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OPINION
OF
HAL STRATTON
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Opinion No. 87-62

By: Andrea R. Buzzard
Assistant Attorney General

To: Honorable Mary L. Thompson
New Mexico State Representative
1915 La Jolla
Las Cruces, New Mexico 88005

QUESTION:

May members of the New Mexico Legislature legally receive retirement benefits pursuant to the legislative provisions of the Public Employees' Retirement Act?

CONCLUSION:

No.

ANALYSIS:

Article IV, section 10 of the New Mexico Constitution provides:

Each member of the legislature shall receive:

- A. as per diem expense the sum of not more than seventy-five dollars (\$75.00) for each day's attendance during each session, as provided by law, and twenty-five cents (\$.25) for each mile traveled in going to and returning from the seat of government by the usual traveled

route, once each session as defined by Article 4, Section 5 of this constitution;

B. per diem expense and mileage at the same rates as provided in Subsection A of this section for service at meetings required by legislative committees established by the legislature to meet in the interim between sessions; and

C. no other compensation, perquisite or allowance.¹

In Attorney General Opinion No. 59-68 (1959), this office concluded that New Mexico legislators were employees of the State of New Mexico within the meaning of the Public Employees' Retirement Act, now codified as Sections 10-11-1 to 10-11-138 NMSA (1987 Repl.). While authorizing legislators to participate in the Act, the opinion did not discuss the manner in which legislators' service and benefits may be credited and calculated under the terms of that Act. The opinion also did not discuss the constitutionality of legislators' participation in and receipt of benefits under the Public Employees' Retirement Act.

In 1963, the New Mexico Legislature enacted a voluntary retirement plan for the lieutenant governor, members of the

1 When the people of New Mexico adopted the New Mexico Constitution in 1911, this section provided: "Each member of the legislature shall receive as compensation for his services the sum of five dollars for each day's attendance during each session, and ten cents for each mile traveled in going to and returning from the seat of government by the usual traveled route, once each session, and he shall receive no other compensation, perquisite or allowance." In 1944, 1953, and 1971, the voters approved amendments to this section increasing legislators' compensation to \$10.00 per day, \$20.00 per day, and \$40.00 per day, respectively. In 1982, the amounts were raised to \$75.00 per day and also \$.25 per mile. The voters in 1971 also approved an amendment providing for payment of per diem and mileage to legislators for service at interim legislative committee meetings. Recently, the voters have defeated proposed amendments to this section that would have: permitted the legislature to establish by law the compensation for legislators (1961); permitted a monthly salary of \$200.00 (1965); provided an annual salary of \$3,600.00 (1969); created a legislative compensation commission (1974); provided a monthly salary of \$300.00 and excepted "legislative retirement" from subsection C (1978); and raised per diem to \$60.00 and mileage to \$.20 (1980).

legislature and persons formerly holding these offices. 1963 N.M. Laws, ch. 101. Chapter 101 gave legislators prior service credit for terms served before August 1, 1947, and permitted them to obtain contributing service credit for terms served after August 1, 1947, provided they paid 5% of compensation or per diem received after August 1, 1947, and before January 1, 1961, together with interest at the rate of 4% a year, and paid \$100.00 per year for each year of service after January 1, 1961. Further, for service after January 1, 1961, each legislator was required to pay or have paid on his behalf an equal amount of employer contributions. Employer contributions also were required for contributing service credit claimed between August 1, 1947, and January 1, 1961. Chapter 101 provided an annuity of \$40.00 per year multiplied by years of service credit, but the annuity could not exceed an amount equivalent to \$170.00 per month. Chapter 101 provided a deadline of January 1, 1964, for legislators to claim service credit and to make arrangements to pay the amounts required for contributing service credit.

In 1965, the legislature amended 1963 N.M. Laws, chapter 101 to provide that remaining amounts required to finance legislative retirement benefits would be paid by annual appropriations from the State's general fund. 1965 N.M. Laws, ch. 232. The 1965 law also altered the benefits provision. Those legislators serving before January 1, 1961, could receive a benefit of \$40.00 per year multiplied by years of service credit, and those serving after January 1, 1961, could receive a benefit of \$125.00 per year multiplied by years of service credit. The deadline for past and present legislators to claim credit and make arrangements to pay the required amounts was extended to January 1, 1966, and a provision was added that permitted retirement at age sixty with twelve years of service or at age sixty-five with five years of service.

