

Opinion No. 75-16

February 21, 1975

BY: OPINION OF TONEY ANAYA, Attorney General

TO: Chris M. Lucero New Mexico State Representative State Capitol Santa Fe, New Mexico 87503

QUESTIONS

FACTS

At the general election in November 1972, the New Mexico electorate voted to amend Article II, Section 18 of the New Mexico Constitution. This constitutional amendment is referred to herein as the New Mexico "Equal Rights Amendment." At the legislative session in 1973, the New Mexico legislature voted to ratify a proposed constitutional amendment to the United States Constitution (Laws 1973, H.J.R. 2). This proposed constitutional amendment is referred to herein as the United States "Equal Rights Amendment." Thirty-four states, but less than the required three-fourths (thirty-eight) have ratified the proposed United States "Equal Rights Amendment."

QUESTIONS

1. Can the State of New Mexico repeal the New Mexico "Equal Rights Amendment"? If so, how?
2. Can the State of New Mexico rescind ratification of the proposed United States "Equal Rights Amendment"? If so, how?
3. What effect would the repeal or rescission of either the state amendment or the proposed federal amendment have?

CONCLUSIONS

1. Yes, see analysis.
2. See analysis.
3. See analysis.

OPINION

{*57} **ANALYSIS**

It seems clear that the State of New Mexico can repeal or amend a state constitutional amendment, in the manner specified in New Mexico Constitution, Article XIX, Section 1. (See Opinion of the Attorney General No. 70-13, dated February 3, 1970). The procedure involves approval by a majority of both houses of the legislature and approval by a majority of the electorate. New Mexico Constitution, Article XIX, Section 1, **supra**. (For example, a proposed repeal of New Mexico Constitution Article XIX, Section 5, was attempted in both 1970 and 1971, but was defeated by a majority of the electorate in both years.) In our opinion, the New Mexico Equal Rights Amendment could be repealed in the manner specified in Article XIX, Section 1, **supra**.

Article V of the United States Constitution provides the procedures for amending the United States Constitution. Such proposed constitutional amendments become valid and a part of the Constitution:

". . . when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress . . ." (U.S. Const., Art. V.)

The United States Supreme Court has not addressed the question whether a state, which has ratified a proposed constitutional amendment, can thereafter rescind its ratification of the proposed constitutional amendment. There is, however, some indication that a state may not rescind its ratification of a proposed constitutional amendment. **Coleman v. Miller**, 146 Kan. 390, 71 P.2d 518 (1937), **aff'd** 307 U.S. 433, 59 S. Ct. 972, 83 L. Ed. 1385; **Wise v. Chandler**, 270 Ky. 1, 108 S.W.2d 1024 (1937), 307 U.S. 474, 59 S. Ct. 992, 83 L. Ed. 1409.

In **Coleman v. Miller, supra**, the Supreme Court of Kansas approved the following language, based on a text-writer's analysis:

"It is also true that a state having once ratified an amendment, a subsequent rejection is void. On this point Jameson says:

'Waiving the consideration of principles, however, the question may be regarded as settled by authority, if a resolution of Congress upon it is to be taken as decisive. We have seen that when the votes upon the XIV Amendment were canvassed by the Secretary of State, doubts were entertained by him whether those of New Jersey and Ohio, whose legislatures had first adopted, and then attempted to reject, that amendment, {*58} were to be counted as having adopted it. This doubt was settled by Congress, which declared by resolution that they were to be counted among the ratifying States, which was accordingly done.' Jameson, Constitutional Conventions, § 584.

From the foregoing and from historical precedents, it is also true that where a state has once ratified an amendment it has no power thereafter to withdraw such ratification. To hold otherwise would make article 5 of the Federal Constitution read that the

amendment should be valid 'when ratified by three-fourths of the states, each adhering to its vote until three-fourths of all the legislatures shall have voted to ratify.'

It is clear, then, both on principle and authority, that . . . when a proposed amendment has once been ratified the power to act on the proposed amendment ceases to exist." (**Coleman v. Miller, supra**, at 71 P.2d 526.)

