Opinion No. 67-38

March 6, 1967

BY: OPINION OF BOSTON E. WITT, Attorney General

TO: Mr. Harrell Budd Legislative Liaison Aide Office of the Governor Santa Fe, New Mexico

QUESTION

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May the governor appoint a person who was a member of the Legislature during 1965-1966 to an office, the salary of which was increased in 1965 if the former legislator agrees to take the office at the salary which was provided for the office prior to his service in the legislature?

CONCLUSION

It is improbable that this can legally be done.

OPINION

*{*49}* **ANALYSIS**

Involved in your question is Article IV, Section 28 of the New Mexico Constitution. This section provides in pertinent part as follows:

"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 . . ."** (Emphasis supplied)

Clearly the former legislator *{*50}* cannot hold the civil office at the increased salary rate. Now, even if the former legislator agreed to accept the civil office at the salary provided for the office prior to his service as a legislator, the fact is that the emoluments of the **office** were increased during the former legislator's term of office.

The provision in question is designed to prevent a legislator from using his position as such to help create a civil office or increase the salary thereof with a view toward being appointed to the office as soon as his term expired.

The intention of Article IV, Section 28 is probably not circumvented by a former legislator accepting appointment to the office at the salary which was provided therefor

prior to the appointee's service in the legislature but the express letter of the provision is violated.

Thus the issue really boils down to this: May we look only to the letter of the law or to the spirit of the law as well?

There are New Mexico decisions which have dealt with this question of spirit or letter of the law. The first was **Leitensdorfer v. Webb,** 1 N.M. 34, affirmed 61 U.S. 176, 20 How, 176, 15 L. Ed. 891. The decision in that case stated that a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter and a thing which is within the letter of a statute is not within the statute unless it is within the intention of the makers and a construction ought to be put upon it that does not suffer the intention to be eluded. The Court also noted that when the intention of the makers can be discovered, it ought to be followed with reason and discretion in the construction of the statute. See **Territory v. Prather,** 18 N.M. 195, 135 Pac. 83.

While the **Leitensdorfer** case dealt with a statute, the same general rule of construction is applicable to constitutional provisions. In **State v. Romero,** 17 N.M. 88, 125 Pac. 617 the Court held that where the spirit and intent of the constitution can be clearly ascertained, effect should be given to it, and the strict letter should not control, if the "letter" leads to incongruous results clearly not intended. But here we cannot apply **both** the letter and the spirit of the provision. And if only the spirit of Article IV, Section 28 is applied, the letter of the unambiguous constitutional provision is violated. We conclude, therefore, that it is improbable that the courts would uphold he procedure mentioned in your question.

By: Oliver E. Payne

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