Since 1965, the legislature regularly has amended the legislative retirement provisions of the Public Employees' Retirement Act. The deadline for past and present legislators to claim service credit and to make arrangements to pay required amounts was extended to January 1, 1972; to January 1, 1973; to five years after expiration of a legislator's term; and to twenty-five years after expiration of a legislator's term. 1971 N.M. Laws, ch. 289, §1; 1972 N.M. Laws, ch. 56, §1; 1977 N.M. Laws, ch. 171, §2; 1981 N.M. Laws, ch. 157, §1. The legislature enacted a specific provision providing for a continuing appropriation from the State's general fund to the legislative retirement fund of the Public Employees' Retirement Association to fund legislative retirement benefits. This appropriation was to be made at each regular session. 1973 N.M. Laws, ch. 328, §2.

In 1977, the legislature amended Section 10-11-9 NMSA 1978 of the Public Employees' Retirement Act ("PERA") to permit only legislators who were retired and receiving an annuity under the Educational Retirement Act, Sections 22-11-1 to 22-11-45 NMSA 1978, to draw a PERA benefit under the legislative retirement provisions of the Act. 1977 N.M. Laws, ch. 171, §1; see Attorney General Opinion No. 79-5 (1979). In 1979, the legislature enlarged the class of legislators entitled to the benefit of \$125.00 per year multiplied by years of service credit to include legislators serving on or after January 1, 1960 (instead of January 1, 1961). 1979 N.M. Laws, ch. 332, §1. In 1986, the legislature raised benefits from \$125.00 per year multiplied by years of service credit to \$250.00 per year multiplied by years of service credit, 1986 N.M. Laws, ch. 86, §1, and, in 1987, revised the retirement-age provision to substitute a sliding scale, permitting retirement at any age with fourteen years of service credit. 1987 N.M. Laws, ch. 253, §40.

While, at various times, the legislature has augmented legislative retirement benefits and reduced the age required to receive benefits, the amount that each legislator must contribute for each year of credited service after January 1, 1961 has remained at \$100.00.² As an example, a legislator who commenced serving at age 36, and continued to serve until age 50, could immediately receive an annual annuity of \$3,500.00. Assuming the retired legislator lived to age 70, those annuity payments, without any cost-of-living increase, would total \$70,000.00. The legislator would have contributed only \$1,400.00. The State of New Mexico finances the membership of legislators covered under the legislative retirement provisions of PERA. 1987 N.M. Laws, ch. 253, §43.

The people of New Mexico, through article IV, section 10 of the New Mexico Constitution, reserved to themselves the right to determine the amount that New Mexico pays its legislators. The object served by the people's reservation of power is "to relieve those in high public office from the necessity of passing upon a matter in which they have a direct pecuniary interest.... [S]elf-interest disqualifies one from acting in a public capacity where unbiased judgment is required." In Re Advisory Opinion, 227

2 1987 N.M. Laws, ch. 253, §42 eliminated the requirement that a legislator pay 5% of his per diem for service from August 1, 1947, to January 1, 1961, providing instead that a legislator contribute only "one hundred dollars (\$100) for each year of credited service earned after December 31, 1959."

N.C. 705, 707, 41 S.E.2d 749, 750 (1947) (holding that the legislature would lack authority to enact a law providing a subsistence and travel allowance to legislators in addition to the compensation that the constitution sets). In Hall v. Blan, 227 Ala. 64, 148 So. 601 (1933), the court held unconstitutional a statute providing to legislators an allowance of \$4.00 per day for expenses incurred while attending sessions, because the Constitution of Alabama fixed legislators' compensation on a per diem and mileage basis. This per diem compensation "was intended as a remuneration for the services of the members, as well as to provide for their expenses [during the legislature]". Id. at 68, 148 So. at 602. The court noted numerous authority from other jurisdictions construing similar constitutional provisions to withdraw from legislative power the matter of legislators' compensation, stating that "the criticism, as well as temptation, seems an obvious reason for dealing with the entire subject in the Constitution itself." Id. at 68, 148 So. at 603.

