Opinion No. 95-03

August 21, 1995

OPINION OF: Tom Udall, Attorney General

BY: Madonna N. Bixby, Assistant Attorney General

TO: The Honorable Stephanie Gonzales, Secretary of State, State Capitol Building, Room 420, Santa Fe, New Mexico 87503

QUESTIONS

Whether a Justice of the New Mexico Supreme Court, Judge of the Court of Appeals, District Court Judge or Metropolitan Court Judge (each a "judicial officer") holding office on January 1, 1995, but appointed to office after adoption of the amendment to Art. VI, § 33 of the New Mexico Constitution on November 8, 1994, must run in a partisan election in 1996?

CONCLUSIONS

No. Pursuant to Art. VI, § 33, as amended, each judicial officer who held office as of January 1, 1995, is deemed to have been elected to that office in a partisan election and is eligible for retention or rejection by the voters at the end of the term to which he or she was elected.

FACTS

During the general election held on November 8, 1994, New Mexico voters approved an amendment to Art. VI, § 33 of the state constitution. Subsection A of the amendment, which applies to the retention or rejection of judicial officers in general elections, included reenactment of previous language that required judicial officers to have been elected in a partisan election before being eligible for retention election and increased to fifty-seven percent the number of approval votes needed by a judicial officer to retain office. N.M. Const. art. VI, § 33(A). The amendment also included reenactment of Subsection E, which provides that any judicial officer holding office on January 1 following approval of the amendment shall be deemed to have met the requirements of Subsection A and shall be eligible for retention election.[1] **Id**. at § 33(E).

ANALYSIS

The New Mexico constitution establishes the elective offices of Supreme Court justices, N.M. Const. art. VI, § 4, Court of Appeals judges, **id**. at § 28, District Court judges, **id**. at § 12, and Metropolitan Court judges, **id**. at § 26, for specified terms. The requirements for election to a judicial office are set forth in art. VI, § 33, which states, in pertinent part:

A. Each justice of the supreme court, judge of the court of appeals, district judge or metropolitan court judge shall have been elected to that position in a partisan election prior to being eligible for a nonpartisan retention election. Thereafter, each such justice or judge shall be subject to retention or rejection on a nonpartisan ballot. Retention of the judicial office shall require at least fifty-seven percent of the vote cast on the question of retention or rejection.

. . .

E. Every justice of the supreme court, judge of the court of appeals, district judge or metropolitan court judge holding office on January 1 next following the date of the election at which this amendment is adopted shall be deemed to have fulfilled the requirements of Subsection A of this section and the justice or judge shall be eligible for retention or rejection by the electorate at the general election next preceding the end of the term of which the justice or judge was last elected prior to the adoption of this amendment.

N.M. Const. art. VI, § 33.

In construing a constitutional amendment, the true meaning and intent of the amendment as adopted by the people must be determined. **Flaska v. State**, 51 N.M. 13, 18, 177 P.2d 174 (1947). In determining the voters' intent, we presume the voters know the meaning of words they use in constitutional provisions and use them according to their plain, natural and usual signification and import. **Id**. at 22. If the language is plain and definite and free from ambiguity when taken in its ordinary sense, no construction is necessary, **id**. at 18, but the manifest intent of the voters will prevail over any incongruous literal application, **see State ex rel. Chavez v. Evans**, 79 N.M. 578, 585, 446 P.2d 445 (1968). We also must construe constitutional provisions as a whole, rather than in isolation. **In re Generic Investigation into Cable Television Services in State of N.M.**, 103 N.M. 345, 349, 707 P.2d 1155 (1985). Applying these rules, we believe art. VI, § 33 reflects the voters' intent that a judicial officer holding office on January 1, 1995: (i) is deemed elected under that provision regardless of appointment date or prior election; (ii) is to hold the office for the remainder of the original term; and (iii) is eligible for retention or rejection at the general election to be conducted just before the end of that term.

The constitution provides that a judicial officer must be elected in a partisan election to be eligible for a non-partisan retention election. N.M. Const. art. VI, § 33(A). That section further states that "every justice of the supreme court, judge of the court of appeals, district judge or metropolitan court judge holding office on January 1 [1995] ... shall be deemed to have fulfilled" that requirement.[2] **Id**. at § 33(E). "Every" means "each individual or part of a class or group whether definite or indefinite in number without exception." Webster's Third New World International Dictionary 788 (1986). The word "deemed" is synonymous with the words "considered," "determined" and "adjudged." **See King v. McElroy**, 37 N.M. 238, 243, 21 P.2d 80 (1933). Applying the "plain meaning" rule to that provision, each judicial officer holding office as of January 1, 1995,

without exception as to appointment date or prior election,[3] is considered to have been elected to office by partisan election. Having been elected in a partisan election, then, the judicial officer is eligible for retention election as set forth in Subsection A.

