Opinion No. 61-26

March 24, 1961

BY: OPINION OF EARL E. HARTLEY, Attorney General Mark C. Reno, Assistant Attorney General

TO: Honorable H. E. Leonard, Member, N.M. State Highway Commission, P.O. Box 1641, Santa Fe, New Mexico

QUESTION

QUESTION

Is the employment as Chief Highway Engineer by the Commission of Mr. L. D. Wilson, who has not been a resident of the State of New Mexico for a period of eighteen months preceding his employment in such capacity and who voted in the last general election in Alaska, lawful?

CONCLUSION

Probably not.

OPINION

ANALYSIS

It is the understanding of this office from your letter that for a period approximating eighteen months immediately preceding Mr. Wilson's appointment as Chief Highway Engineer by the New Mexico State Highway Commission on March 17, 1961, he had been a resident of the State of Alaska and had voted in the last preceding general election. This opinion is written on the basis of such understanding of fact.

Article VII, Section 2 of the Constitution of the State of New Mexico provides in part:

"Every citizen of the United States who is a legal resident of the state and is a qualified elector therein, shall be qualified to hold any public office in the state except as otherwise provided in this Constitution."

A "qualified elector" is defined by § 3-1-1, N.M.S.A., 1953 Compilation, as any citizen of the United States over the age of twenty-one years and who has resided in the state twelve months * * *.

Section 5-1-5, N.M.S.A., 1953 Compilation, provides:

"Hereafter all employees of the state of New Mexico, including all political subdivisions thereof and including all of the departments, bureaus, boards, commissions and institutions in said state, and all of its political subdivisions, shall be residents of the state of New Mexico, having resided in this state for a period of at least one year prior to the commencement of their employment and it shall be the duty of every employer of labor, including the state of New Mexico and all political subdivisions thereof and including all the departments, bureaus, boards, commissions or institutions, engaged in the construction, erection, alternation, repair or maintenance of any public work with the state of New Mexico to employ persons who have resided in the state of New Mexico, for at least one year previous to the time of employment, to the extent of ninety (90) per centum of the total number of persons of each class of labor so employed, whenever such equally skillful resident labor is available."

In Attorney General Opinion No. 59-152, September 29, 1959, holding illegal the employment of Mr. L. L. Hughes as Executive Secretary of the Highway Commission as violating § 9 (C), Chapter 235, Laws of 1957, this office held that the exceptions contained in § 5-1-5 applied only to laborers and certainly not to the Executive Secretary of the Commission. Similarly, such exceptions obviously would not include the Chief Highway Engineer.

Section 20 of Chapter 288, New Mexico Laws of 1959, provides:

"Such statutory restrictions as to residence provided for public employees shall not apply in the following cases: * * * C. those state departments in which professional or technical training is required for which qualified prospective employees, who are bona fide residents of the state of New Mexico, are not available, all or part of whose salary is paid from appropriations made herein."

If this exception is deemed valid, it would seem clearly incumbent upon the Commission to make a definitive finding probably at the time of employment that other prospective employees who are bona fide residents of the State of New Mexico are not professionally qualified or available. This would appear to touch materially upon the capabilities of residents of New Mexico who desire employment in such capacity. A finding by the Commission that no qualified resident is available would seem essential before the Commission could avail itself of the exception.

However, the constitutionality of § 20, above quoted, seems open to question. Article IV, Section 16 of the Constitution of the State of New Mexico provides:

"The subject of every bill shall be clearly expressed in its title, and no bill embracing more than one subject shall be passed except general appropriation bills and bills for the codification or revision of the laws; but if any subject is embraced in any act which is not expressed in its title, only so much of the act as is not so expressed shall be void. General appropriation bills shall embrace nothing but appropriations for the expense of the executive, legislative and judiciary departments, interest, sinking fund, payments on the public debt, public schools, and other expenses required by existing laws; but if any

such bill contain any other matter, only so much thereof as is hereby forbidden to be placed therein shall be void. All other appropriations shall be made by separate bills."

It is to be observed that said provision requires that "the subject of every bill shall be clearly expressed in its title" and that "general appropriation bills shall embrace nothing but appropriations."

The title of Chapter 288, Laws of 1959 State of New Mexico, is as follows:

"THE GENERAL APPROPRIATION ACT MAKING APPROPRIATIONS AND AUTHORIZING EXPENDITURES FOR EXECUTIVE, LEGISLATIVE AND JUDICIAL DEPARTMENTS, INSTITUTIONS, INTEREST, SINKING FUNDS, PAYMENT OF PUBLIC DEBT, PUBLIC SCHOOLS, PUBLIC BUILDINGS AND OTHER EXPENSES REQUIRED BY EXISTING LAWS DURING THE FORTY-EIGHTH AND FORTY-NINTH FISCAL YEARS, AND MAKING ADDITIONAL AND EMERGENCY APPROPRIATIONS FOR THE FORTY-SEVENTH FISCAL YEAR."

Please note that no reference is made therein to the waiver of statutory restrictions as to residence requirements of public employees and that the waiver of such restrictions is not an appropriation of money. While the tendency of the courts is to sustain legislation as constitutional whenever reasonably possible, the Supreme Court of the State of New Mexico has declared legislation void for being prefaced by a title which clearly failed to express the contents of a bill and for containing more than one subject or matter not germane to the subject of the legislation. **Tindall v. Bryan,** 54 N.M. 112, 215 P. 2d 354; **State v. Candelaria,** 28 N.M. 573, 215 P. 816; **Kilburn v. Jacobs,** 44 N.M. 239, 101 P. 2d 189; **Johnson v. Greiner,** 44 N.M. 230, 101 P. 2d 183. Conversely, the court has sustained appropriation acts and acts relating to taxation which contained matter other than monetary appropriations or including plural subjects. **State ex rel. Lucero v. Marron,** 17 N.M. 304, 128 P. 485; **Crosthwait v. White,** 55 N.M. 71, 226 P. 2d 477; **State v. Grissom,** 35 N.M. 323, 298 P. 666. Consequently it is felt that a determination of the constitutional question under scrutiny must be made by the courts rather than this office.

None of the cases above cited is controlling on the basis of the facts here presented, but cast doubt on the adequacy of the title to Chapter 288 to reflect the fact that it contains Section 20 and the relevancy of that section to legislation which, according to the Constitution, should embrace nothing but appropriations. Cases from other jurisdictions are not cited as they are not determinative of the problem, and superficial research reveals legislative language used which is different from that above quoted. There is a consequent seeming split of authority. Therefore, such cases could be at best described as being persuasive to our court.

It is submitted, therefore, that the employment of Mr. Wilson as Chief Highway Engineer by the New Mexico State Highway Commission is of extremely questionable validity and that the matter can best be determined by a decision of the Supreme Court of the State.