

Opinion No. 60-60

March 29, 1960

BY: OPINION of HILTON A. DICKSON, JR., Attorney General

TO: H. Leslie Williams Assistant District Attorney Second Judicial District Albuquerque, New Mexico

QUESTION

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May a new appointee to the office of probate judge receive the increased salary designated for that office by legislation enacted by the last legislature?

CONCLUSION

Yes.

OPINION

{*418} ANALYSIS

Your inquiry was precipitated because of the resignation of the incumbent probate judge for Bernalillo County and the subsequent appointment of the successor by the Bernalillo County Commission. The legislature, during its last session, enacted Ch. 262, Sec. 1, codified as Sec. 15-43-4, N.M.S.A., 1953 Comp. (P.S.), which increased the salary of probate judges in class "A" counties from \$ 2400 to \$ 3600 per annum. Section 27, Art. IV of the New Mexico Constitution provides in part as follows:

"* * * nor shall the compensation of any officer be increased or diminished during his term of office, except as otherwise provided in this Constitution."

Thus, the question is squarely presented as to whether the appointee may receive the increased salary authorized by the last legislature or is this such an increase as is prohibited by the above Constitutional provision.

{*419} Our Supreme Court has had occasion to consider this constitutional provision in the case entitled **State ex rel Gilbert et al., v. Board of County Commissioners of Sierra County**, 29 N.M. 209, 222 P. 654. The Court therein, at page 214 of the New Mexico Reports defined the purpose of the Constitutional provision as follows:

"* * * And the considerations which doubtless entered into and prompted the inclusion of such a provision of the Constitution are obvious. It 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. To obviate these conditions in the purpose of this wise constitutional provision."

The facts of the above case are distinguishable from those at hand and therefore the holding of the Court is not applicable here. This office, in Opinion No. 5995 dated July 27, 1954, considered the provision because of an effort of a county superintendent through resignation and reappointment to obtain the higher salary. Under that set of facts, it was the opinion of this office that the effort was merely a subterfuge and sham and was prohibited under Art. IV, Sec. 27 of the Constitution.

Other jurisdictions have split on the question of whether an appointee may receive an increased salary when appointed under the circumstances such as here are involved. See 43 Am. Jur. 144, Sec. 351; 166 ALR 839 and the annotation there following. It appears that the conflict in thought is drawn between "applicability of the inhibiting provision either to the full prescribed period of the term or to the individual incumbent at the moment, and the evil sought to be avoided by adoption of the provision." 166 ALR 842.

In view of the analysis of our Supreme Court of the purpose to be served by the constitutional provision, it is our opinion that the facts as here presented are not within the contemplation of the prohibited increase or decrease of salary. The 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. Therefore, the evils which are to be avoided were not present and it appears that the prohibition of the Constitution should not be invoked.

Therefore, it is our conclusion that the appointee is entitled to the increase in salary under the facts presented. This is not to be construed as changing the decision in Opinion No. 5995 supra, for under the facts there presented it would clearly be prohibited as a sham or subterfuge to avoid the exact circumstances which gave rise to the constitutional provision.

By: Thomas O. Olson

First Assistant Attorney General