Opinion No. 58-10

January 20, 1958

BY: OPINION OF FRED M. STANDLEY, Attorney General Alfred P. Whittaker, Assistant Attorney General

TO: Honorable Horace DeVargas, State Senator, Rio Arriba County, Espanola, New Mexico

QUESTION

QUESTIONS

1. Will the provisions of Laws 1957, Chapter 179, prescribing qualifications for the State Investment Officer and State Investment Council, be constitutional?

2. Since the proposed Constitutional Amendment does not itself prescribe the terms or the manner of appointment of the State Investment Officer and the members of the State Investment Council, what power does the Legislature have to provide for these appointments by statute?

3. Would the Legislature have the power to place appointment in someone other than the Governor and restrict the Governor's removal power?

4. In the event of the adoption of the Amendment, would the Legislature in the future retain the power to restrict or prescribe, as distinguished from provide for, the type of investments?

5. Are the attempted restrictions on the types of investments set up in Laws 1957, Chapter 179, to become effective as the Amendment is adopted, constitutional?

CONCLUSIONS

1. There is serious question.

2. See opinion.

3. Yes; but see Analysis.

4. Yes; see opinion.

5. Yes.

OPINION

ANALYSIS

All of the questions asked relate to the effect of the provisions of Senate Joint Resolution No. 12, proposing a Constitutional Amendment with respect to the investment of permanent funds of the State of New Mexico, and the companion statute, Chapter 179, Laws of 1957.

The answer to your first inquiry involves the determination of whether the above provisions create new public offices within the meaning of constitutional provisions, in providing for a State Investment Council and a State Investment Officer.

As you know, Article VII, § 2 of the Constitution of New Mexico provides, in relevant part, as follows:

"Every citizen of the United States who is a legal resident of the state and is a qualified elector therein, shall be qualified to hold **any public office in the state** except as other wise provided in this Constitution. (Emphasis added)."

The Supreme Court of New Mexico, in Board of Commissioners of Guadalupe County v. The District Court, Fourth Judicial District, 29 N.M. 244 (1924), held that the provision quoted relates to the definition of those who are eligible to hold public office; and in Gibbany v. Ford, 29 N.M. 621 (1924), flatly held that the Legislature has no power to impose additional restrictions upon eligibility for public office, since the constitutional provision gives the right to hold public office to persons meeting the qualifications stated. Thus the need to determine whether or not the proposed Constitutional Amendment and accompanying legislation create public offices.

The question of the definition of a "public office" has been before the New Mexico Supreme Court for determination in several cases: State v. Quinn, 35 N.M. 62 (1930); State ex rel. Gibson v. Fernandez, 40 N.M. 288 (1936); and Pollack v. Montoya, 55 N.M. 390 (1951). In these cases, the Court determined the question before it by reference to the tests adopted by the Montana Court, as stated, for example, in State ex rel. Nagle v. Page, 98 Mont. 14, 37 P. 2d 575, 576, from which our Court, at 55 N.M. 394, quoted the following tests:

"(1) It must be created by the Constitution or by the Legislature or created by a municipality or other body through authority conferred by the Legislature; (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers conferred, and the duties to be discharged, must be defined, directly or impliedly, by the Legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power, other than the law, unless they be those of an inferior or subordinate office, created or authorized by the Legislature, and by it placed under the general control of a superior officer or body; (5) it must have some permanency and continuity, and not be only temporary or occasional. In addition, in this state, an officer

must take and file an official oath, hold a commission or other written authority, and give an official bond, if the latter be required by proper authority."

If we consider the constitutional and statutory provisions for a "State Investment Council" against these tests, we find the following. The proposed Constitutional Amendment is a proposal to amend Article XII, § 7 of the Constitution for the purpose stated in the title of "permitting greater diversity in the prudent investment of the state permanent funds." At present, investment of these permanent funds is restricted to bonds of the State or specified political subdivisions thereof (or other "interest-bearing securities" if the Legislature approves such investments by a three-fourths vote of the membership of each house). The function of handling the investment and reinvestment of permanent state funds has been and now is in the hands of the State Treasurer. The proposed Constitutional Amendment provides that investment of the state permanent funds will be done by "the state investment officer" under the supervision of the State Investment Council. The Amendment itself, provides certain explicit restrictions upon the type of investment which may be made. It further provides that the Legislature may provide for the investment of the state's permanent funds in "interest bearing or other securities." The Amendment further provides that investment is to be in accordance with "policy regulations promulgated by a state investment council." It is clear that the Constitutional Amendment contemplates that the State Investment Council will establish "policy regulations" which will govern the investment of permanent state funds within the limits prescribed by the Constitution as amended. In this respect, the Investment Council should almost surely be considered as exercising some portion of the sovereign power of the State, and so membership in the State Investment Council would clearly meet the test which our Court has described as the decisive test requiring the conclusion that the position created constitutes a public office.

