Opinion No. 65-160

August 23, 1965

BY: OPINION OF BOSTON E. WITT, Attorney General Oliver E. Payne, Deputy Attorney General

TO: Mr. Anthony A. Lucero, State Representative, 2010 Rio Grande, N.W., Albuquerque, New Mexico

QUESTION

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1. Under the Federal Constitution does the socalled "one man -- one vote" theory require that the eligible voters of a city commission district vote only for a candidate from that district rather than voting at large for candidates for as many commission positions as are open?

2. May the governing body of a city operating under the commission-manager form of government provide by ordinance or resolution that commissioners are to be elected by the eligible voters of their particular district rather than at large?

3. May the city charter of a municipality operating under the commission-manager form of government be amended or revised to provide that commissioners are to be elected by the eligible voters of their particular district rather than at large?

4. May the city charter be amended or revised to provide that commissioners must reside in the district from which they are elected?

CONCLUSIONS

1. No.

2. No.

3. Yes.

4. No.

OPINION

*{*270}* ANALYSIS

Initially it should be pointed out that none of the opinions by the United States Supreme Court relative to legislative reapportionment have even intimated that the doctrines

enunciated therein apply to the governing body of a municipality. Secondly, even if they had, our present municipal election laws would be in full compliance therewith. The reapportionment decisions simply hold that seats of both houses of a bicameral legislature are to be based substantially upon a population basis. And Section 14-13-6 of the new Municipal Code provides that in a municipality operating under the commission-manager form of government, districts shall be "equal in population, as nearly as possible."

The catch phrase "one man -- one vote" has been misunderstood, misinterpreted and misused. It does not mean what it seems to imply. None of the reapportionment cases even indicate that "at large" voting violates the Federal Constitution. Quite to the contrary. The six leading legislative reapportionment cases actually recognize that even in the case of state legislatures multi-member districts are permissible. **Reynolds v. Sims,** 84 S. Ct. 1362 (1964); **WMCA v. Lomenzo,** 84 S. Ct. 1418 (1964); **Maryland Committee for Fair Representation v. Tawes,** 84 S. Ct. 1429 (1964); **Davis v. Mann,** 84 S. Ct. 1441 (1964); **Roman v. Sincock,** 84 S. Ct. 1449 (1964); **Lucas v. Forty-Fourth General Assembly of Colorado,** 84 S. Ct. 1459 (1964).

In the past the Federal courts have not only intimated that failure to reapportion a state legislature along population lines would result in a judicial decree ordering that the election of the entire state legislature would have to be at large, they have, on occasion, actually so ordered. See McRay, **Reapportionment and Equal Protection,** 61 Mich. Law Rev. 705 (1963).

We conclude then that the Federal Constitution, as interpreted up to this point in time, does not prohibit "at large" elections for members of a city commission.

Your second question asks whether the governing body of a city operating under the commission-manager form of government may, by ordinance or resolution, provide that commissioners are to be elected by the eligible voters of their particular district rather than at large. The answer is no.

Section 14-13-6 of the new municipal Code provides as follows:

"The governing body of a municipality organizing under the commission-manager form of government shall district the municipality into five commissioner districts. Each district shall be compact in area and equal in population, as nearly as possible. A commissioner shall be elected for each district **but shall be voted on at large."** (Emphasis added).

Even the old statute on this matter (Section 14-10-6), which was repealed by the municipal code, provided that the commissioners should run at large in the city. Thus the city commission could not by ordinance or resolution provide otherwise.

In your third question you ask whether such a change could be *{*271}* accomplished by an amendment or revision of the city charter.

Section 14-14-11 of the new Municipal Code provides that "no law relating to municipalities inconsistent with the provisions of the charter shall apply to any such municipality." The prior statute on this subject (Section 14-13-11) provided the same thing. And since that statute was impliedly held to be constitutional in **Albuquerque Bus Co. v. Everly,** 53 N.M. 460, 211 P. 2d 127, it would seem that the "at large" provision contained in Section 14-13-6 could be superseded by a charter amendment pursuant to Section 14-14-14 of the Municipal Code. The prior statute (14-13-14) also provided for charter amendment pursuant to Section 14-14-14 of the Municipal Code. The prior statute (14-13-14) also provided for charter amendment. See also Section 14-14-1 of the Municipal Code.

It is a general rule that a charter provision, whether of a home-rule or other municipality, does not supersede or prevail over conflicting general law dealing with affairs purely of statewide concern, even though they may pertain to municipal corporations; on the contrary, the charter provision is superseded and prevailed over by such general law.

Needless to say, a municipality adopting a charter does not become an independent sovereignty. The state remains supreme in all matters not purely local. 6 McQuillin, **Municipal Corporations,** Section 21.30 (1950).

Whether commission members are to be elected from a district only or at large would seem to be a matter of local concern. In the case of **Merryman v. Gorman,** Ohio, 117 N.E. 2d 629 the court held that the number of councilmen is a matter of local concern, so that a charter provision to the effect that the council should have seven members prevailed over a statutory provision that there should be nine councilmen.

It appears that in enacting Section 14-14-5 of the Municipal Code our legislature felt that the matter with which we are here concerned is a local matter. That Section provides that "The charter may provide for any system or form of government that may be deemed expedient and beneficial to the people of the municipality, including **the manner of appointment or election of its officers,** the recall of the officers and the petition and referendum of any ordinance . . ." Emphasis added). For the reasons just set out, we answer your third question in the affirmative.

In answer to your fourth question, the only method by which a requirement that city commissioners reside in the district from which they were elected can be imposed is by constitutional amendment. Article V, Section 13 provides that all district, county, precinct and municipal officers, shall be residents of the political subdivisions for which they are elected or appointed. However, city commission districts are not political subdivisions **(Gibbany v. Ford,** 29 N.M. 621, 225 Pac. 577); hence a district residence requirement would in fact add an additional qualification for holding office. Opinion No. 61-6. Article V. Section 13 was amended in 1960 to provide that "the legislature may in its discretion provide that elective county commissioners reside in their respective county commission districts." It has not been so amended in the case of city commissioners, and thus no statute, charter or ordinance provision could validly require district residence.