In New York Public Interest Research Group, Inc. v. Steingut, 40 N.Y.2d 250, 386 N.Y.S.2d 646, 353 N.E.2d 558 (1976), the court applied a constitutional provision that prohibited increases in legislators' compensation and emoluments during their terms of office. It held unconstitutional certain allowances to legislators that exceeded the prior year's appropriation or represented new allowances. The constitutional provision served: "(1) to avoid a conflict of interest by removing from legislators the authority to vote themselves financial benefits at the expense of the public treasury, and (2) to forestall the possibility of manipulation of legislators' votes by promises of reward or threats of punishment effectuated through changes in salaries or allowances." Id. at 258, 386 N.Y.S.2d at 650, 353 N.E.2d at 562.

New Mexico's Constitution withdraws from legislators any authority to provide for themselves "compensation, perquisite[s] or allowance[s]," apart from establishing a per diem rate within, but not exceeding, the maximum that article IV, section 10 authorizes. The legislature has provided the maximum authorized. Section 2-1-8 NMSA 1978. The authority to provide compensation for legislators rests solely with the people speaking through their constitution.

The purpose of this withdrawal and reservation of power in the people is to prevent the legislative members from acting on a matter and benefitting from an action in which they have a direct pecuniary interest. Article IV, section 28 of the New Mexico Constitution manifests further this purpose:

No member of the legislature shall, during the term for which he was elected, be appointed to any civil office in the state, nor shall he within one year thereafter be appointed to any civil office

created, or the emoluments of which were increased during such term; nor shall any member of the legislature during the term for which he was elected nor within one year thereafter, be interested directly or indirectly in any contract with the state or any municipality thereof, which was authorized by any law passed during such term.

The Supreme Court of New Mexico observed that the purpose of article IV, section 28 is to remove, as much as possible, any improper bias in a legislator's vote. State ex rel. Anaya v. McBride, 88 N.M. 244, 250, 539 P.2d 1006, 1012 (1975).

Legislatively created retirement benefits for legislative members is precisely the self-interested legislation that article IV, section 10 forbids lawmakers to enact. It is our opinion that, were the Supreme Court of New Mexico to consider the merits of the issue, it would conclude that legislative retirement benefits provided under PERA are unconstitutional. The legislature is prohibited from paying itself such benefits. Legislators may receive only the per diem and mileage that article IV, section 10 fixes.

Public retirement benefits are compensation, Copeland v. Copeland, 91 N.M. 409, 411, 575 P.2d 99, 101 (1978), most often characterized as deferred compensation, State ex rel. Sena v. Trujillo, 46 N.M. 361, 367, 129 P.2d 329, 332 (1942).⁴

3 The Supreme Court case of Eastham v. Public Employees' Retirement Association Board, 89 N.M. 399, 553 P.2d 679 (1976), squarely raised the issue of the constitutionality of legislative retirement benefits. The court never ruled on the merits, however, holding instead that the plaintiffs lacked standing as potential retirees, citizens, or taxpayers to litigate the issue, and that necessary and indispensable parties had not been joined in the action.

4 See also Lynch v. Lynch, 665 S.W.2d 20, 24 (Mo. App. 1983); Masse v. Public Employees' Retirement System, 87 N.J. 252, 259, 432 A.2d 1339, 1343 (1981); Lecci v. Nickerson, 313 N.Y.S.2d 474, 477 (Sup.Ct. 1970); State ex rel. Albright v. City of Spokane, 64 Wash. 2d 767, 770, 394 P.2d 231, 233 (1964); State ex rel. Bolen v. City of Seattle, 61 Wash. 2d 196, 198, 377 P.2d 454, 455 (1963); 3 McQuillin, Municipal Corporations §12.142, at 546 (3d ed. 1982).

Authority, reason, and the undisputed fact of pecuniary gain resulting from retirement benefits compel the conclusion that legislative retirements benefits are "other compensation" that subsection C of article IV, section 10 prohibits. By enacting and amending retirement laws that monetarily benefit its members, the legislature subverts the will of the people expressed through their constitution that its legislators act in an unbiased fashion, free of self-interest and of temptation to vote themselves financial benefits.