We note, however, that the Constitutional Amendment does not explicitly provide for the term of the position created, the method of appointment or the specific duties of the position. These matters are left to the Legislature, acting within its powers subject to constitutional restrictions. See Torres v. Grant, No. 6267, July 12, 1957, and see 67 C.J.S., Officers, § 111, page 397.

Consideration of the Constitutional Amendment strongly indicates the intention that the State Investment Council will act as public officers, since they will clearly exercise delegated sovereign power. Consideration of the accompanying legislation, however, casts serious doubt upon such status of the Investment Council in several respects. Chapter 179, Laws of 1957, in § 2, creates a "state investment council" but creates it **"in the finance department.** (Emphasis added)." In § 3, the Act provides for appointment of the public members of the Council by the Governor and fixes the term of office. The qualifications prescribed by Chapter 179, § 3, that "The public members of the council shall be qualified by competence and experience in the field of investment or finance", violate the provisions of Article VII, § 2 of the New Mexico Constitution, prescribing the conditions of eligibility to public office. Gibbany v. Ford, supra. Furthermore, Chapter 179, having created the State Investment Council, fails directly to prescribe the duties of the Council, except that § 7, in the last paragraph thereof, requires the Council to meet

at least once monthly and "to consult with the state investment officer concerning the work of the investment division." Section 7, in providing the duties of the Investment Officer, does make his exercise of authority subject to the limitations contained "in policy making regulations or resolutions promulgated by the council **with the approval of the finance officer."**

The same provision does require "prior authorization by the council" for any action taken by the Investment Officer with respect to investments. The sphere of activity of the Investment Council apparently is further limited by the provisions of § 6, transferring all functions relating to the investment of permanent funds of the state "to the state investment officer **under the supervision of the finance officer."**

The entire concept of the activities of the Investment Council, as reflected in the provisions of Chapter 179, Laws of 1957, appears to be clearly at variance with the concept reflected in the proposed Constitutional Amendment. The Constitutional Amendment apparently visualizes the independent exercise of delegated sovereign power by the Investment Council acting as public officers. The accompanying legislation apparently reduces the function of the Council to that of an advisory group within a single executive department and subject to approval by the head of that department as to all action taken by the Council. To the extent that the legislation is inconsistent with the proposed Constitutional Amendment, the legislation may well be found to be unconstitutional; and a judicial determination of its constitutionality is clearly indicated in the event that the Constitutional Amendment should be approved by the voters and enabling legislation should be adopted by the Congress of the United States, thus making Chapter 179 effective. If the provisions of Chapter 179 should be deemed to be constitutional, the restrictions imposed upon the authority of the Investment Council, in our view, are so substantial that the members of the Investment Council, as such, would properly be viewed as employees rather than public officers. Accordingly, in that event, the restrictions imposed by the Legislature upon eligibility of the public members of the Council (§ 3 of Chapter 179) will be constitutional.

We consider next whether the position of the "State Investment Officer" constitutes a "public office" within the meaning of Article VII, § 2 of the New Mexico Constitution. If we look to the proposed Constitutional Amendment, we find that it clearly contemplates the exercise of considerable discretion by the State Investment Officer, with respect to the investment of permanent funds of the state. Subject to the restrictions stated in the amendment itself, within the range of investments provided for by the Legislature pursuant to the amendment, and in accordance with policy regulations promulgated by the State Investment Council and under the supervision of the Council,

"the state investment officer . . . shall exercise the judgment and care under the circumstances then prevailing which businessmen of ordinary prudence, discretion and intelligence exercise in the management of their own affairs not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital; . . . (emphasis added)."

It seems clear that the Constitutional Amendment contemplates that the State Investment Officer, in determining investments to be made. will be exercising a portion of the sovereign power of the State. The term "sovereign power" has been defined as "That power in a state to which none other is superior or equal, and which includes all the specific powers necessary to accomplish the legitimate ends and purposes of government." (Black's Law Dictionary, 3d ed., West, 1933; citations omitted). It follows that the Constitutional Amendment apparently contemplates that the position created is a public office.

