Opinion No. 91-03

March 27, 1991

OPINION OF: TOM UDALL, Attorney General

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TO: The Honorable Martin J. Chavez, State Senator, Suite 1010, 200 Lomas Blvd., N.W., Albuquerque, NM 87102

QUESTIONS

Does the appointment of Dick Minzner, a former state legislator, as Secretary of the Taxation and Revenue Department contravene Article IV, Section 28 of the New Mexico Constitution if the salary for that office was increased as a result of an appropriations bill generally adjusting all state employee salaries enacted during Mr. Minzner's legislative term of office?

CONCLUSIONS

The appointment does not violate Article IV, Section 28 when the enactment was intended to adjust salaries of state employees generally rather than to increase the salary for a particular office or class of offices.

FACTS

In March 1990, during its first special session, the New Mexico Legislature authorized comprehensive salary adjustments for state employees in conformance with the "Hay plan," a study which made recommendations regarding the salary ranges for every position in state government to conform them to equivalent positions in the governments of eight states surrounding New Mexico. In a single enactment, the state legislature authorized the Department of Finance and Administration ("DFA") to implement the Hay plan for exempt officers and employees and also appropriated funds to implement the plan for classified employees,[1] commissioned officers of the New Mexico state police division of the public safety department and judicial employees. 1990 N.M. Laws, ch. 1, § 5, ch. 6, § 5 (2)(1st Spec. Session).[2] The law did not specify the amount of any salary increase it authorized for any position; that was left to DFA's implementation of the Hay plan. Further, the legislation did not mention the position of Secretary of the Taxation and Revenue Department, or any other specific office or position, for that matter.[3] It addressed only the broad categories described above. As a result of the legislation and the conclusions of the Hay plan, the salaries of all cabinet secretaries (including that of the Secretary of the Taxation and Revenue Department) were increased about four percent to approximately $62,088 as of the fiscal year beginning July 1, 1990.

Dick Minzner was a member of the legislature until December 31, 1990. In late December 1990, Governor-elect Bruce King nominated him to be Secretary of the Taxation and Revenue Department, effective January 1, 1991. Mr. Minzner decided not to accept the $2,392.00 increase authorized by the legislature and has been receiving his salary at the unadjusted amount of $59,691.84.

ANALYSIS

The appointment of Mr. Minzner raises questions under Article IV, Section 28 of the New Mexico Constitution which provides, in pertinent part:

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....

In general, there is a strong presumption in favor of eligibility for public office and courts construe constitutional provisions restricting the right to hold public office strictly against ineligibility. Cannon v. Gardner, 611 P.2d 1207, 1211 (Utah 1980); Oceanographic Comm'n v. O'Brien, 447 P.2d 707, 712 (Wash. 1968). As suggested by the Texas Supreme Court, this principle should "temper" considerations based on the purpose of constitutional provisions like Article IV, Section 28 "to keep improper motivations of personal gain from influencing lawmakers when they establish the rewards of elective office." Brown v. Meyer, 787 S.W.2d 42, 45 (Tex. 1990) (holding that an increase in "emoluments" contemplated by Texas' version of Article IV, Section 28 did not include contingent and remote benefits like retirement benefits).

In addition, the New Mexico Supreme Court has acknowledged that "[t]he fundamental principle of constitutional construction is to give effect to the intent of the framers of the organic law and of the people adopting it," Greene v. Esquibel, 58 N.M. 429, 440, 272 P.2d 330, 337 (1954), and "where the spirit and intent is clearly ascertainable as contrary to the strict letter of the language and literal application would lead to an incongruous result, it should not be permitted to control." State ex rel. Chavez v. Evans, 79 N.M. 578, 585, 446 P.2d 445, 452 (1968). Accord Board of County Comm'rs v. McCulloh, 52 N.M. 210, 215-16, 195 P.2d 1005, 1008 (1948); State ex rel. Ward v. Romero, 17 N.M. 88, 100, 125 P. 617, 621 (1912) ("[w]e should not permit legal technicalities, and subtle niceties, to control and thereby destroy what the framers of the constitution intended").

The issue here is whether the prohibition against appointment to "any civil office...the emoluments of which were increased during such term" applies when the legislature has addressed the salaries of all state employees across the board, rather than the salaries of a particular state office or class of offices (e.g., all district judges or all cabinet secretaries). We believe it does not. The purpose of this provision is to prevent legislators from disregarding their public duties by voting increases in salaries or other "emoluments" for specific offices they will or expect to assume. This provision is an

important protection against legislative misconduct and should not be taken lightly. Nevertheless, under the specific facts presented here, the risk of legislative misconduct is so attenuated that this constitutional provision should not be interpreted to override the strong presumption in favor of eligibility for public office.[4]

The 1990 legislation represented a general overhaul of the state salary structure. The resulting increase in the salary of the Secretary of the Taxation and Revenue Department was merely incidental to the overall purpose of the legislation and, significantly, was not specifically mandated by the legislation. It is unlikely that legislators were motivated by ulterior purposes to allow implementation of the Hay plan, particularly since they did not control which positions, if any, would receive increases. Absent such control, the possibility that a legislator voted for the legislation with the idea of maneuvering for appointment to an affected office is remote. There is no evidence that such maneuvering occurred here.[5]

