Opinion No. 60-25

February 15, 1960

BY: OPINION of HILTON A. DICKSON, JR., Attorney General

TO: Victor C. Breen District Attorney Tenth Judicial District Tucumcari, New Mexico

QUESTION

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1. Is a qualified elector qualified to run for county commissioner from a district other than that of his residence?

2. Can a qualified elector who is elected in the general election to the office of county commissioner from a district other than the one of which he is a resident qualify and serve in that office on January 1, 1960?

3. Can the county be divided at this time according to population?

CONCLUSIONS

1. Yes.

2. Yes.

3. Yes, but see analysis.

OPINION

*{*370}* **ANALYSIS**

The answers to your first and second questions depend upon the validity of Section 15-37-3, N.M.S.A., 1953 Comp., as amended by Chapter 106, Laws 1959. Prior to the 1959 amendment, the section only provided that the county was to be divided into three county commissioner districts and that one commissioner would be elected to each district. Opinion of the Attorney General No. 40-43 dated March 13, 1942, held that commissioners must be elected by the vote of the entire county rather than the votes of each district. It also held that county commissioner districts were not political subdivisions. Subsequently, Opinion of the Attorney General No. 5154 dated May 25, 1948, held that a commissioner would not have to be a resident of the district from which he is elected. This was based upon the fact that any resident requirement would violate Article V, Section 13 of the New Mexico Constitution under the rationale of **Gibbney v. Ford,** 29 N.M. 621, 225 P. 577.

It appears that the legislature attempted to alter this situation in 1959 when it enacted Chapter 106, Laws 1959, which among other things, provided that a commissioner had to be a resident of the district from which he was elected. That section, as it was amended by that chapter now reads as follows:

"Each county **may** be divided by the first board of commissioners holding office, into three compact districts, as equal in proportion to population as possible, numbered respectively by one, two, three, and **if so divided** shall not be subject to alteration oftener than once in two years, and **if so divided** one commissioner shall be elected by each such district by the votes of the whole county and shall be a resident **of the district from which he is elected.** Such division of the county into three districts **if such division** is made shall be made within six months after the first board of commissioners of the county have been elected to office; **provided that districts as they existed on January 1, 1959, shall not be changed until after January 1, 1961. Provided, however, that any board of county commissioners of counties of the H class may by resolution adopted in any calendar year in which no election of county commissioners is to be held, provide that *{*371}* the three county commissioners for said county shall be elected at large and without division of the county into districts, and such resolution shall not be subject to repeal, revision or amendment for a period of two years following the date of its adoption.**

The underlined portions of the section are the changes which Chapter 160 made in the section.

The 1959 legislature also passed House Joint Resolution No. 8 which proposed an amendment to Article V, Section 13 of the Constitution which reads as follows:

"Section 1. It is proposed to amend Article 5, Section 13 of the Constitution of New Mexico to read:

'All district, county, precinct and municipal officers, shall be residents of the political subdivisions for which they are elected or appointed. **The legislature is authorized to enact laws permitting division of counties of this state into county commission districts. The legislature may in its discretion provide that elective county commissioners reside in their respective county commission districts."**

The underscored portion of the above resolution is the change which was proposed to the section of the Constitution. It seems clear that what the legislature intended was to amend Article V, Section 13 so that the legislature could provide that commissioners had to be residents of the districts from which they are elected. It is unfortunate that it chose the manner it did in making the proposed change. Chapter 106 went into effect on June 12, 1959, since it did not contain an emergency clause. The proposed constitutional amendment must still be voted upon by the electors of this state in the general election this fall so it is not as yet effective. The result of this course of events is that the statute became effective before Article V, Section 13 was amended to allow

such a statute. As a general rule, a statute must be construed on the basis of the Constitution as it existed when the statute became effective. **Etchison Drilling Co. v. Flournoy,** (1912) 131 La. 442, 59 S. 867. Since Chapter 106 went into effect on June 12, 1959, before the Proposed Joint Resolution had become effective, if it conflicts with Article V, Section 13 of the Constitution as it is unconstitutional.

It is our view that Chapter 106 is unconstitutional under the holding of **Gibbney v. Ford,** supra, inasmuch as a county commissioner district is not a political subdivision and therefore, any requirement that the commissioners be residents of the district from which they are elected is a limitation of the right to hold office which is beyond those provided in the Constitution.

Holding as we do that Chapter 106 is unconstitutional, we must examine whether the subsequent approval of the constitutional amendment would at the time of approval, validate the unconstitutional statute. While we recognize that there is some authority to the effect that a legislature can pass a statute in anticipation of a constitutional amendment or provide that such a statute will not be effective until the amendment is adopted, we feel that the better reasoned and proper rule to apply in this case is to the effect that an unconstitutional statute is not validated by a subsequent constitutional amendment which does not ratify or confirm the statute but merely authorizes the enactment of such a statute. The proposed constitutional amendment in this case does not speak of having a retrospective effect. It speaks only of the future. This was stated by the Court in **Etchison Drilling Co. v. Flournoy,** supra, as follows:

"The language used in the amendment refers to the future. It admits of no other interpretation. There is nothing whatever *{*372}* ambiguous in its terms in this regard. It confers certain authority upon future legislature. It does not control or attempt to confirm any act of past legislature.

As we view the question, such is the case here. The amendatory language of the resolution merely gives the legislature the power to enact a statute providing for residency in the future. No words are found which can reasonably be construed as giving the amendment retrospective effect. See ex parte **Sparks,** (898) 120 Cal. 395, 52 P. 715; **Norris v. Union City,** (1937) 184 Ga. 283, 191 S. E. 105; **People v. Frencavage,** (1925) 233 Mich. 369, 206 N.W. 567; **Board of Elections v. State,** (1934) 120 Ohio State 273, 191 N. E. 115 and generally 171 A.L.R. 1070, in this connection.

The result therefore, is that Chapter 106, Laws 1959, except the last proviso dealing with H class counties is unconstitutional. Said last proviso remains effective, since Opinion of the Attorney General No. 59-188 dated November 13, 1959, held that this last proviso was a substantive enactment which would be unaffected by the remainder of the statute being unconstitutional notwith-standing the fact that it was worded in the form of a proviso. Therefore, Section 15-37-3, N.M.S.A., 1953 Comp., as it stood before the attempted amendment is the law on this subject today except that the last proviso of Chapter 106 is still in effect and controls districting in H class counties.

Your third question as to whether districts can be redistricted now is controlled by Section 15-37-3, supra, as it stood before amendment. Under that section this may be done if it has not been done within two years.

By: Boston E. Witt

Assistant Attorney General