

Opinion No. 32-352

January 20, 1932

BY: E. K. Neumann, Attorney General

TO: Honorable Ralph E. Davy, State Labor Commissioner, Santa Fe, New Mexico.

{*127} Your letter of January the 14th, contains or raises three questions, which I quote, as follows:

(a) Would thank you kindly for an opinion as to whether or not there is any way of legally enforcing Article 20, Section 19 of the Constitution of New Mexico in the matter of hours of work for police department and fire departments employed by city administrations.

(b) Would the violation of this Article by a City administration be cause for their removal from office for violation of their oath of office?

(c) Could municipal officers be mandamusd and required to show cause for continued violation of this constitutional provision?

These matters are so related that they may be discussed together, for the conclusion in question (a) is controlling in each of the remaining questions.

The Constitutional provision to which you refer, Sec. 19 of Article 20, is as follows:

"Eight hours shall constitute a day's work in all cases of employment by and on behalf of the state or any county or municipality thereof."

The legislature of this state has passed no laws, in so far as we can ascertain, which touch upon this subject, so that we must look to such sections of our Constitution, as quoted, for all answers to the questions which you have asked.

We must therefore determine if such section is self-executing, or if it requires some legislative act to give it effect. General rules upon the subject are as follows:

"Although a constitution is usually a declaring of fundamental law, many of its provisions being only commands to the legislature to enact laws to carry out the purpose of the framers of the constitution, and mere restrictions upon the power of the legislature to pass laws, yet it is entirely within the power of those who confirm and adopt the constitution to make any of its provisions self-executing." -- Illinois Central R. Co. vs. Ihlenberg, 21 C. C. A. 546.

"A provision which is complete in itself and needs no legislative enactment to carry it into effect or provide special means for its enforcement is self-executing." -- Groves vs. Slaughter, 45 U.S. (Led) 429.

"A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be employed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given force by law." -- Cooley -- Constitutional Limitations 121.

"Self-executing provisions are chiefly characterized by language of the detailed character which is intended to be operative, and which would be used by a legislature were it enacting such a provision into law." -- Ill. Cent. Ry. Co. vs. Ihlenberg, 21 C. C. A. 546.

"It has been said that if a provision is sufficiently specific to operate upon the rights, remedies and persons therein referred to, without further provision or detail, it is self-executing." -- Id.

"On the other hand, if a provision lays down general principles, or is a general one directed to the legislature, or one which covers an entire subject in a few words, or which fixes only limits of action, or provides no rule for its enforcement, or vests a wide discretion as to the manner in which the mandate shall be carried into effect, it is not self-executing, {**128*} but belongs to that class of powers which are dormant and inoperative until vigor and vitality are imparted to them by specific action of the legislative department of the government." -- Davis vs. Burke, 45 U.S. (L. Ed.) 249.

"If a constitutional provision supplies the rule for enforcement and fixes the penalty for violation there can be no doubt as to its character. * * * Even though there may be no penalty attached for violation of constitutional provisions, it does not necessarily imply that the provision is not self-executing. The want of a penalty is a circumstance which should be given great weight." -- Ex parte Caim, 1 Okla. A. 7.

"The constitution except when special provision is made for that purpose does not execute itself. It defines certain powers, but to make them operative certain legislation is necessary." -- Lannigan vs. Gallup, 17 N.M. 627.

Tested by the above rules, is Sec. 19 of Article 20 of the New Mexico Constitution self-executing? Let us first note constitutional and statutory provisions of other states.

The Ohio Constitution, in Sec. 37 of Article 11 provides: "Except in cases of extraordinary emergencies, not to exceed eight hours shall constitute a day's work, and not to exceed forty-eight hours a week's work, for workmen engaged on any public work carried on or aided by the state, or any political sub-division thereof, whether done by contract or otherwise."

Sec. 17-1 of the 1929 Code of Ohio carries this provision into effect, excepting therefrom policemen and firemen, and

You will note the difference between this provision and the one in our Constitution. We would experience less difficulty in determining the present question under the Ohio Constitution than our own, but legislative action in Ohio put such provision into effect.

Sec. 2 of Article XIII of the Idaho Constitution is as follows: "No more than eight hours actual work shall constitute a lawful day's work on all state and municipal works. . . ", and Section 2324 of the 1919 Code carries same into effect.

Sec. 1 of Article XVIII of the Arizona Constitution, provides -- "Eight hours and no more shall constitute a lawful day's work in all employment by or on behalf of the state or any political sub-division of the state", and then provides that the Legislature shall enact appropriate legislation to put such provision into effect, which the Legislature did as evidenced by Sec. 1350 of the 1928 Code of Arizona.

The State of Oklahoma has a constitutional provision similar to ours relating to the same subject, in fact the wording is identical, Sec. 1 of Article XXIII.

"Eight hours shall constitute a day's work in all cases of employment by or on behalf of the state, or any county or municipality."

The only difference as you will note is that the word "thereof" is found in our Constitution and is left out of the Oklahoma provision.