In **Wise v. Chandler, supra**, the Court of Appeals of Kentucky also intimated that the ratification power once exercised was exhausted. The court stated:

"We think the conclusion is inescapable that a State can act but once, either by convention or through its Legislature, upon a proposed amendment; and, whether its vote be in the affirmative or be negative, having acted, it has exhausted its power to consider the question without a resubmission by Congress . . ." (**Wise v. Chandler, supra**, 108 S.W.2d 1033.)

Thus, there is serious doubt whether the State of New Mexico can rescind its ratification of the proposed United States "Equal Rights Amendment." Also, it is highly doubtful whether the United States would recognize such an attempted rescission, in view of the treatment accorded New Jersey and Ohio with respect to the XIV Amendment (**Coleman v. Miller, supra**). In other words, the Secretary of State or the Congress might well count a rescinding state as having ratified the amendment and ignore the rescission as being ineffectual. This type of controversy can ultimately only be decided by the United States Supreme Court. In our opinion, if New Mexico did **attempt** to rescind ratification, however, the mechanism would be the same as was required for ratification, i.e., concurrence of a two-thirds majority of both houses of the New Mexico legislature.

With respect to your third question, in view of the previous discussion, any attempted rescission of the proposed United States "Equal Rights Amendment" would probably be futile. If New Mexico repealed the New Mexico "Equal Rights Amendment," such repeal would have no effect if the proposed United States "Equal Rights Amendment" becomes valid and a part of the United States Constitution. If the United States "Equal Rights Amendment" is not ratified, it is impossible to predict what effect repeal of the New Mexico "Equal Rights Amendment" would have. Repeal of the New Mexico "Equal Rights Amendment," **in and of itself**, may have little **initial** legal effect. A number of statutes have been amended to implement the provisions of the New Mexico "Equal Rights Amendment," to remove any discrimination based on sex, (see attached list). Repeal of the amendment would not **require** the legislature to change these statutes again. However, without a state or federal "Equal Rights Amendment," {*59} there would be no definitive constitutional prohibition against the state enacting statutes that discriminate on the basis of sex, other than the protections accorded by the Fourteenth Amendment to the United States Constitution. The general trend of the law, regardless of state or federal Equal Rights Amendments, has been to strike down arbitrary discriminations based on sex under the provisions of the Fourteenth Amendment to the United States Constitution. Thus, repeal of the state Equal Rights Amendment, in

absence of a federal Equal Rights Amendment, may ease somewhat the state's burden in defending actions alleging discrimination based on sex, if any challenges were brought in court against state actions under the Fourteenth Amendment to the United States Constitution.

In conclusion, while we cannot predict what effects might occur if the New Mexico "Equal Rights Amendment" were repealed, in the absence of a federal "Equal Rights Amendment," nevertheless, there may be pressures on the legislature to enact statutes which discriminate on the basis of sex. Since the constitutional protection of the New Mexico "Equal Rights Amendment" would be removed, the only constitutional protection against any such alleged acts of discrimination would be the Fourteenth Amendment to the United States Constitution.

LIST

Article VII, Section 2 of the New Mexico Constitution

Article VIII, Section of the New Mexico Constitution

Laws 1973, Chapter 41

Laws 1973, Chapter 42

Laws 1973, Chapter 43

Laws 1973, Chapter 44

Laws 1973, Chapter 45

Laws 1973, Chapter 46

Laws 1973, Chapter 47

Laws 1973, Chapter 51

Laws 1973, Chapter 57

Laws 1973, Chapter 58

Laws 1973, Chapter 59

Laws 1973, Chapter 60

Laws 1973, Chapter 70

Laws 1973, Chapter 71

Laws 1973, Chapter 72

Laws 1973, Chapter 103

Laws 1973, Chapter 134

Laws 1973, Chapter 139

Laws 1973, Chapter 218

Laws 1973, Chapter 241

Laws 1973, Chapter 266

Laws 1973, Chapter 275

Laws 1973, Chapter 276

Laws 1973, Chapter 277

Laws 1973, Chapter 319

Laws 1973, Chapter 320

By: Ralph W. Muxlow, II

Assistant Attorney General