The rule of statutory construction that if a statute makes sense as written, a court will not read words into it which are not present, applies equally to constitutional provisions, **Cable Television Services**, 103 N.M. at 349, and supports our conclusion. By its express terms, Subsection E applies to every judicial officer holding office on January 1, 1995, without regard to appointment date. To interpret that provision as applying only to judicial officers elected or appointed before adoption of the amendment requires the addition of limiting words not found in the amendment. If the voters had intended to treat judicial officers appointed before adoption of the amendment differently from those appointed after, the amendment could have stated that the judicial officers holding office as of the date of adoption of the amendment, rather than January 1, were deemed to have been elected. Instead, the provision expressly reaches beyond the date of adoption to include every judicial officer holding office on January 1. Because the provision is definite and unambiguous with respect to its application to each such judicial officer, we may not read into it words which except from its application persons appointed to judicial offices after adoption of the amendment.[4]

We note that the New Mexico Supreme Court reviewed art. VI, § 33 in **State ex rel. Schoen v. Carruthers**, No. 19003 (filed Feb. 20, 1990). In that case, a potential candidate filed a Verified Petition for Alternative Writ of Mandamus after issuance of the 1990 Primary Election Proclamation by Governor Garrey Carruthers. The 1990 Primary Election was the first election to be held following adoption of the constitutional amendment providing for partisan elections of judicial officers. At issue was the office of Judge, Court of Appeals, that was held by an appointee at the time the proclamation was issued.[5] The proclamation did not include that judicial office for a partisan race in the 1990 Primary Election. Petition, p. 6-7. Alleging that the proclamation was unconstitutional, the petitioner sought an order requiring the governor to amend the proclamation to include the Court of Appeals judicial office. **Id**. at 9. The Supreme Court denied the petition, and the Court of Appeals judge ran for retention in the 1990 General Election without having first run in a partisan election for that office.[6]

Having concluded that a judicial officer holding office on January 1, 1995 is eligible for retention, rather than partisan, election, we must determine at which general election he or she may run for retention. According to Subsection E, a judicial officer will be eligible for retention or rejection by the voters "at the general election next preceding the end of the term of which the justice or judge was last elected prior to the adoption of this amendment." N.M. Const. art. VI, § 33(E). Thus, the general election in which the judicial officer is eligible for retention is dependent upon the end of the applicable period during which the judicial officer may hold the office. We believe it was the voters' intent that the judicial officers in office on January 1, 1995, hold those offices for the remainder of their unexpired terms.[7]

Article VI, § 33 must be read in harmony with other relevant constitutional provisions. **See Incorporated County of Los Alamos v. Johnson**, 108 N.M. 633, 634, 776 P.2d 1252 (1989). Those provisions set forth specific procedures for filling a judicial office, as well as applicable periods for holding the office. The constitution provides that, upon occurrence of a vacancy in a judicial office, the governor may appoint a judicial officer to serve until the next general election.[8] N.M. Const. art. VI, § 35. At the next general election, the voters elect a judicial officer to fill the vacancy for the remainder of the original term.[9] **Id**. Finally, upon expiration of that term, the voters elect a candidate to serve for the next full term of office.[10]

Article VI, § 33 may be construed consistently with those provisions. The judicial offices at issue were filled by persons appointed by the governor pursuant to § 35. As appointees, the constitution permitted them to serve only until the next general election. **Id**. Article VI, § 33, however, accomplished the next step of electing persons to fill the remainders of the unexpired terms of those offices by providing that judicial officers holding the offices on January 1, 1995, were deemed elected.[11] As a result, the offices to which the judicial officers were originally appointed became the offices to which they were last elected. Therefore, the constitutional limitation on the terms of persons elected to fill vacancies in judicial offices apply.

The applicable limitation is set forth in art. VI, § 35, which states that a person elected to fill a vacancy in a judicial office holds the office for the remainder of the original term. Similarly, Subsection E states that a judicial officer holding office on January 1, 1995, serves for the remainder of the term of office to which the judicial officer "was last elected"; that is, the appointive office to which the officer was deemed elected.[12] N.M. Const. art. VI, § 33(E). Accordingly, we conclude that a judicial officer is eligible for retention or rejection by the voters in the general election to be conducted just before the end of the original term of office held on January 1, 1995, by the judicial officer.[13]

ATTORNEY GENERAL

TOM UDALL, Attorney General

GENERAL FOOTNOTES

n1 Voters approved the previous amendments to Art. VI, § 33 during the general election held in November 1988. Prior to the 1988 amendments, judicial officers were subject only to retention elections.

n2 Subsection A also requires that a judicial officer obtain at least fifty-seven percent of the vote in order to retain the office. N.M. Const. art. VI, § 33(A). Thus, any judicial officer who held office on January 1, 1995, pursuant to a retention election is deemed to have obtained the percentage vote necessary to retain the office. Because that requirement applies only to retention elections, it is not relevant to your inquiry concerning appointees.

