

Opinion No. 92-08

September 2, 1992

OPINION OF: TOM UDALL, Attorney General

BY: David M. Kaufman, Assistant Attorney General, Carol A. Baca, Assistant Attorneys General

TO: Jerome D. Block, Louis E. Gallegos, Commissioners State Corporation Commission, Post Office Drawer 1269, Santa Fe, New Mexico 87501

QUESTIONS

Whether N.M. Const. art. XI, § 5 governs the legislature's authority to increase the salaries of the State Corporation Commissioners during their terms of office.

CONCLUSIONS

Yes. Pursuant to N.M. Const. art. XI, § 5, the legislature has the authority to increase the salaries of the State Corporation Commissioners during their terms of office.

FACTS

The three state corporation commissioners serve six year terms and one commission seat is on the general election ballot every two years. N.M. Const. art. XI, § 2. As originally adopted, the state constitution expressly provided that the commissioners would receive equal annual salaries of \$3,000. N.M. Const. art. XI, § 5. That provision remained unchanged until 1964 when it was amended to its present form, which provides, in pertinent part,

that "[t]he salary of each commissioner shall be prescribed by the legislature."

On January 1, 1987, when Commissioner Jerome D. Block assumed office, the annual salary provided for state corporation commissioners was \$40,425. 1986 N.M. Laws, ch. 49, § 1. On January 1, 1989, when Commissioner Louis E. Gallegos assumed office, the salary for the office had not changed. In 1989, the legislature enacted 1989 N.M. Laws, ch. 237, § 1 (codified as amended at NMSA 1978, § 8-1-1 (Repl. Pamph. 1991)) which increased the annual salary of the office of state corporation commissioner to \$65,000, effective January 1, 1991. In the 1990 general election Commissioner Eric P. Serna was elected to a new six-year term beginning January 1, 1991. All three commissioners have been paid at the rate of \$65,000 per year since January 1, 1991.

ANALYSIS

Standing alone, article XI, § 5 appears to give the legislature unqualified and unrestricted power and authority to determine the compensation of the state corporation commissioners. A question arises because the first clause of article IV, § 27 of the New Mexico Constitution also provides:

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

The corporation commissioners are clearly public officers for the purposes of article IV, § 27. In **State ex rel. Gilbert v. Board of Commissioners**, 29 N.M. 209, 218, 222 P. 654, 657 (1924), the New Mexico Supreme Court stated that "a person who is elected to a public office for a fixed and definite term, whose functions and duties affect the public" is an officer within the meaning of article IV, § 27. The Commission's duties under N.M. Const. art. XI, § 7, which include regulation of such things as common carriers and telecommunications, obviously affect the public. Thus, if article IV, § 27 qualifies article XI, § 5 and prohibits the salaries of the corporation commissioners from being changed mid-term, Commissioners Block and Gallegos cannot receive the salary increase that was effective January 1, 1991, during their current terms of office. On the other hand, if article XI, § 5 is not qualified by article IV, § 27, then the legislature may determine the salaries of the state corporation commissioners at any time and Commissioners Block and Gallegos are eligible for the January 1, 1991 salary increase. Court decisions and opinions of this office that have considered the propriety of mid-term changes in compensation under article IV, § 27 are not entirely consistent and do not directly address the specific facts here involving constitutional officers of a multiple-member commission with staggered terms of office. In view of the unsettled state of the law in this area, we have analyzed not only the particular constitutional provisions at issue here but similar provisions and authorities concerning other public officers in New Mexico and other states. We also have considered the historical context and the purposes and intent of article IV, § 27. Based on this analysis, it is our opinion that article XI, § 5 gives the legislature authority to prescribe the salaries of the corporation commissioners and the article IV, § 27 prohibition of mid-term salary changes does not apply to those officers. This is particularly so in light of the absence of any facts that would show that the salary increases in this case were improperly motivated or influenced and, thus, implicate the evils that article IV, § 27 was intended to prevent.¹

