

Opinion No. 94-09

December 23, 1994

OPINION OF: Tom Udall, Attorney General

BY: Elizabeth A. Glenn, Assistant Attorney General

TO: The Honorable H. John Underwood, State Representative, 1096 Mechem St. #3-E, Ruidoso, New Mexico 88345

QUESTIONS

Would an interpretation of NMSA 1978, Section 4-44-12.3(B) which permits county commissioners to increase their salaries during their terms of office violate Article IV, Section 27 of the New Mexico Constitution?

CONCLUSIONS

Yes. An interpretation of Section 4-44-12.3(B) permitting an increase of county commissioner salaries during their terms of office would violate Article IV, Section 27's restriction on salary changes during a public officer's term.

FACTS

Relying on NMSA 1978, Section 4-44-12.3(B), several county commissions are contemplating measures which would increase commissioner salaries, including those of incumbent commissioners during their terms of office.

ANALYSIS

Section 4-44-12.3(B) is one of several statutory provisions which collectively set the salaries of county officers. It provides, in pertinent part:

the majority of a board of county commissioners may provide for salary increases for elected county officials; provided, however, that no salary increase shall take effect until the first day of the term of the first elected county official who takes office after the date that salary increase is approved, at which time the salary increase shall take effect for all county-elected officials.

This provision appears to permit salary increases mid-term for officials if they are holding office when the county official who is first elected after the salary increase takes office.

Under Article IV, Section 27 of the New Mexico Constitution:

No law shall be enacted giving any extra compensation to any public officer ... after services are rendered...; **nor shall the compensation of any officer be increased or diminished during his term of office**, except as otherwise provided in this constitution.

(Emphasis added). In the leading case addressing the underlined clause of Article IV, Section 27, the New Mexico Supreme Court held unconstitutional a statute that had the effect of diminishing the salaries of elected county officials during their terms of office. **State ex rel. Gilbert v. Board of Comm'rs of Sierra County**, 29 N.M. 209, 222 P. 654 (1924). Following the holding in **State ex rel. Gilbert**, this office has consistently applied Article IV, Section 27 to prohibit salary changes affecting county commissioners and other elected county officials. **See** AG Op. No. 59-100 (1959) (county commissioners serving their terms were not allowed statutory salary increase); 1929-30 AG Op. 32 (1929) (county classification act which results in increase or decrease of officers' salaries during their terms is unconstitutional).

We believe that **State ex rel. Gilbert** and prior Attorney General opinions require us to conclude that Section 4-44-12.3(B) may not constitutionally be interpreted to permit county officials to receive salary increases during the terms in which the increase was adopted. This conclusion is consistent with the underlying purposes of Article IV, Section 27's prohibition on mid-term salary increases. As explained in **State ex rel. Gilbert**, the provision was designed to protect against both legislative "grudge" (decreasing a salary) and favoritism. 29 N.M. at 214.

These concerns also apply to the statute at issue here. The legislature establishes the maximum salaries for elected county officials, but it delegates to county commissioners the responsibility for setting their own actual salaries. This scheme presents the potential for both the legislative grudge or favoritism addressed in **State ex rel. Gilbert** plus the additional potential danger of self-interest by public officials who are permitted to increase (or decrease) their own and other elected county officials' salaries during their terms of office.

Although Section 4-44-12.3(B) cannot constitutionally be interpreted to permit elected county officials to receive increased salaries during their terms of office, we do not believe the provision is without effect. When a statute is susceptible to two constructions, one which supports it and the other which renders it unconstitutional, the former construction will be adopted. **See New Mexico State Bd. of Educ. v. Board of Educ. of Alamogordo Pub. Sch. Dist.**, 95 N.M. 588, 592, 624 P.2d 530 (1981). Here, it is possible to construe Section 4-44-12.3 in a manner consistent with the constitution by reading the section to mean the salary increase shall take effect for each county-elected official as he or she is elected to a new term.

We are aware that one district court decision and several previous Attorney General opinions have reasoned that the "except" clause of Article IV, Section 27 would allow salary increases for incumbent officers other than county officials when the constitution directly and specifically gives the legislature broad authority to set the salaries for those

officers.¹ However, the constitutional provisions at issue in those opinions are broader than that involved here. More importantly, neither Article IV, Section 27 nor Article X, Section 1 (the constitutional provision applicable to county officers' salaries) has changed since **State ex rel. Gilbert**, and the court in that case expressly considered the two provisions together to reach its conclusion. The court explained that,

[p]rior 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.

29 N.M. at 213. Thus, it appears that, in reaching its conclusion that Article IV, Section 27 applied to mid-term decreases in elected county officers' salaries, the court did not find it significant that the legislature was constitutionally charged with establishing salaries for those officers. Unless and until **State ex rel. Gilbert** is overruled by the New Mexico Supreme Court, we are bound to apply Article IV, Section 27 to bar mid-term salary changes for county officials.