Certain courts have upheld legislative retirement benefits. They generally do so, however, pursuant to constitutional provisions that allow legislative "compensation" to be "fixed by law." In Chamber of Commerce v. Leone, 141 N.J. Super. 114, 357 A.2d 311 (Super. Ct.), aff'd, 75 N.J. 319, 382 A.2d 381 (1978), the court considered the constitutionality of legislative retirement benefits under a constitutional provision permitting legislators to receive "annually" and "during the term for which elected" such compensation as is fixed by law. The plaintiffs contended that retirement benefits were not received "annually," but rather were paid in installments; that such pension payments were not paid during the legislators' elected terms; and that a retroactive purchase of prior service credit violated another constitutional provision that prohibited any compensation increase for legislators from taking effect until after the next general election. The court concluded that legislative retirement was permissible compensation; that the "right" to the pension was received during continuance in office; and that the method for computing pensions was sufficiently "fixed." It held unconstitutional and severed, however, those provisions of the legislative retirement law that permitted purchase of prior service credit. A pension was compensation and, therefore, was governed by the waiting period; purchase of prior service credit amounted to a retroactive increase in compensation. The court viewed retirement benefits as compensation in addition to salary, "which compensation consists of the right to a pension to be computed and ultimately paid according to the statutory formula." Id. at 142, 357 A.2d at 326.

In Boryszewski v. Brydges, 37 N.Y.2d 361, 372 N.Y.S.2d 623, 334 N.E. 2d 579 (1975), the court upheld a law providing for legislative retirement benefits. The state constitution permitted legislators to receive an annual salary "to be fixed by law."⁵ The court stated:

5 Boryszewski is significant in holding that a taxpayer has standing to challenge the constitutional validity of legislative retirement benefits. The court observed that failure to accord standing:

[I]n our view retirement benefits constitute as real and substantial a form of compensation as does a pay check. The only significant difference lies in the time of payment. We find nothing in the constitutional provisions on which petitioners rely which forbids deferred payment of compensation currently earned. In a literal sense the right to payment in the future is "received during continuance in office". Retirement benefits are a component of present compensation.

Id. at 367-68, 372 N.Y.S.2d at 629, 334 N.E.2d at 583.

In Campbell v. Kelly, 157 W. Va. 453, 202 S.E.2d 369 (1974), a citizen and taxpayer brought a mandamus proceeding to require cessation of benefit payments to retired legislators and to compel recovery of benefits paid. The court recognized the plaintiff's standing, and ruled that the legislative pension law was constitutionally valid except certain provisions that gave legislators greater benefits for service after 1971 than other state employees.⁶ The legislative pension system was first established

would be in effect to erect an impenetrable barrier to any judicial scrutiny of legislative action.... [I]t must be considered unlikely that the officials of State government who would otherwise be the only ones having standing to seek review would vigorously attack legislation under which each is or may be a personal beneficiary.

Id. at 364, 372 N.Y.S.2d at 626, 334 N.E.2d at 581.

- 6 In 1970, the West Virginia electorate approved a constitutional amendment creating a legislative compensation commission to recommend to the legislature the maximum amount of compensation to be paid to legislators. This commission recommended that legislators be permitted to participate in the public employees' retirement system "on the same basis as any other officer or employee of the State." The court acknowledged that the commission's power to control legislators' compensation included authorization to make pension recommendations. The court concluded, however, that to the extent that the legislative retirement law accorded benefits to legislators based upon service during or after 1971 which were more favorable than benefits accorded to other members of the system, the law was invalid as in excess of the authority conferred upon the legislature by the commission's recommendation. The court severed those provisions.

in West Virginia in 1961. The constitutional provision addressing legislators' compensation in effect at that time, which had remained unchanged since adoption of the constitution in 1872, prohibited paying legislators any "allowance or emolument" other than salary and expenses specified in the constitution. Noting that, in the late nineteenth century when the constitution was adopted, there were no state pension plans in the country and private pension plans were rare, the court held that "pensions were not contemplated at the time of the original ratification of the Constitution of the State of West Virginia and, therefore, the Legislature had the same right to establish pensions for themselves that they had to establish pensions for other persons in the employ of the State." Id. at 466, 202 S.E.2d at 377.

In Knight v. Board of Administration of State Employees' Retirement System, 32 Cal.2d 400, 196 P.2d 547 (1948), the court considered the validity of legislative retirement benefits under two constitutional provisions. One provided that legislators would receive \$100.00 per month during the terms for which they were elected, plus mileage, and "no compensation other than that fixed by the constitution," apart from an expense allowance while attending session. The second stated that: "The Legislature shall have the power to provide for the payment of retirement salaries to employees of the State who shall qualify therefor by service in the work of the State as provided by law." The court held that the second provision authorized a retirement system for legislators, who were, in the court's interpretation, "employees" for purposes of that authorization. "While the latter provision does not by itself name a certain compensation it authorizes the Legislature to adopt a pension system which has often been called deferred compensation. That is tantamount to the Constitution fixing it...." Id. at 405, 196 P.2d at 550. There is no such provision in the New Mexico Constitution.