The principles of statutory construction apply to the construction of the constitution. **State v. Ball**, 104 N.M. 176, 180, 718 P.2d 686, 690 (1986); **Postal Finance Co. v. Sisneros**, 84 N.M. 724, 725, 507 P.2d 785, 786 (1973). The object is to ascertain the intent of the framers and adopters of the constitutional provision. **In re Generic Investigation Into Cable Television Services**, 103 N.M. 345, 348, 707 P.2d 1155, 1158 (1985). Constitutional provisions are not to be considered in isolation but are to be considered as a whole. *Id.* Where two constitutional provisions cannot be harmonized, the specific section governs over the general regardless of the priority of enactment. **City of Albuquerque v. New Mexico State Corporation Commission**, 93 N.M. 719,

721, 605 P.2d 227, 229 (1979). Where the language used is clear and unambiguous, there is no need nor occasion to resort to extrinsic aids of construction. **Storey v. University of New Mexico Hospital/BCMC**, 105 N.M. 205, 207, 730 P.2d 1187, 1189 (1986); **State v. Pitts**, 103 N.M. 778, 789, 714 P.2d 582, 583 (1986).

In considering the particular constitutional provisions at issue here, a court could conclude that the 1964 amendment to article XI, § 5 gave the legislature plenary authority to prescribe the salaries of the state corporation commissioners. First, there is a presumption of validity in favor of legislative enactments. A legislative enactment should be sustained unless it is proved unconstitutional by proof beyond a reasonable doubt. **State v. Ball**, 104 N.M. 176, 182, 718 P.2d 686, 692 (1986); see also **State ex rel. Whittier v. Safford**, 28 N.M. 531, 534, 214 P. 759, 760 (1923) (in doubtful cases, statute's constitutionality is favored; only when a statute clearly violates the constitution do courts so construe it). There is at least a "reasonable doubt" as to the applicability of article IV, § 27 to the salary increase authorized by the legislature.

Second, the provisions of article XI, § 5 addressing the authority of the legislature to provide for the compensation of the commissioners is specific while the provisions in article IV, § 27 are generally applicable to the compensation of "any public officer, servant, agent or contractor." See **Sevier v. Riley**, 244 P. 323 (Cal. 1926) (constitutional provision granting the legislature unqualified authority to prescribe the compensation of judges repeals by implication a more general constitutional provision limiting the power over compensation, to the extent of its application to judges). Furthermore, the "except" clause in article IV, § 27 makes it subordinate to any other constitutional provision providing specific authority without the limitations in article IV, § 27.

An older decision of the New Mexico Supreme Court held that article IV, § 27 prohibited a mid-term decrease in certain county officers' salaries. **State ex rel. Gilbert v. Board of Commissioners**, 29 N.M. 209, 222 P. 654 (1924). The **Gilbert** decision, however, does not answer the instant question for several reasons. First, article X, § 1 is worded slightly differently from article XI, § 5. The former section merely provides that: "The legislature shall at its first session classify the counties and fix salaries for all county officers, which shall also apply to those elected at the first election under this constitution." The chief issue raised in **Gilbert** was whether the offices of county clerk, assessor and treasurer were exempt from article IV, § 27 because they were not constitutionally created. The **Gilbert** court did not expressly focus on the question whether a constitutional provision authorizing the legislature to fix salaries would constitute an exception to article IV, § 27. Second, **Gilbert** did not consider the issue in the context of a multiple-member commission with staggered terms of office such as the corporation commission. At the time **Gilbert** was decided, in 1924, county officers (including county commissioners) were all elected in the same year to two-year terms. See N.M. Const. art. X, § 2.² In a more recent memorandum opinion the Santa Fe District Court held that the exception in article IV, § 27 applied to officers specified in article V, § 12 (the governor, secretary of state, state auditor, state treasurer, attorney general and commissioner of public lands). **State ex rel. Thompson v. Olmstead**, No.