Evidently the framers of the Oklahoma Constitution and the Legislature of the State did not consider that provision self-executing for on May 27, 1908, Senate Bill No. 79 was approved and became Article 4, Chapter 53 of the Laws of 1908 and is as follows:

"An act to put into effect Section 1 of Article 23 of the Constitution, providing what shall constitute a day's work in all cases of employment by and on behalf of the state or any county or municipality; prescribing penalties for the violation thereof, and establishing Labor Day and declaring an emergency.

"Sec. 1. Eight hours shall constitute a day's work in all cases of employment by and on behalf of the state, or any county or municipality.

"Sec. 2. Any person, firm, or corporation, or any agent, con-contractor or sub-contractor, who shall violate the provisions of this Act, or who shall aid, abet, assist, connive at, or permit any violation thereof is guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than fifty dollars nor more than one thousand dollars {*129} and by imprisonment of not less than thirty days nor more than six months or by both fine and imprisonment. Each day such violation continues shall constitute a separate offense.

"Sec. 3. Not less than the current market rate of wages in the locality where the work is performed shall be paid."

You will note in the various quotations from the various constitutions, excepting of course the one from Oklahoma, a marked difference in the wording as compared with the wording of the New Mexico Constitution. Ohio uses the words "not to exceed eight hours shall constitute a day's work", limiting the hours of a day's work, as does Idaho when she uses the words "No more than eight hours actual work shall constitute a lawful day's work, etc.", and Arizona by the use of the words, "Eight hours and no more shall constitute a lawful day's work, etc." From the wording of our constitutional provision it is impossible to determine whether it is intended to specify the maximum hours a state, county or municipal employee can work or only the minimum number of hours he must work, to receive a day's wages or perform a day's work. In this one particular, then, we must conclude that the provision quoted, in so far as your question is concerned, fails to be self-executing in that it fails to measure up to the rule which states, in substance: "To be self-executing a constitutional provision must supply a sufficient rule by means of which the right given may be employed and protected."

For instance, does the provision clearly answer the following in reference to the class of employment mentioned?

Are its provisions a limitation of hours the employees mentioned can work, or only a minimum number of hours such employees must work to constitute a day's work? Does it mean that by a contract an employee can work more than eight hours a day? Does it mean officials cannot allow an employee to work more than eight hours? Does it mean that all officers, elective or appointive and their employees are included or are the elective and appointive officers excepted? Does it refer to all classes of employment, skilled as well as unskilled? Who shall enforce it? How shall it be enforced? What shall be the penalty? Does it mean that anyone shall be penalized for permitting, causing or compelling an employee to work over eight hours per day? If so, who and in what manner? Does it mean that anyone shall be penalized for permitting or causing an employee to work less than eight hours a day? If so, who and in what manner? Is a right or privilege given to anyone? If so, to whom? Can an employee refuse to work more than eight hours a day? Can an employee agree to work more than eight hours a day?

In my opinion these questions are not answered by the language of the provision mentioned, and, applying the general rules heretofore set forth, said constitutional provision is not in my opinion, self-executing. Its language only:

1. Restricts the legislature in the passage of any act which requires more or less than eight hours work to constitute a day's work in cases of all employment by or on behalf of the state, any county or municipality thereof, but does not restrict the right of an officer or an individual, by contract to require and agree to do more.
2. It lays down a general principle.
3. Covers an entire subject in a few words.
4. Fixes only limits of action.

5. Vests a wide discretion as to the manner in which the mandate shall be carried into effect.

6. Requires a specific action of the legislature to validate and carry same into effect.

Said provision fails to meet the test of rules in that:

1. It is not complete in itself.

2. It fails to supply sufficient rules by means of which its provisions may be enforced.

3. It is not characterized by language of the detailed character which is intended to be operative and which would be used by a legislature to enact it into law.

{*130} 4. It is not specific to operate upon the persons, their rights and remedies, therein referred to, without further detail.

5. It fixes no penalty for violation thereof.

6. It provides no provision for the purpose of executing itself.

It is to be noted that in Oklahoma, which, as pointed out, has an identical constitutional provision as has this state, it was apparently the opinion of the Legislature that, to give such provision effect, it was necessary to pass legislation to that end, and such legislation became a law in that state.

The gist of the matter is, in my opinion, just this: Without a prohibition or a penalty for the violation of that prohibition, such provision is merely a declaration of what constitutes a day's work for employment by or on behalf of the state, county or municipality and it remains for the legislature to declare that it is unlawful to allow or compel employment by or on behalf of the state, etc., for more than eight hours per day.

My conclusion, therefore, is that Sec. 19 of Article 20 of the New Mexico Constitution is not self-executing, that it is incomplete in and of itself and requires legislation to give it effect.

Consequently, as such Section imposes no duty upon municipal officials, there can be no dereliction of duty for which an officer can be removed from office, nor is there such a ministerial duty imposed upon any officer, which, in case it is not performed, will sustain a mandamus action.

You are to be commended in your stand and I sincerely trust that you can, by argument, prevail upon the various officials of political sub-divisions of this state to arrange to put all employees upon an eight hour day basis, until such time as effective legislation can be gotten thru the legislature.