On the other hand, consideration of the accompanying legislation casts doubt upon such status of the Investment Officer in several respects. We note that the Constitutional Amendment, again, is silent as to term of office, method of appointment, or definition of duties with respect to specific matters. Chapter 179, Laws of 1957, provides for appointment of the Investment Officer by the Governor upon recommendation of the Financial Officer and the Investment Council or, if the Governor should fail to act, by the Investment Council. No term is provided. Chapter 179, § 4, requires the Investment Officer to devote his entire time to the duties of "his office", and prohibits his holding "any other public office". Again, the qualifications prescribed by Chapter 179, § 4, that "He shall be a person qualified, by training and investment experience, to direct the work of the investment division", violate the provisions of Article VII, § 2 of the New Mexico Constitution, prescribing the conditions of eligibility to public office. Again, the concept of the status of the State Investment Officer reflected in Chapter 179 differs from the clear concept of the Constitutional Amendment in several respects. While the Amendment contemplates the independent exercise of discretion by the Investment Officer, subject to the general supervision by the Council, Chapter 179, in § 7, apparently requires "prior authorization by the council" for every action taken by the Investment Officer. While the Amendment contemplates supervision of the Investment Officer's activities by the Council, Chapter 179, § 6, transfers investment powers to the Investment Officer **"under the supervision of the financial officer."** To the extent that Chapter 179 subordinates the Investment Officer's exercise of discretion to specific approval by the Council of each action taken, and to supervision by the Financial Officer, the legislation indicates an intent that the position of the Financial Officer should be viewed as that of an employee, and not a public officer. Again, there appear to be questions of the constitutionality and effect of Chapter 179 which should be resolved by judicial determination, should the statute become effective by action of the voters on the Constitutional Amendment, and by enabling legislation of the Congress. If effect is given to the provisions of Chapter 179, § 6, making the Investment Officer subject to supervision by the Financial Officer, the legislation in this respect seems clearly inconsistent with the Constitutional Amendment. If effect is given to the provision of Chapter 179, § 7, apparently requiring prior authorization by the Council for any action by the Investment Officer, the legislation in this respect also seems inconsistent with the Constitutional Amendment, which appears to contemplate independent decision by the Investment Officer of particular matters, subject to general supervision only by the Council. This latter question is compounded, of course, by the question arising out of the provision of § 7 of Chapter 179 which makes action of the Council itself, in promulgating policy making regulations, subject to approval by the

Financial Officer. It may well be that Chapter 179 in fact places the ultimate responsibility for the entire matter of investment of state funds upon the Director of the State Department of Finance and Administration, although this cannot be said to be clear. If so, the legislation almost certainly must be viewed as in conflict with the Constitutional Amendment. On the other hand, if Chapter 179 should be viewed as constitutional in the respects stated, the restrictions imposed upon the authority of the Investment Officer, in our view, are so substantial that he should be viewed as an employee rather than a public officer; and in that event, the restrictions imposed by the Legislature upon eligibility for the position (Chapter 179, § 4) will be constitutional.

In your second question, you inquire as to the power of the Legislature to provide for the term of office and manner of appointment of the State Investment Officer and the State Investment Council, since the proposed Constitutional Amendment does not make such provision. Subject to constitutional limitations, the power to create an office is legislative (67 C.J.S., Officers, § 9, p. 119); and in the absence of constitutional restrictions, the Legislature may fix the term of an office created by the Constitution without provision therefor (67 C.J.S., Officers, § 44(b), p. 198). In the same way, the method of appointment of a public officer is also a legislative matter. subject to constitutional limitation (67 C.J.S., Officers, § 27, p. 156). We recognize that the New Mexico Constitution specifically provides as follows:

"The governor shall nominate, and, by and with the consent of the senate, appoint all officers whose appointment or election is not otherwise provided for, . . ."

This office has previously pointed out, in connection with that language, "that the corresponding sections of many other state Constitutions carry the language 'not otherwise provided for **in this constitution.'** This, in my opinion, is most persuasive to the view that the language of our § 5 can only mean 'not otherwise provided for in this Constitution, **or by statute.'"** See Opinion No. 5397, Report of the Attorney General, 1951-52, p. 90, at p. 92; and see also Opinion No. 5750, Report, 1953-54, p. 151, to the same effect. We agree with and adhere to the view expressed in the opinions cited. Accordingly, subject to the restriction that the Legislature may not impose restrictions upon the qualifications for eligibility for the office. provided in Article VII, § 2 of the Constitution, and subject to the provisions of the proposed Constitutional Amendment (which provides generally for the creation of such office), the Legislature has full power to provide for the term of office and the manner of appointment to that office. Of course, as indicated in response to your first question, if it should be determined that either position constitutes merely an employment, rather than a public office, the Legislature has full power to prescribe both the term and the manner of selection and qualification, without reference to the provisions of Article VII, § 2 (67 C.J.S., Officers, § 27, p. 156, and § 44 (b), p. 198).