45038, mem. op. (D. N.M. Jan. 11, 1973). According to Judge Santiago Campos, the history of article IV, § 27 demonstrates that the "except" language of that article was intended to make it inapplicable whenever the constitution expressly gave the legislature the unqualified authority over the compensation of particular officers. Id.

Olmstead contains a historical resume tracing the evolution of article IV, § 27 in the Proceedings of the Constitutional Convention of the Proposed State of New Mexico (1910) ("Proceedings Const. Convention"), particularly the addition thereto of the exception to the absolute prohibition against salary increases for public officials during their terms of office. Id. The report of the proceedings does not include an explicit analysis and explanation of why provisions were introduced and why they were changed. However, the report does provide a chronological history of the introduction, modification and adoption of the various constitutional provisions. It was from this chronology that Judge Campos deduced that officers designated in article V, § 12 were exempt from the prohibitions of article IV, § 27.

Judge Campos pointed out that, on October 22, 1910, the Committee on the Legislative Department introduced the initial version of article IV, § 27. In its original form, the article provided for no exceptions to its prohibition of mid-term changes in compensation but stated:

No law shall be enacted giving any extra compensation to any public officer, servant, agent or contractor, after services are rendered or contract made; nor shall the compensation of any officer be increased or diminished during his term of office.

Proceedings Const. Convention at 63.

On October 27, 1910, the Committee on the Executive Department introduced the initial version of article V, § 12. The original version of the article fixed the specified officers' salaries for a period of ten years and added the following proviso:

Provided, the compensation of said officers shall not be increased or decreased in any manner, directly or indirectly, for a period of ten years after the adoption of this constitution, nor at any time shall said salaries be increased or decreased during the term of office for which the said officer may be elected.

Proceedings Const. Convention at 102. On the afternoon of the same day, the Committee of the Whole drastically revised that article to permit the salaries of the enumerated officers to be increased or decreased after ten years, without restriction. As amended and referred to the Committee on Revision and Arrangement the provision read:

Provided, the compensation of said officers may be increased or decreased by law ten years after the adoption of this Constitution but at any time shall said salaries be increased or decreased during the term of office for which said officer may be elected.

Proceeding Const. Convention at 107.

On November 15, 1910, article V, § 12, as revised by the Committee on Revision and Arrangement, was adopted by the constitutional convention in its final form. The article fixed the salaries of the specified officials for ten years and permitted the legislature to increase or decrease salaries after that date. The language specifically permitting mid-term increases and decreases in salary was deleted. The final language is as follows:

The compensation of any of said officer may be increased or decreased by law after the expiration of ten years from the date of the admission of New Mexico as a state. Three days after final action on article V, § 12, the Constitutional Convention completed its work on article IV, § 27 by amending it to include the phrase, "except as otherwise provided in this constitution." Proceedings Const. Convention at 216. In considering the application of this exception, Judge Campos concluded that the intent was that the officers specified in article V, § 12 were the exception provided by article IV, § 27. Judge Campos did not, however, rule out the possibility of other exceptions to the article IV, § 27 prohibition. **Olmstead** at 11. As we will discuss below, similar constitutional language has been adopted to provide for the salaries of several other officers in other sections of the constitution. If such language brings the officers specified in article V, § 12 within the exception, similar language should have the same effect on such other officers, including the state corporation commissioners.

