

Opinion No. 83-01

January 12, 1983

OPINION OF: Paul Bardacke, Attorney General

BY: Paul Bardacke, Attorney General

TO: The Honorable Mickey D. Barnett, New Mexico State Senator, Executive Legislative Building, Santa Fe, New Mexico 87502

FACTS

Prior to January 1, 1983, Section 4-44-4 NMSA 1978 provided that

The annual salaries of elected officers of class "A" counties are:

- A. county commissioners, ten thousand nine hundred thirty dollars (\$10,930) each;
- B. treasurer, twenty-four thousand two hundred eighty-eight dollars (\$24,288);
- C. assessor, twenty-four thousand two hundred eighty-eight dollars (\$24,288);
- D. sheriff, twenty-five thousand three hundred forty-four dollars (\$25,344);
- E. county clerk, twenty four thousand two hundred eight-eight dollars (\$24,288);
- F. probate judge, ten thousand six hundred eighty-seven dollars (\$10,687); and
- G. county surveyor, ten thousand nine hundred thirty dollars (\$10,930).

By Laws 1982, Chapter 39, Section 1, the legislature amended Section 4-44-4, effective January 1, 1983, to provide instead that

The annual salaries of elected officers of class "A" counties shall not exceed:

- A. county commissioners, thirteen thousand seven hundred dollars (\$13,700) each;
- B. treasurer, thirty thousand four hundred dollars (\$30,400);
- C. assessor, thirty thousand four hundred dollars (\$30,400);
- D. sheriff, thirty-one thousand seven hundred dollars (\$31,700);
- E. county clerk, thirty thousand four hundred dollars (\$30,400);

F. probate judge, thirteen thousand four hundred dollars (\$13,400); and

G. county surveyor, thirteen thousand seven hundred dollars (\$13,700).

Sections 4-44-5 through 4-44-12 NMSA 1978 were similarly amended to provide for the salaries of elected officers in class "B", class "C" first class, second class, third class, fourth class and fifth class counties.

Since January 1, 1983, several county commissions have enacted ordinances to set salaries of elected county officers in amounts greater than those previously set by law but not exceeding the maximums now authorized by Sections 4-44-4 through 4-44-12.

QUESTIONS

Do Sections 4-44-4 through 4-44-12 NMSA 1978 violate Article IV, Section 27 of New Mexico Constitution insofar as they authorize salaries for elected county officers which are greater than those previously fixed by law?

CONCLUSIONS

Yes.

ANALYSIS

The New Mexico Constitution governs the question of the compensation of elected county officers by providing first, at Article X, Section 1, that the annual salary of elected county officers shall be as provided by law depending upon the classification of the county and second, at Article IV, Section 27, that the compensation of any officer shall not "be increased or diminished during his term of office." The New Mexico Supreme Court explained the intent of these provisions in **State ex rel. Gilbert et al. v. Board of Commissioners of Sierra County**, 29 N.M. 209, 213, 222 P. 654 (1924):

Prior to the adoption of the Constitution, county officers had been compensated for their services upon a fee basis, and it was evidently intended by the two constitutional provisions hereinbefore quoted (section 1, art. 10, and section 27, art. 4) to dispense with such method and to substitute in lieu thereof a salary method, with the provision that such compensation should be neither increased nor diminished during the term of any such officer.

The **Gilbert** case was brought to challenge the constitutionality of a state law which required the state auditor to fix the classification of counties in January in each odd-numbered year so that the salaries of the elected county officials could be determined accordingly. The Court held that under the "clear and unmistakable" language of Article IV, Section 27, the law was "unconstitutional and void in so far as it operates to increase or diminish the compensation" of county officers during the term for which they were elected. 29 N.M. at 218-219.

In this case, a similar question has been raised with respect to Sections 4-44-4 through 4-44-12 under which county commissions have acted, during the current term of office, to set the salaries of elected county officers. Insofar as such salaries have been set at amounts which exceed the amounts previously fixed by law, Sections 4-44-4 through 4-44-12 operate to increase the compensation of elected county officers during the term for which they were elected. Following the reasoning in the **Gilbert** case, Sections 4-44-4 through 4-44-12 are "unconstitutional and void" under Article IV, Section 27.

As a rule, if an amendment to a statute is unconstitutional and void, the original statute remains in effect. **See, e.g., State v. Bloss**, 637 P.2d 1117 (Ha. 1981); **Clark v. State**, 287 A.2d 660 (Del. 1972). **See also, In re Mares**, 42 N.M. 556, 82 P.2d 786 (1938). Thus, the salaries of the incumbent elected county officers should properly be determined by reference to the provisions of Sections 4-44-4 through 4-44-12 as they existed prior to January 1, 1983.

ATTORNEY GENERAL

Paul Bardacke, Attorney General

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