n3 The interpretation that art. VI, § 33 applies only to judicial officers elected before adoption of the amendment renders the language in Subsection E superfluous because, having been elected in partisan elections, they are already eligible for retention. The rule that we assume the legislature does not intend to enact useless statutes also applies to constitutional provisions. **See, e.g., Postal Finance Co. v. Sisneros**, 84 N.M. 724, 725, 507 P.2d 785 (1973) (citing **State v. City of Aztec**, 77 N.M. 524, 424, P.2d 801 (1967) (principles governing construction of statutes apply to interpretation of constitutions)).

n4 We also do not find such a limitation in the provision's reference to the term to which the judicial officer was last elected "prior to the adoption of this amendment." We believe the reference applies to the timing for retention elections and has no effect on the provision's applicability. Moreover, even if a literal reading of those words could exclude judicial officers appointed after adoption of the amendment, such a reading must give way to the voters' clear intent that every judicial officer holding office on January 1, 1995, is deemed elected to office. **See State ex rel. Chavez v. Evans**, 79 N.M. at 585.

n5 The office at issue was held by Judge Harris Hartz, who had been appointed one month before voters approved the constitutional amendment establishing the partisan election requirement. Petition, p. 4.

n6 While the Supreme Court's denial of the petition may not constitute authoritative interpretation of art. VI, § 33, **see**, **e.g.**, **United States v. Raynor**, 302 U.S. 540, 552, 58 S. Ct. 353, 358, 82 L. Ed. 413 (1938), thereby creating an assumption that the voters knew of the interpretation and intended to maintain it through reenactment of the provision, **see State ex rel. Udall v. Public Employees Retirement Board**, 118 N.M. 507, 882 P.2d 548 (Ct. App.), **cert. granted** 118 N.M. 695, 884 P.2d 1174 (1994), it appears that the Court denied the Petition under the earlier, identical version of art. VI, § 33 based on the interpretation that the appointee was deemed elected to fill that vacancy.

n7 In view of the efforts made to describe the timing of the elections in terms of term ending dates, it is clear that the voters did not intend for all such judicial officers to run for retention at the next general election. If the voters had so intended, the amendment simply could have stated that the judicial officers would be eligible for retention or rejection at the next general election following adoption of the amendment.

n8 The constitution creates an appellate judges nominating commission for the purpose of soliciting, accepting and evaluating applications for the position of Justice of the Supreme Court or Judge of the Court of Appeals. N.M. Const. art. VI, § 35. It also provides that the governor shall fill any vacancy or appoint a successor to fill an impending vacancy in those offices. **Id**. With certain exceptions not relevant here, the same provisions apply to District Court judges, **id**. at § 36, and Metropolitan Court judges, **id**. at § 37.

n9 That election must be a partisan election because the successful candidate must have been elected in a partisan election in order to be eligible for retention. N.M. Const. art. VI, § 33(A).

n10 Terms of office for judicial officers are set forth in art. VI, § 33. That section provides that each justice of the Supreme Court or judge of the Court of Appeals shall be subject to retention or rejection at the general election every eight years, District Court judges are subject to retention or rejection every six years, and Metropolitan Court judges are subject to retention or rejection every four years. N.M. Const. art. VI, § 33(B), (C) and (D).

n11 **See McElroy**, 37 N.M. at 244 ("where something is by statute 'deemed' to have been done, it is to be treated as having been done."). The specific language used in Article VI, § 33(E) is: "shall be deemed to have fulfilled the requirements of Subsection A of this section," i.e., as Subsection A of Article VI, § 33 provides, "have been elected to that position in a partisan election prior to being eligible for a nonpartisan retention election."

n12 While art. VI, § 33 refers to terms of office to which elected "before adoption of this amendment," we do not interpret those words to mean that a different term applies to persons appointed after adoption of the amendment. We believe the language was necessary to clarify that persons deemed elected were to hold office for the terms to which previously appointed and not for full terms beginning on January 1. Except for the terms of persons elected to fill vacancies, the terms of elected state, county or district officers begin on the first day of January following election to the office. N.M. Const. art. XX, § 3.

n13 To interpret art. VI, § 33 as imposing either of the other constitutionally imposed time limits on judicial offices is clearly contrary to the voters' intent that the judicial officers be deemed elected to fill vacancies. The limitation that an appointee serves until the next general election does not apply to the judicial officers, because they are no longer appointees. **See** N.M. Const., art. VI, § 35. Likewise, the provision that officers begin their terms on January 1 to serve for full terms does not apply, because the judicial officers were elected to fill vacancies for the remainder of the original terms, rather than for new terms. **See id**. at art. XX, § 3.