matters of policy relating to **the design, construction, location, and maintenance of** state highways and public roads. It shall have general charge and supervision of all the highways and bridges which are constructed or maintained in whole or in part with state aid. It shall have (complete) charge, **subject to such control as may hereafter be provided by law**, of all matters pertaining to the expenditure of state funds for the construction, improvement and maintenance of public roads and bridges.

It shall have charge of all matters pertaining to highway employees. It shall have the power to institute any legal proceedings deemed necessary to the exercise of its powers. It shall have all powers which are now or which may hereafter be conferred on it by law."

The only other change in the entire section is contained in subsection 'D' where the County of Los Alamos was added to those counties comprising Highway Commission District No. 5.

Now, does the acceptance of this amendment have the effect of abolishing the highway commission existing prior to the amendment and thereby create a completely new commission unoccupied by any members?

Firstly, we consider that the only express change was that of transferring from the commission to the Legislature, should the Legislature desire to exercise it, control over expenditures of the Commission's funds. The remainder of the provisions in the section, the Los Alamos provision excepted, remain exactly as before.

Before proceeding further, it may be noted that in the case of amendments to laws our Constitution, by Art. IV, § 18 requires, among other things, that ". . . each section thereof as revised, amended or extended shall be set out in full."

Presumably the above also applies to joint resolutions proposing amendments to provisions of our Constitution. But whether, strictly, it does or does not, it can be reasonably assumed that the established practice of setting out the entire section of the constitutional provision in the joint resolution proposing the amendment follows the practice in amending ordinary laws. Thus, whatever legal consequences follow from the requirement that an ordinary law be to amended must be set out in full, must also follow where a constitutional provision is sought to be amended and, under the established practice, is also set out in full. This must be the starting point in our inquiry for presumably had the entire section not been set out in full in SJR 11, the amending section, your question would not have arisen. What then is the effect of following such amendatory procedure? The following are some of the authorities on the question:

"The constitutional provision requiring amendments to be made by setting out the whole section as amended was not intended to make any different rule as to the effect of such amendments. So far as the section is changed, it must receive a new operation, but so far as it is not changed, it would be dangerous to hold that the mere nominal reenactment should have the effect of disturbing the whole body of statutes **in pari materia** which have been passed since the first enactment. There must be something in the nature of the new legislation to show such an intent with reasonable clearness before an implied repeal can be recognized. . . The amendment operates to repeal all of the section amended not embraced in the amended form. **The portions of the amended sections which are merely copied without change are not to be considered as repealed and again enacted, but to have been the law all along;** and the new parts or the changed portions are not to be taken to have been the law at any time prior to the passage of the amended act. . . ." (Emphasis Supplied) Lewis' Sutherland Statutory Construction (2nd Ed.) 441.

The following excerpts from primary sources further illustrate the proposition:

". . . But we understand that a statute amending a prior one by declaring that it shall be amended so as to read in a given manner, has no retrospective effect. **The portion of the amended statute, which is merely copied without change, is not to be considered as repealed and again enacted, but to have been the law;** and the new parts are not to be taken as to have been the law prior to the passage of the amended statute. The new provisions are to be understood as enacted at the time the amended statute went into effect." (Emphasis Supplied.) Kelsey vs. Kendall, 48 Vt. 24.

". . . Under our Constitution an amended section must be recited at length in the amending act, . . . **by observing the constitutional form of amending a section of a statute, the Legislature does not express an intention then to enact the whole section as amended, but only an intention then to enact the change which is indicated. Any other rule of construction would surely introduce unexpected results and work great inconvenience. . . .**" (Emphasis Supplied.) State vs. Mayor, etc., of City of Newark, et al., 30 Atl. 543.

Among many more of the cases supporting the legal proposition above are: Alexander vs. State, 9 Ind. 337; Cordell vs. State, 22 Ind. 1; United Hebrew Benevolent Assoc. vs. Joshua Benshinof, 130 Mass. 325; Gordon vs. People, 44 Mich. 485; Stingle et al. vs. Nevel et al., 9 Ore. 62.

From the above authority and discussion, it is apparent that the first paragraph of Art. V, § 14 of the New Mexico Constitution has been in effect since original enactment. This paragraph creating the highway commission was not repealed and re-enacted by the latest amendment to § 14. Thus the commission which was appointed prior to the latest amendment is now the lawful and duly appointed commission since the members thereof were appointed under a constitutional provision which has continued uninterrupted since its original enactment.

Question 2

Mr. Forrest Atchley was the duly elected representative from Union County during the 22nd Legislature sitting in 1955. As a representative, his term of office was for two years. Art. IV, § 4, New Mexico Constitution.

And, of course, that term commenced on the first day of January next after his election. Art. XX, § 3, New Mexico Constitution.

Mr. Atchley's term thus started on January 1, 1955 and ended December 31, 1956.

Now, Art. IV, § 28 of the New Mexico Constitution provides:

"Appointment to office -- Contracts. No member of the legislature shall, during the term for which he was elected, be appointed to any civil office in the state, nor shall he within one year thereafter be appointed to any civil office created, or the emoluments of which were increased during such term; nor shall any member of the legislature during the term for which he was elected nor within one year thereafter, be interested directly or indirectly in any contract with the state or any municipality thereof, which was authorized by any law passed during such term.

Without reviewing the authorities on the subject, it is assumed, as is undoubtedly the case, that the office of highway commissioner is a "civil office" within the meaning of Art. IV, § 28 above.

Again it is noted that "no member of the Legislature shall, during the term for which he was elected, be appointed to any civil office in the state. . . ."

This is the first prohibition contained in Art. IV, § 28. However, Mr. Atchley's term as a legislator has been concluded and since this is the case, he will not have been appointed to another civil office ". . . during the term for which he was elected," The first prohibition is thus not a bar to a present appointment.

The second prohibition in Art. IV, § 28, is contained in the next phrase "nor shall he within one year thereafter be appointed to any civil office created, or the emoluments of which were increased during such term; . . ."

Now the present period is certainly within one year after the end of Mr. Atchley's term. However, as indicated in answering your first question, the office of highway commissioner was not created during Mr. Atchley's term of office. The office of highway commissioner was created when Art. V, Section 14 of the Constitution took effect on January 1, 1950. And I cannot find that the emoluments of that office were increased nor enhanced in any fashion by the 22nd Legislature. Thus, the second prohibition of Art. IV, § 28 is not a bar to Mr. Atchley's appointment.

In short, the first portion of Art. IV, § 28 prohibits all legislators from being appointed to all other civil offices during their term as legislators. As to those who have already served their term as legislators, the second phrase prohibits their appointment for one year, not to all civil offices, but only to those which were created during their term or to those whose emoluments were increased during that period.

Mr. Atchley falls under neither category and thus there is no prohibition in this Article and Section of the Constitution against his appointment to office of Highway Commissioner.