

August 9, 2007 Salary increase for appointee to office of sheriff

The Honorable Stuart Ingle
New Mexico State Senator
2106 West University Drive
Portales, NM 88130

Re: Opinion Request — Salary Increase for Appointee to Office of Sheriff

Dear Senator Ingle:

You requested our advice regarding whether Article IV, Section 27 of the New Mexico Constitution prohibits a county commission from compensating a person appointed to fill a vacancy in a county office at a higher rate than the previous incumbent. As discussed in more detail below, we conclude that the constitutional prohibition against midterm salary increases generally does not apply to a person who is appointed to fill a vacancy in a county office.

We understand that your question stems from a vacancy in the position of De Baca County sheriff that occurred in June 2007. The county commission is preparing to fill the vacancy for the remainder of the term, which ends December 31, 2010. The county commission would like to pay the person appointed to fill the vacant position at a rate higher than that received by the previous incumbent, although still within the statutory limits. See NMSA 1978, §§ 4-44-4 to -8 (2006) (setting maximum salaries of elected county officers, including sheriffs, that may be provided by boards of county commissioners).

Article IV, Section 27 provides, in pertinent part:

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.) The New Mexico Supreme Court has explained that Article IV, Section 27's prohibition against midterm salary increases

was designed to protect the individual officer against legislative oppression which must flow from party rancor, personal spleen, enmity, or grudge. These could well harass and cripple service; while, on the other hand, party feeling, blood, or business relations might be combined in such pernicious activity in the form of strong and powerful lobbying as to sway the members of the Legislature and cause the bestowal of an unmerited increase.

State ex rel. Gilbert v. Board of County Comm'rs, 29 N.M. 209, 214, 222 P. 654 (1924)
(holding that legislature's reduction at midterm of elected county officers' salaries

violated Article IV, Section 27). *See also State ex rel. Haragan v. Harris*, 1998-NMSC-043, 126 N.M. 310, 968 P.2d 1173 (applying *Gilbert* and holding that Art. IV, § 27 prohibited the legislature from making statutory increases in county officer salaries effective before the expiration of the officers' current terms).

We found no reported New Mexico case addressing the applicability of Article IV, Section 27 when a person is appointed to fill a vacancy in an elected county office. However, this office issued an opinion in 1960 that dealt with a question similar to yours that arose from the resignation of the probate judge for Bernalillo County and the subsequent appointment of a successor by the Bernalillo County Commission. See N.M. Att'y Gen. Op. No. 60-60 (1960) (copy enclosed). After the previous incumbent took office, but before he resigned, the legislature enacted a salary increase for probate judges. This raised the question whether the appointee might receive the increased salary, unless prohibited by Article IV, Section 27.

Opinion No. 60-60 noted a split between state courts on the interpretation of constitutional and statutory provisions similar to Article IV, Section 27, which prohibits the midterm salary changes in a public officer's salary during "his term of office." Some courts interpret the word "term" in this context as referring to the term constitutionally or statutorily prescribed for the office, while others interpret it as the period that an individual officer may hold the office. *Id.* *See also* T.C. Williams, *Constitutional or Statutory Inhibition of Change of Compensation of Public Officer as Applicable to One Appointed or Elected to Fill Vacancy*, 166 A.L.R. 842 (1947, as updated by Westlaw). Following the latter line of cases, this office concluded in Opinion No. 60-60 that the appointee was entitled to the salary increase enacted before his appointment, reasoning that the "evils" Article IV, Section 27 was designed to prevent were not present. Specifically, "[t]he 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." Opinion No. 60-60.1

The same reasoning applies to the appointment to fill the vacancy in the office of De Baca county sheriff.? The primary difference between the proposed increase for the sheriff appointee and that addressed in Opinion No. 60-60 is that, here, the salary increase will be approved by the county commission, within limits previously set by the legislature, while, in the earlier opinion, the legislature enacted the increase in the office of probate judge. We do not believe this difference is material, and conclude that Article IV, Section 27 does not preclude the De Baca county commission from approving a higher salary for the person appointed to fill the vacancy in the sheriff position than was paid to the previous incumbent. Of course, Article IV, Section 27 generally would prohibit the county commission from making any further changes in the appointee's salary for the remainder of his or her term. *See Haragan*, 1998-NMSC-043, ¶ 9, 126 N.M. at 313 (Art. IV, § 27 applied to prevent midterm salary increases set by counties under authority delegated by the legislature).2

If we may be of further assistance, please let us know. Your request to us was for a formal Attorney General's Opinion on the matters discussed above. Such an opinion

would be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Sincerely,

ELIZABETH A. GLENN
Assistant Attorney General

[1] In N.M. Att'y Gen. Op. No. 5995 (1954), this office concluded that N.M. Const. art. IV, § 27 prohibited a salary increase to a person who resigned from his position as county superintendent and was immediately reappointed to the same position to obtain a salary increase. As noted in Opinion No. 60-60, the conclusion reached in the earlier opinion was proper and distinguishable because the resignation and reappointment of the county superintendent addressed in the earlier opinion was "merely a subterfuge and sham" to avoid the constitutional prohibition against midterm salary changes.

[2] Cf. N.M. Att'y Gen. Op. No. 68-60 (1968) (concluding that N.M. Const. art. IV, § 27 did not preclude elected county officers from receiving a midterm salary increase where they had been receiving less than the statutory salaries to which they were entitled because of insufficient funds).