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September 6, 1989

OPINION
OF
HAL STRATTON
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Opinion No. 89-28

TO: The Honorable Rebecca Vigil-Giron
Secretary of State
State Capitol Bldg., 4th Floor
Santa Fe, New Mexico 87503

BY: Carol A. Baca
Assistant Attorney General

QUESTIONS:

If a county increases its Board of County Commissioners to five members pursuant to N.M. Const. art. X, §§ 7(C) and (D):

(1) May a county officer elected to a two-year term in 1988 seek re-election for a four-year term in 1990 and a four-year term in 1994?

(2) May a county officer who was elected to a two-year term in 1986 and a second two-year term in 1988 run for the same or a different county office in 1990?

CONCLUSION:

(1) Yes.

(2) Yes.

ANALYSIS:

New Mexico voters amended N.M. Const. art. 10, § 7 in the 1988 general election to add subsections C and D.¹ Art. 10, § 7(C) permits any county that does not meet the population and assessed valuation requirements of art. 10, §§ 7(A) and (B) to increase the size of its board of county commission from three to five members. Article X, § 7(D) provides:

In every county that has a five-member board of county commissioners, all elected county officials shall serve four-year staggered terms. To provide for staggered terms, the secretary of state shall determine by lot, in two groups of approximately equal numbers, the county officials who shall be elected to a two-year term and those who shall be elected to a four-year term in the 1990 general election or in the first general election following adoption of five-member board of county commissioners, provided the terms of the county assessor and county treasurer shall not expire in the same year and the terms of no more than three county commissioners shall expire in the same year. All county officers, after having served two consecutive four-year terms, shall be ineligible to hold any county office for two years thereafter.

The 1988 amendments to art. 10, § 7 do not expressly amend N.M. Const. art. X, § 2, which continues to provide: "All county officers shall be elected for a term of two years, and after having served two consecutive terms, shall be ineligible to hold any county office for two years thereafter." Article X, § 2 has been in the constitution in its current form since November 3, 1914.

We believe that the New Mexico Supreme Court's decision in Morris v. Gonzales, 91 N.M. 495, 576 P.2d 755 (1978), answers your

1 N.M. Const. art. X, § 7 was originally adopted on November 6, 1973 to require counties having a population greater than 100,000 and an assessed valuation greater than \$75,000,000 to be divided into five county commission districts. Article X, § 7 was amended in 1988 by renumbering the previously adopted provisions as subsection A and adding a new subsection B allowing those counties having a population between 65,000 and 100,000 and an assessed valuation between \$200,000,000 and \$450,000,000 to create a five-member board of county commissioners.

questions. In Morris the court examined art. X, § 7 as it originally was adopted on November 6, 1973. Prior to the adoption of art. X, § 7, Section 15-37-2(A) NMSA 1953 and art. X, § 2 required all counties to have a three member board of county commissioners and limited commissioners' terms of office to two consecutive two-year terms. As adopted in 1973, art. X, § 7 provided that the county commission shall have five members elected by district in counties with populations greater than one hundred thousand and an assessed valuation greater than seventy-five million dollars. It further provided:

County commissioners serving on five-member boards of county commissioners shall serve terms of four years, and after having served two consecutive terms, shall be ineligible to hold any county office for four years thereafter.

Provided, that in the first general election immediately following the adoption of this amendment, two county commissioners shall each be elected for a term of two years; two county commissioners shall each be elected for a term of four years; and one county commissioner shall be elected for a term of six years; thereafter, each county commissioner shall be elected for a term of four years.

Morris, a Bernalillo County Commissioner, was elected to and served a two-year term (1972-74) under art. X, § 2. In 1974 he was re-elected to the office, this time for a four-year term pursuant to art. X, § 7. In 1978 the Bernalillo County Clerk filed a declaratory judgment action to determine whether Morris could declare his candidacy for a second four-year term.