Shortly after the **Olmstead** decision, an opinion of this office stated that district attorneys were also exempt from the prohibitions of article IV, § 27 and concluded that it was permissible to increase the salaries of district attorneys during their terms of office. AG Op. No. 73-8 (1973). Under article VI, § 24 of the New Mexico Constitution, district attorneys shall "receive such salary as may be prescribed by law."³ Opinion No. 73-8 reasoned that when the constitution itself in article VI, § 24 says that the salary for a particular office shall be fixed by law, without any limiting phrase, such a provision must be construed as bringing the office within the "except as otherwise provided in this constitution" proviso of article IV, § 27. *Id.*

Relying on AG Op. No. 73-8, a later Attorney General's opinion stated that judges serving on constitutionally created courts are exempt from the provision prohibiting mid-term salary changes. AG Op. No. 79-27 (1979). At the time AG Op. No. 79-27 was issued, article VI, sections 11, 17, 23, 26, and 28 of the state constitution (as amended in 1949, 1953, 1965 and 1966) provided that the salaries of supreme court justices and judges of the district courts, court of appeals, magistrate courts and probate courts shall be fixed by law. However, the opinion concluded that the offices of municipal court judges, whose salaries are not provided for in the constitution, are subject to the prohibition against mid-term salary increases in article IV, § 27. *Id.*⁴

Attorney General Advisory Letter 84-9 (1984) held that lay magistrate salaries are exempt from the prohibitions of article IV, § 27. Article VI, § 26 of the constitution provides in pertinent part: "Magistrates shall receive compensation as provided by law, which compensation shall not be diminished during their term of office." The letter states

that the more specific provision of the constitution prohibits only decreases in magistrates' salaries during their terms of office; there is no prohibition against salary increases during magistrates' terms. *Id.* Although not mentioned in the Advisory Letter, it also is significant that article VI, § 26 specifically prohibits diminishing magistrates' salaries during their terms of office. If magistrates were subject to article IV, § 27, the prohibition of salary decreases would be redundant and a nullity. See, e.g., **Cromer v. J.W. Jones Constr. Co.**, 79 N.M. 179, 184, 441 P.2d 219, 224 (Ct. App. 1968) (stating that statute should be construed so that no part of it will be rendered superfluous.) It appears, therefore, that the legislature's authority to provide magistrates' salaries by law removes those officers from the application of article IV, § 27.

It follows that the state corporation commissioners should also fall within the exception. Article XI, § 5 provides that "[t]he salary of each commissioner shall be prescribed by the legislature." There is no meaningful distinction between the wording of the provision for state corporation commissioners' salaries in article XI, § 5 and the wording in article V, § 12 which **Olmstead** held to create an exception to article IV, § 27. Similarly, if other constitutional officers such as judges of constitutional courts and district attorneys are excepted from article IV, § 27, the same should hold true for the state corporation commissioners.⁵ In construing constitutional language similar to New Mexico's, the Ohio Supreme Court held that judges were exempt from that state's constitutional prohibition of mid-term salary changes. **Wallace v. City of Celina**, 29 Ohio St.2d 109, 279 N.E.2d 866 (1972) (constitutional provision that certain judges "shall receive such compensation as may be provided by law" exempted those judges from constitutional prohibition of mid-term salary changes). See also **Harbert v. Harrison County**, 129 W. Va. 54, 39 S.E.2d 177 (1946) (constitutional amendment permitting salary changes during terms of office applied only to specified officials; the amendment held to permit mid-term salary changes stated that salaries were to be set by the legislature). The Connecticut Supreme Court has stated that a similar provision in that state's constitution did not prevent mid-term salary changes. The constitutional provision was held to prohibit payments of extra compensation or gratuities, not the establishment in the regularly ordained manner of compensation for future services. Increases are only prohibited by other than legislation. **McGovern v. Mitchell**, 63 A. 433 (Conn. 1906).