In your third question, you ask whether the Legislature would have the power to place appointment in someone other than the Governor and restrict the Governor's removal power. It is our conclusion that the Legislature may do so. Subject to the limitations and restrictions imposed by constitutional provisions, the power to create an office is

legislative (67 C.J.S., Officers, § 9, p. 119). Since the proposed Constitutional Amendment provides for the creation of the position, if not office, of State Investment Officer and State Investment Council, but does not directly provide for the manner of appointment or removal, the legislature, in providing for these positions or offices may prescribe all of the incidents thereof. In the absence of constitutional limitation, the method of filling even public offices is to be determined by the Legislature (67 C.J.S., Officers, § 27, p. 156, and § 29, p. 158). Accordingly, we see no impediment to the Legislature's placing the power of appointment in someone other than the Governor. Similarly, the power to provide for removal generally is viewed as residing in the Legislature, subject to constitutional limitations (67 C.J.S., Officers, § 59, p. 244).

In State v. Mechem, 58 N.M. 1, 265 P. 2d 336 (1954), in speaking of the power of appointment to fill a vacancy in the office of district judge, the Supreme Court said (58 N.M. 5):

"With us, the people are the source of government and the power of selecting persons for office belongs to them. Therefore, **the power of appointment belongs where the people have chosen to place it by their Constitution or laws.** (Emphasis added)."

In Pollack v. Montoya, 55 N.M. 390, 234 P. 2d 336 (1951), in holding that the office of Chief of the Division of Liquor Control is a public office, the Court said, at 55 N.M. 393:

"The enumeration by the Constitution of certain officers constituting the executive departments of the State, Article 5, Section 1, does not necessarily deprive the Legislature of the power to create other executive officers, although it cannot abolish any of those created by the Constitution. Article 5, Section 5, of the Constitution recognizes and provides for the appointment of all officers whose appointment or election is not otherwise provided for."

In State ex rel. Ulrick v. Sanchez, 32 N.M. 265, 255 Pac. 1077 (1926), the Supreme Court said, with reference to removal, at 32 N.M. 277:

"The Constitution makers who, either directly or indirectly, create an office, have plenary power to provide how removal shall be made. Whoever accepts an office so created accepts the burdens as well as the benefits. * * * He is entitled as a matter of right to so much consideration as the adopters of the Constitution, or the Legislature, see fit to give him -- no more, no less."

Since the power of removal is not necessarily an inherent incident of the power to appoint, it may be expressly restricted by constitutional or statutory provision. See 67 C.J.S., Officers, § 59, p. 244.

The foregoing authorities strongly indicate that the Legislature, in the instant case, might provide for appointment to these offices or positions by someone other than the Governor, and, in that event, might prescribe the authority designated to exercise the removal power, and the manner of its exercise.

We must point out, however, that the Legislature, in Chapter 179, Laws of 1957, has properly conferred the appointing power upon the Governor, thereby recognizing the executive nature of the functions of the posts created and the provision of Article V, § 4 of the Constitution of New Mexico, that "The supreme executive power of the state shall be vested in the governor, who shall take care that the laws be faithfully executed." We also point out that, in our opinion, the Legislature lacks the power to restrict the Governor's removal power, so long as these appointments are to be made by him. Article V, § 5 of the Constitution expressly provides that "The governor . . . may remove any officer appointed by him for incompetency, neglect of duty or malfeasance in office." In State ex rel. Ulrick v. Sanchez, 32 N.M. 265, 255 Pac. 1077 (1926), the Supreme Court flatly declared that the only question open to judicial review, upon removal by the governor of an officer appointed by him, was the question whether the cause assigned for removal is one provided for in the above constitutional provision; and the order in that case, since it was found to assign a constitutional cause for removal, was deemed conclusive upon the courts.

Of course, if those appointed to the posts now created should be determined to be merely public employees, and not public officers, it would follow that the Legislature would have full power to provide for the manner of removal as well as appointment.

In your fourth question, you ask whether the Legislature, should the proposed Amendment be adopted, will retain the power in the future to restrict or prescribe the type of investments permitted, as distinguished from the power to provide for the type of investments. In our opinion, the Legislature will have that power.