The Attorney General's Office represented the county clerk's office and maintained that Morris could not run for a third term. The Attorney General opined that, although the 1973 constitutional amendment changed the length of the terms for certain county commission offices, the limitation of "two consecutive terms" remained unchanged. A.G. Op. No. 78-1 (1978). Therefore, affected county commissioners were limited to two consecutive terms of office, regardless of the terms' lengths. The Attorney General also argued in Morris that the court should apply the rule of statutory construction discussed in In re Thaxton, 78 N.M. 668, 671, 437 P.2d 129, 131-32 (1968). That rule treats the repeal of a statute, accompanied by its re-enactment in substantially the same language, as merely a continuation of the original statute.

The New Mexico Supreme Court rejected the Attorney General's suggested rule of construction, saying that the rule does not

apply when an amendment or repeal is made by a constitutional amendment or an addition "of the character and substance of the new article 10, § 7, since the change is clearly expressed by the will of the sovereign people themselves in adopting the new amendment." 91 N.M. at 497, 576 P.2d at 757. The court held that Morris was eligible to run for a third consecutive term:

N.M. Const. art. 10, § 7 replaces N.M. Const. art. 10, § 2 with respect to the office of county commissioners in Bernalillo County....

When N.M. Const. art. 10, § 7 was added by constitutional amendment, the old § 2 of article 10 ceased to apply to counties having a population greater than one hundred thousand and an assessed valuation greater than seventy-five million dollars. N.M. Const. art. 10, § 7 is considerably different than N.M. Const. art. 10, § 2. Under article 10, § 7, the original office of county commissioner for two-year terms in Bernalillo County was in effect abolished and a new office of county commissioners to be elected for a period of two four-year terms was created. This is sufficiently clear, notwithstanding the new constitutional provision does not expressly say that the old office was abolished and a new one created.

91 N.M. at 496, 576 P.2d at 756.

Following the holding in Morris, we conclude in answer to your first question that, if a county commission timely² adopts an

2 Unlike the 1973 constitutional amendment, the 1988 amendments to art. X, § 7 grant county commissions the power to create the districts for the new five-member boards. See State ex rel. Robinson v. King, 86 N.M. 231, 522 P.2d 83 (1974). Article X, § 7(C) specifies that the districts must be "compact, contiguous and as nearly equal in population as possible." There is no constitutional or statutory provision that specifically sets a deadline for re-districting, but the proclamation for the 1990 primary election must contain the "offices" that will be on the ballot and must be filed with the Secretary of State by January 29, 1990. NMSA 1978, §§ 1-8-12 and 1-8-13 (Repl. Pamp. 1985). The Robinson case held that when the primary proclamation lists the "office" of county commissioner it must describe the boundaries of the

ordinance to increase its size to five members under Article X, §§ 7(C) and (D), those county commissioners who were elected to a two-year term in 1988 may run for re-election in 1990 and 1994. The same conclusion holds true for the remainder of the elected officials in the county because, once a county converts to a five member board of county commissioners, all elected county offices are automatically converted from two-year to four-year offices. Morris held that a change from a two-year to a four-year office abolished the old office and prevented application of the limit to two consecutive two-year terms in article X, § 2.

Your second question causes us more difficulty. If it were a question that had not been addressed by the courts, we would be inclined to follow the reasoning in AG Op. No. 78-1 and conclude that county officials who were elected to a two-year term in 1986 and a second two-year term in 1988 could not run for a third term in 1990. Given the 1988 constitutional amendment's silence on the question of abolition of the two-year offices, we would be reluctant to infer that the voters intended that county officials could hold office for up to twelve or fourteen consecutive years. Moreover, we believe the a mere change in the length of terms does not result in such a "fundamental alteration" in the offices that one is forced to conclude that the old offices were abolished and new ones created. See, e.g., In re Thaxton, 78 N.M. at 671, 437 P.2d at 131-32.