An examination of the purposes and intent underlying the article IV, § 27 prohibition also supports the conclusion that the prohibition does not apply to the instant case. The evil that article IV, § 27 addresses is that officers should be protected from interference by way of retaliation, revenge or influence from members of the legislature through the increase or decrease of salaries. **Gilbert**, 29 N.M. at 218-19, 222 P. at 657 Another purpose is to prevent incumbents from using their influence to increase their salaries. *Id.* There is no evidence that in enacting the legislation providing for the 1991 salary increases the legislature was attempting to improperly influence the state corporation commissioners, or that the state corporation commissioners had improperly influenced the legislature to provide the increase. Thus, the evil that article IV, § 27 is to protect against was not implicated here. Indeed, a situation in which the legislature could reward a single commissioner starting a new term with a salary increase or punish one with a decrease, could result in the sort of abuses article IV, § 27 seeks to prevent. *Cf.*

AG Op. No. 91-03 (1991) (holding that, under the particular facts presented, a literal application of the restrictions on appointing former legislators to civil office contained in N.M. Const. art. IV, § 28 would not serve the purposes behind the constitutional provision).

Consistent with this approach, AG Op. No. 60-60 (1960) concluded that article IV, § 27 did not prohibit a probate judge appointed to replace a judge who had resigned from receiving a salary increase authorized by the legislature. The opinion distinguished **Gilbert**, noting that the concerns addressed by the supreme court in that case were not implicated. The opinion pointed out:

[T]he facts as here presented are not within the contemplation of the prohibited increase or decrease of salary. The appointee neither had control of nor was he under the control of the legislature at the time of the authorized increase. He neither knew nor was he aware of the fact that he would subsequently become the office holder. Therefore, the evils which are to be avoided were not present and it appears that the prohibition of the constitution should not be invoked.

However, the opinion concluded that if the increase was the result of a sham or subterfuge, the increase would be prohibited. See AG Op. No. 5995 (1954) (holding that the resignation and reappointment of a county superintendent to obtain a higher salary was a subterfuge and sham prohibited by article IV, § 27).

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GENERAL FOOTNOTES

[n1](#) See pages 9-10, *supra*.

[n2](#) As amended in 1973, 1980 and 1988, N.M. Const. art. X, § 7, now authorizes counties to create five-member county commissions, which automatically results in four-year staggered terms for all county officers. Many counties, however, have retained three-member county commissions and two-year terms for all county officers under N.M. Const. art. X, § 2 and NMSA 1978, § 4-38-2 (Repl. Pamp. 1984). We note that NMSA 1978, § 4-44-12.3 (Cum. Supp. 1991) provides that no salary increases for elected county officials "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." But see AG Op. 83-1 (1983) (relying on **Gilbert** for the proposition that county officers' salaries could not be increased mid-term). We also note that a determination that article IV, § 27 prohibits the salaries of the state corporation commissioners from being changed mid-term would result in the different commissioners, who each have the same official responsibilities, being paid different salaries. We believe such a result would be inequitable and might

implicate rights to equal protection under the law. See **MacDonald v. Bell**, 23 Ohio App.2d 249, 255, 262 N.E.2d 707, 711 (1970).

[n3](#) Although not specifically discussed in AG Op. No. 73-8, the provision for district attorneys' salaries was adopted by the constitutional convention on November 2, 1910. Proceedings Const. Convention at 139. As was the case with article V, § 12 officers, the salary provision was introduced after the original article IV, § 27 was proposed (without provision for exceptions) and before the final language providing for exceptions was agreed upon. Arguably, the convention may also have been referring to district attorneys' salaries when the article IV, § 27 exception was created.

[n4](#) See also AG Op. No. 87-5 (1987) (city council members are subject to article IV, § 27); AG Op. No. 87-5 (1987) (incumbent Santa Fe city council members could not share a salary increase with new city council members); AG Op. No. 81-17 (1981) (the governing body of a municipality may enact an ordinance to increase the salaries of its members, but members serving during the term in which such ordinance is enacted cannot benefit from the increase during the term).

[n5](#) The positions of the state corporation commissioners and judges of the constitutional courts are perhaps the most analogous. The wording of the salary provisions in the constitution for both types of offices are comparable. In addition, both offices are made up of members having the same general responsibilities as other members, and elections for both offices are held on a staggered basis.