As you know, § 10 of the Enabling Act required the State Treasurer to keep the permanent land grant funds invested in "safe interest-bearing securities". This restriction upon the power to invest such funds was made more specific in Article 12, § 7 of the Constitution, which limited the investment power as follows:

"The principal of the permanent school fund shall be invested in the bond of the state or territory of New Mexico, or of any county, city, town, board of education or school district therein. The legislature may by three-fourths vote of the members elected to each house provide that said funds may be invested in other interest-bearing securities."

The constitutional provision quoted has been characterized by our Supreme Court as an express limitation upon "the class of securities in which these funds may be invested, until the Legislature shall otherwise provide." State v. Marron, 18 N.M. 426, 137 Pac. 845 (1913). This is in accord with the general rule that the provisions of a state constitution are to be regarded as limitations or restrictions of power and not as grants or delegations of power. See 16 C.J.S., Constitutional Law, § 70, p. 189.

The proposed Constitutional Amendment provides as follows:

"The principal of the permanent school fund, and other permanent funds, shall be invested by a state investment officer in accordance with policy regulations promulgated

by a state investment council. The legislature may by a three-fourth's vote of the members elected to each house provide that said funds may be invested in interest bearing or other securities. All losses from such interest bearing notes or securities which have definite maturity dates shall be reimbursed by the state."

The proposed Amendment goes on to prescribe the "prudent man rule" as a standard to guide the State Investment Officer in making investments, and then prescribes several specific limitations upon the investment of state funds. First not more than 25% of any permanent fund shall be invested at any one time in corporate stocks and bonds. Second, no more than 10% of the voting stock of a corporation shall be held in the aggregate. Third, the only stocks eligible for purchase are those of businesses incorporated within the United States, listed upon a national stock exchange and having a ten year dividend history at the time of purchase.

As we construe the proposed amendment, it limits the investment of permanent state funds in three ways. First, the amendment, itself, contains specific limitations which must be observed. Second, it provides that the State Investment Council may prescribe policy regulations with respect to the investment of permanent funds. Such regulations, in prescribing the classifications of permissible investment will necessarily restrict the scope of investment authority to the extent that by silence they exclude investments which might otherwise be permissible under the Constitutional Amendment. Third, the proposed Amendment provides:

"The legislature may by a three-fourth's vote of the members elected to each house provide that said funds may be invested in interest bearing or other securities."

Although this provision employs the word "provide", in our view the provision authorizes the Legislature to impose limitations upon the scope of investment authority as to permanent funds. To the extent that the Legislature provides that certain investments are authorized, it necessarily by silence excludes other investments. In this sense, it is clear, in our view, that the Legislature may in the future restrict or prescribe investments.

In this connection, it is interesting to compare the language of Article 12, § 7 of the Constitution, as it now stands, with the language of the proposed Constitutional Amendment. The present constitutional provision first limits investment authority substantially by restricting investment to certain governmental bonds. It then provides that the Legislature may relax these restrictions by providing for investment in other interest bearing securities.

The proposed Amendment, on the other hand, first provides broad authority, that investments may be made in accordance with the policy regulations promulgated (subject, of course, to the restriction specified in the Amendment itself). The Amendment then provides that the Legislature may provide for the investment of the permanent funds in interest-bearing or other securities.

The contrast in the language of the present and proposed constitutional provisions is indicative of the clear intention that the Legislature may limit the scope of investment authority, within the restrictions specified in the amendment itself.

Finally, you inquire whether the restrictions on the scope of investment authority, which are specified in Chapter 179, Laws of 1957, will be constitutional should the proposed amendment be adopted.

In our view, what has been said in answer to the previous question compels the conclusion that the restrictions specified in the 1957 statute are valid and constitutional. In this connection, it is not without significance that the same Legislature which proposed the Constitutional Amendment under consideration is the Legislature which adopted Chapter 179, Laws of 1957. In our view, this fact in itself is evidence that the Legislature considered the language of the proposed Constitutional Amendment as leaving in the Legislature the power to limit investments subject to restrictions specified in the Constitution.

Your attention is further called to the fact that Chapter 179, § 9 E, in providing for investment in common stocks, does not expressly contain the restriction that common stocks, purchased must be those of corporations having a ten year dividend history at the date of purchase. The statutory provision in our opinion, is nevertheless subject to this restriction which is expressly specified in the proposed Constitutional Amendment.