Opinion No. 62-106

August 6, 1962

BY: OPINION OF EARL E. HARTLEY, Attorney General Oliver E Payne, Assistant Attorney General

TO: Mr. C. V. Nunn, Jr., City Attorney, Lordsburg, New Mexico

QUESTION

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Is a municipal ordinance valid which provides that a municipal judge shall not hold any other state, county, city or precinct office or position?

CONCLUSION

Yes.

OPINION

ANALYSIS

The 1961 Legislature enacted Section 37 - 1 - 1, N.M.S.A., 1953 Compilation (P.S.) providing that

"The **qualifications** of municipal judges, bond required and salary received shall be provided by ordinance of the municipality." (Emphasis added)

Pursuant to this enabling legislation, on August 11, 1961 the City of Lordsburg enacted Ordinance No. 198 which created a municipal magistrate court and provided, among other things, that the municipal judge "shall not hold, by either election or appointment, any other office or position in said City, State, County, or precinct therein." Thus, while the two positions here involved (municipal magistrate and justice of the peace) are not incompatible under common law (Attorney General Opinion No. 60-82), the City of Lordsburg has chosen to provide that the municipal judge is not to hold **any** other State, county, city or precinct office or position.

At the recent municipal election in Lordsburg a person then holding the office of justice of the peace was a candidate for the office of municipal judge and was elected. The question now arises as to whether Ordinance No. 198 is valid, because if it is the municipal judge cannot continue to hold office as justice of the peace.

It has long been the rule in this jurisdiction that Article VII, Section 2 of the New Mexico Constitution prohibits the legislature from adding restrictions upon the right to hold office

beyond those provided in the Constitution itself. **Gibbany v. Ford,** 29 N.M. 621. This Section provides as follows:

"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."

In the case of police magistrates there are no pertinent additional qualifications imposed by the Constitution. Article VI, Section 26.

Even though the 1961 legislature did provide that municipalities could set the qualifications for municipal judges (Section 37-1-1, supra), it apparently recognized that neither it nor the municipalities could impose qualifications in addition to those set forth in the Constitution. We say this because the same session of the legislature proposed the following amendment to the Constitution:

"Justices of the peace, police magistrates and constables shall be elected in and for such such districts as are or may be provided by law. **The legislature shall prescribe the qualifications for these offices."** (Emphasis added)

We do not need to decide whether the legislature could properly delegate to the municipalities the power to prescribe the qualifications for police magistrates (as it purported to do in Section 37-1-1, supra) since the fact is that the above-quoted constitutional amendment had not been submitted to nor approved by the electorate at the time Section 37-1-1, supra, was enacted. Accordingly, even the Legislature itself could not constitutionally prescribe restrictions or qualifications for municipal magistrates in addition to those imposed by the Constitution. And the fact that the proposed amendment did **subsequently** pass did not serve to breathe life into a statute which was invalid when enacted. Attorney General Opinion No. 60-25, dated February 15, 1960.

This brings us to the crucial point for purposes of your inquiry; namely, does Ordinance No. 198 impose restrictions or add qualifications for the office of municipal magistrate which are in addition to those contained in the Constitution? If so, then this portion of the ordinance is invalid.

The two New Mexico cases dealing with the problem of prescribing qualifications to the right to hold public office in addition to those contained in the Constitution are **Board of Commissioners of Guadalupe County v. District Court of Fourth Judicial District,** 29 N.M. 244 and **Gibbany v. Ford,** 29 N.M. 621.

In the latter case the Court stated as follows:

"Manifestly, therefore, the Legislature is without power to make added restrictions as a qualification to the right to hold the office of alderman. To permit it to do so would

authorize the superaddition of requirements to hold office beyond those provided by the Constitution."

In so holding, the Court relied on the earlier case of **Board of Commissioners v. District Court,** supra. Turning to this decision we find that the Court said the word "qualified" as used in the Constitution is the equivalent of "eligible." The Court went on to say that the constitutional provision is concerned with personal qualifications and characteristics of persons who are eligible to be chosen to hold public office and "does not in any way attempt to deal with the subject of how, and in what manner, these officers shall qualify before entering upon the discharge of their duties."

While we view this as a close question, it is our opinion that tested in the light of the above-quoted rule, the portion of Ordinance No. 198 which is in question deals only with the manner in which the municipal magistrate shall qualify for entering upon the duties of the office -- that is, by resigning from any State, county, city or precinct office or position.

Such being the case, we are of the opinion that Ordinance 198 does not violate Article VII, Section 2, and the provision in question is therefore valid.

You also mention that there are certain reporting requirements in Ordinance 198 which may conflict with State law and that while such provisions are not here in question, since the Ordinance contains no severability clause, it might be that the entire Ordinance must fall.

However, the rule in this jurisdiction is that even in the absence of a severability clause the invalidity of a portion of a statute or ordinance will not annul other valid portions unless the valid and invalid portions are so interdependent that it can reasonably be said that one portion would not have been enacted without the other. **In re Gibbon,** 35 N.M. 550, 4 P. 2d 643; **Schwartz v. Town of Gallup,** 22 N.M. 521, 165 Pac. 345. Such is not the case here. Accordingly, even if the reporting requirements were determined to be invalid, these provisions would simply be severed, leaving the remainder of Ordinance 198 in full force and effect.