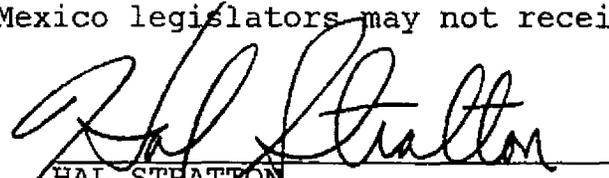
In summary, Leone and Brydges hold that legislative retirement is constitutional, because it is "compensation" authorized by those states' constitutions to be paid to them. That such retirement is "compensation" is the precise reason that New Mexico's constitution forbids it to New Mexico's legislators. Subsection C of article IV, section 10 expressly prohibits the payment to legislators of any compensation, other than \$75.00 per day and mileage at \$.25 per mile when attending sessions or interim legislative committee meetings. Campbell relied on the static condition of West Virginia's constitution to conclude that the original framers of the constitution did not contemplate and,

therefore, did not prohibit legislators' pensions with the phrase "no other allowance or emolument." In contrast, New Mexico's article IV, section 10 has been amended several times since adoption, yet always retaining the prohibition against payment to legislators of any compensation other than per diem and mileage. The Campbell court acknowledged that when the voters amended West Virginia's constitution in 1970, they clearly understood that "compensation" included pensions; New Mexico voters rejected in 1978 a proposed amendment to article IV, section 10 that would have permitted legislative retirement and provided a monthly salary to legislators. Knight should be distinguished because, in contrast to California's constitution, New Mexico's constitution contains no provision that allows legislators to augment the compensation "fixed" by article IV, section 10 to include retirement benefits allowed elsewhere in the constitution. Further, subsection C of article IV, section 10 fixes legislators' compensation at only the per diem and mileage rates authorized by subsections A and B of article IV, section 10 and permits none other.

In State ex rel. Spire v. Public Employees Retirement Board, 226 Neb. 176, ___ N.W.2d ___ (1987), the Nebraska Supreme Court, in its opinion filed August 7, 1987, ruled that a Nebraska statute providing retirement benefits to members of the Nebraska Legislature was unconstitutional and, therefore, invalid and unenforceable. The Nebraska Constitution prohibited paying legislators any "pay" or "perquisite" other than the salary and expenses specified therein. This prohibition meant that "Nebraska legislators shall receive no wages, remuneration, compensation, fees, profit, or gain incidental to their office other than the salary mandated in the [constitution]." Id. at 180, ___ N.W.2d at ___. The court stated: "We are unable to conceive how a retirement benefit awarded a former legislator for 'creditable service' can be said not to be within one of the many meanings of either 'pay' or 'perquisites.'" Id. at 181, ___ N.W.2d at ___. The Nebraska Supreme Court rejected the Campbell court's rationale in upholding, in part, West Virginia's legislative retirement law: "[T]he Campbell court overlooks that, irrespective of whether the 1872 framers of the West Virginia Constitution contemplated pensions, they clearly stated that legislators were to receive nothing other than the sums specified in the Constitution. The Campbell court simply ignored that direction." Id. at 183, ___ N.W.2d at ___.

The Attorney General's office, like the courts, should presume that the legislators, as the people's representatives, have acted in a constitutional manner, see, e.g., State v. Ball, 104 N.M. 176, 182, 718 P.2d 686, 692 (1986); Wells v. County of Valencia, 98 N.M. 3, 6, 644 P.2d 517, 520 (1982), and as the state's attorney, we are reluctant to opine that any state statute is unconstitutional. And although we will opine that a state

statute is unconstitutional only in the most extreme circumstances, it is our duty to provide all state officials, especially the legislature, with the best-reasoned legal advice and opinion that we can. This Office is more familiar than most with the sacrifices and economic penalties of being a state legislator in New Mexico. The question of legislator compensation in this state is not, however, governed by decisions of the attorney general, or of the courts or of the legislature itself. It is governed by the people through their constitution. For the reasons stated herein, we conclude that the legislative retirement provisions of the Public Employees' Retirement Act are unconstitutional, invalid and unenforceable, and that New Mexico legislators may not receive legislative retirement benefits.


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