Notwithstanding our reservations, however, we are compelled to follow the precedents of the New Mexico Supreme Court. In Morris the supreme court held that a similar constitutional amendment converting offices from two-year to four-year terms abolished the two-year offices and created new ones. At the same time, the old term limitation in article 10, § 2 ceased to apply to the new offices and the new limit to two consecutive four-year terms began to apply.

districts that make up the office as well as the terms that apply to each district office. 86 N.M. at 233, 522 P.2d at 85. As a practical matter, therefore, re-districting must be accomplished in a timeframe that will allow sufficient time for the Secretary of State to determine the terms of the county officials by lot under art. 10, § 7(C) and for the drawing up of the primary proclamation. The Secretary may wish to consider promulgating a regulation setting a suitable deadline by which she must be informed of the adoption of an ordinance to create a five-member board of county commissioners and the new district boundaries for those officials.

We have been urged to distinguish Morris on the ground that the amendment reviewed in Morris took effect immediately upon its adoption by the voters, and the 1988 amendments do not take effect until the new officeholders begin their terms in 1991. We do not believe we can rely upon this distinction for two reasons. First, we see no significant differences in the timing of the effective dates of the two amendments. The 1973 amendment did not abolish the two-year offices immediately because incumbent county commissioners were authorized to serve the remainder of their two-year terms and the holders of the "new" county commission offices did not begin to serve until 1975. Moreover, although the 1973 amendment stated that the board of the subject counties "shall" consist of five members, the New Mexico Supreme Court held that the amendment was not self-executing and the definition of the new offices was not completed until the legislature determined the new district boundaries in 1974. See State ex rel. Robinson v. King, 86 N.M. 231, 522 P.2d 83 (1974). The effect of the 1988 amendment is, therefore, no different from the 1973 amendment, except that, instead of requiring legislative action, the incumbent board of county commissioners "creates" the five member board upon adoption of an ordinance and the setting of boundaries for the new districts.³

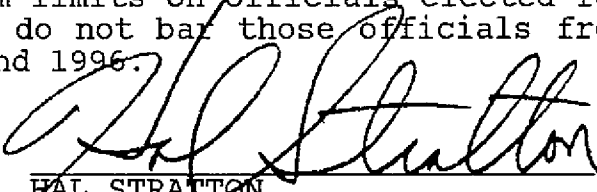
Second, in this context it would be anomalous to attach any significance to the fact that, in one sense, the new offices authorized by the 1988 amendments do not come into existence until 1991. If one were to conclude that the old limit in article X, § 2 continues to apply until January 1, 1991 to county officials who were re-elected in 1988 to a second consecutive two-year term, then those officers could not run in 1990 for the new offices that begin in 1991. On the other hand, it is clear under Morris that the limits in article X, § 2 do not apply to the new offices. We decline to find that, in effect, those incumbents re-elected to a second consecutive two-year term in 1988 are theoretically eligible to hold the county offices beginning in 1991 but could not run for those offices in 1990. Therefore, we conclude that county officers who were elected to a two-year term in 1986 and a second two-year term in 1988 may run for county office in 1990.

3 Article X, § 7(C) provides: "[T]he board ... may adopt an ordinance to increase the size of the board of county commissioners to five members. Upon creation of a five-member board, the county shall be divided by the incumbent board ... into five county commission districts" (emphasis added). See also footnote 2, above.

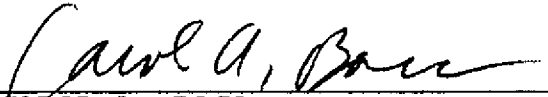
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Finally, we also note that, due to the requirements in the 1988 amendments that four-year staggered terms be achieved, "approximately" half of the county offices on the ballot in 1990 will be for an initial term of two years, to be followed thereafter by four-year terms. Article X, § 7(D) only limits officeholders from holding more than two consecutive four-year terms. Therefore, the new durational term limits on officials elected for an initial two-year term in 1990 do not bar those officials from running for re-election in 1992 and 1996.



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