The Utah Supreme Court, in construing that state's version of Article IV, Section 28, observed that the purpose of such provisions is "to guard against dishonesty or improper connivance by or with legislators and to prevent them from being influenced by ulterior schemes to enrich themselves at the expense of the public treasury by creating or increasing the pay of a public office and then taking advantage of it." Shields v. Toronto, 395 P.2d 829, 830 (Utah 1964). Given its underlying purpose, the court refused to apply Utah's provision to prevent legislators from running for governor and secretary of state, even though the legislature had enacted a bill during their terms which had raised the salaries of all state officers. The court concluded that the provision was not meant to apply

where, as here, there has been an overhaul and consolidation of salary statutes and an incidental relatively small increase in the salaries of state officials and where there is no possibility of such impropriety.

395 P.2d 829 at 835. Other states' courts also have determined that similar prohibitions on dual office-holding by legislators should not apply in situations where the concerns giving rise to the prohibition addressed were not implicated. See, e.g., State ex rel. West v. Gray, 74 So.2d 114 (Fla. 1954); Mayor and Comm'rs of Westernport v. Green, 124 A. 403 (Md. 1923).

The leading New Mexico case interpreting Article IV, Section 28 is State ex rel. Anaya v. McBride, 88 N.M. 244, 539 P.2d 1006 (1975). In that case, during a state senator's term in the legislature the salaries of district judges specifically were increased by $7,000 per annum. Subsequently, the legislator was appointed to the district court by the governor to fill a vacancy caused by resignation. The court ruled that the appointment violated Article IV, Section 28. Although McBride can be interpreted to require literal application of Article IV, Section 28's prohibition, the situation here differs significantly from that facing the court in McBride. Unlike the salaries of district court judges, the salaries of cabinet secretaries are not set by the legislature. Rather, they are established by DFA and presented to the legislature for necessary funding. Moreover, the appropriations

made by the 1990 legislature were intended to adjust the salary schedules of employees throughout state government; the enactment did not specify the particular positions which would receive an increase or whether implementation of the Hay plan would necessarily permit a salary increase for any given provision. Unlike the situation in McBride, the purpose of Article IV, Section 28 would not be furthered by a literal application of its provisions in the instant situation.[6]

Accordingly, we conclude that Article IV, Section 28, under the facts presented here, does not prohibit Dick Minzner from holding the office of Secretary of the Taxation and Revenue Department.

ATTORNEY GENERAL

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GENERAL FOOTNOTES

n1 Classified employees are those covered by the Personnel Act. NMSA 1978, § 10-9-4 (Repl. Pamp. 1990).

n2 The legislature also appropriated funds for a five percent salary increase for teachers and other public school personnel, district attorney employees and legislative employees, and for a salary increase for employees of post-secondary and vocational schools. 1990 N.M. Laws, ch. 1, §§ 6-9, ch. 6, § 5(1).

n3 Specifically as to "exempt employees" (which include cabinet secretaries, their deputies, agency division directors, other political appointees and employees in the Office of the Attorney General), the legislation authorized DFA to "implement the Hay plan for exempt employees covered by the exempt salary plan pursuant to Section 10-9-5 NMSA 1978 from appropriations contained in Laws 1990, Chapter 131." 1990 N.M. Laws, ch. 1, § 5 (E). Section 10-9-5(A) directs DFA to

prepare, by December 1 of each year, an exempt salaries plan for the governor's approval. The plan shall specify salary ranges for the following public officer and public employee positions of the executive branch of government:...

(10) secretaries of departments appointed by the governor.

The exempt salaries plan is published as part of the executive budget document presented to the legislature and, after approval by the governor, takes effect at the beginning of the next fiscal year. NMSA 1978, § 10-9-5(C), (D) (Repl. Pamp. 1990).

End of Footnote 3

n4 Of course, if there were any evidence of legislative misconduct, the fact that the scheme was imbedded in a general appropriation for government-wide salary

adjustments would not save it from the prohibition addressed in this Opinion. In that case the purposes of the prohibition would be violated, rather than be served, by allowing the appointment to stand. This Opinion is intended to apply very narrowly to the facts presented here.

n5 In fact, at the time of the special session in March 1990, Mr. Minzner was running for the office of Attorney General and Bruce King who later nominated him to be Secretary of the Taxation and Revenue Department was running in a contested primary for Governor.

n6 Courts reaching the opposite view have generally adopted a "plain meaning" approach and applied literally the terms of their state constitutions. See, e.g., Strake v. Court of Appeals, 704 S.W.2d 746, 747-48 (Tex. 1986); Warwick v. State ex rel. Chance, 548 P.2d 384 (Alaska 1976). Interestingly, three justices dissented from the majority's position in Strake. They noted that "the majority's interpretation of the constitutional provision may conform to the letter of the prohibition, but it is at odds with the underlying purpose and the spirit of the constitutional provision," and stated that the reasoning of the Utah Supreme Court in Shields v. Toronto should apply.