We also recognize that, because the constitution was amended in 1992 to increase the terms of elected county officials from two years to four years and to provide for staggered terms (N.M. Const. art. X, § 2, as approved by the electorate on Nov. 3, 1992), the application of Article IV, Section 27 may result in county commissioners or other elected county officials who come into office or enter a new term after a salary increase has been approved earning more than officials who are mid-term at the time of the increase. We do not believe, however, that the prohibition on mid-term salary increases, as applied to officers serving staggered terms, violates constitutional equal protection principles.² The prohibition would be reviewed merely under a rational basis test,³ which means it will be struck down only if it "is so devoid of rational support or serves no valid governmental interest, so that it amounts to mere caprice." **Richardson v. Carnegie Library Restaurant, Inc.**, 107 N.M. 688, 693, 763 P.2d 1153 (1988). **See also Thompson v. McKinley County**, 112 N.M. 425, 430, 816 P.2d 494 (1991) ("[w]e apply minimum scrutiny and the rational basis test when reviewing social and economic legislation").

The prohibition at issue here is rational and serves a legitimate governmental interest. As described above, the purpose of the prohibition against salary changes during an officer's term is to avoid potential abuses of legislative authority. We believe that this justifies the distinction between incumbents and newly-elected officers and is sufficient to withstand an equal protection challenge. **See** AG Op. No. 79-27 (1979) (no denial of equal protection where Art. IV, § 27 prevented salary increases for municipal judges but not judges of constitutionally created courts). **See also State ex rel. Gonzales v. Manzagol**, 87 N.M. 230, 234, 531 P.2d 1203 (1975) (statute that prohibited classified but not exempt employees from holding political office did not deny equal protection).

Cf. AG Op. No. 87-5 (1987) (incumbent city council members were prohibited from receiving pay increases which had been adopted for new council members).⁴

ATTORNEY GENERAL

TOM UDALL Attorney General

GENERAL FOOTNOTES

[n1](#) See **State ex rel. Thompson v. Olmstead**, No. 45038, memorandum op. (N.M. 1st Judicial Dist. Ct. Jan. 11, 1973) (provision in Art. V, § 12 of the state constitution stating that the compensation of listed executive officers "may be increased or decreased by law" permitted mid-term salary increases for those officers); AG Op. No. 92-08 (1992) (Art. XI, § 5, which provides that the salary of each state corporation commissioner "shall be prescribed by the legislature" permitted mid-term salary increases); AG Op. No. 79-27 (1979) (same conclusion based on constitutional provisions providing that the salaries of appellate, district, magistrate and probate court judges would be fixed by law); AG Op. No. 73-8 (1973) (same conclusion based on Art. IV, § 24, which provides that a district attorney shall "receive such salary as may be prescribed by law").

[n2](#) Thus, we answer in the negative the question raised in a previous Attorney General opinion addressing state corporation commissioner salaries about whether the application of Article IV, Section 27 to elected officials with staggered terms implicates equal protection principles. See AG Op. No. 92-08, n. 2 (1992).

[n3](#) By contrast, courts employ strict scrutiny when reviewing classifications that infringe fundamental constitutional rights or involve "suspect classes," such as race, national origin or religion. **Richardson v. Carnegie Library Restaurant, Inc.**, 107 N.M. 688, 693, 763 P.2d 1153 (1988); **Vandolsen v. Constructors, Inc.**, 101 N.M. 109, 112, 678 P.2d 1184, **cert. denied**, 101 N.M. 77, 678 P.2d 705 (1984). Courts also have applied an "intermediate standard of review" to certain classifications such as those based on gender and illegitimacy. **Richardson**, 107 N.M. at 693-94.

[n4](#) While we are aware of one state supreme court which concluded differently, **Kirk v. Board of County Comm'rs**, 595 P.2d 1334 (Okl. 1979), the reasoning in that case was unclear and did not employ generally-accepted equal protection analysis. The better reasoning and weight of authority fully supports our conclusion that the application of Article IV, Section 27 to officers with staggered terms does not violate equal protection. See **Kavanagh v. Brown**, 206 F. Supp. 479 (E.D. Mich.) (application of state constitutional provision prohibiting mid-term salary increases which resulted in newly-elected state supreme court justices receiving higher salaries than those serving at the time the increase was enacted did not violate federal guarantees of equal protection), **aff'd per curiam**, 371 U.S. 35 (1962); **Shubat v. State**, 484 P.2d 278 (Mont. 1971) (state constitutional provision prohibiting changes in officer salaries after election did not violate equal protection principles where it resulted in officers, such as county

commissioners with staggered terms, being paid different salaries for performance of the same offices).