Opinion No. 64-91

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BY: OPINION OF EARL E. HARTLEY, Attorney General Oliver E Payne, Assistant Attorney General

TO: Clay Buchanan, Director, New Mexico Legislative Council, Capitol Building, Santa Fe, New Mexico

QUESTION

FACTS

Chapter 17, Laws 1964, First Special Session, amended a number of statutes relating to hunting and fishing, the major change being an increase in the license fees. The act provided for an April 1st effective date so that it would coincide with the first day of the license year. The bill as originally introduced contained an emergency clause but it did not pass by the necessary majority to make the emergency clause effective.

QUESTIONS

(1) Is the law unconstitutional in that it discriminates between persons of the same class on the basis of the date on which they purchase a hunting or fishing license?

(2) Is the law unconstitutional as ex post facto legislation?

(3) If the law was supposed to go into effect on May 25th rather than May 26th, is the Director of the Game Department personally liable for the amount of money which should have been collected on all licenses sold on May 25th?

(4) Since the April 1st effective date cannot stand, does this cause the entire bill to fail since it contained no severability clause?

(5) Since this act does not require residents to obtain a license to hunt non-protected (non-game) animals, is it unconstitutional since it requires non-residents to obtain a license to hunt this type of animal?

(6) Since the act mentions posting as being permissible, does the act abrogate the lease agreement between the State Land Commissioner and the Game Department?

CONCLUSIONS

(1) No.

(2) No.

(3) No.

(4) No.

(5) No.

(6) No.

OPINION

ANALYSIS

We would emphasize at the outset that the April 1st effective date provision in the act is a nullity. Article IV, Section 23 of the New Mexico Constitution provides that laws shall go into effect ninety days after the adjournment of the legislature enacting them except general appropriation laws and those containing an emergency clause which pass by the requisite majority. These latter laws take effect immediately upon approval by the governor. Since the legislature adjourned on February 25, 1964, and since the act did not pass as an emergency measure, the legislature was proscribed by the constitution from providing that the act would go into effect sooner than ninety days after adjournment. **State ex rel. New Mexico State Bank v. Montoya,** 22 N.M., 215, 160 Pac. 359. We would also point out since, as will be seen subsequently, it is important, that there is considerable doubt whether the April 1st date would have been effective even if the act had passed as an emergency measure. Arizona's constitutional provisions relative to effective dates of legislation are practically identical to ours. And in the case of **Industrial Commission v. Frohmiller,** Ariz., 140 P. 2d 219, the court was dealing with a situation where a legislative enactment contained an effective date of July 1st but also contained an emergency clause and passed by the required two-thirds vote. The court held that under the constitution the act became effective upon approval of the governor and struck the July 1st provision as a nullity, Contra, **George v. Randolph,** Okla., 207 P. 2d 248.

Your first question is whether the act is unconstitutional "in that it discriminates between persons of the same class on the basis of the date on which they purchase a hunting or fishing license," i.e., the license fee is less prior to the effective date of the legislation in question.

Our answer is negative. As our Supreme Court said in **State v. Thompson,** 57 N.M. 459, 260 P. 2d 370:

"It follows that legislation may be limited in scope and adjusted to various situations. If it makes no arbitrary or unreasonable distinction within the sphere of its operation and accords substantially equal and uniform treatment to all persons similarly situated, the law complies with the equality provisions.

* * * *

Thus both classification and discrimination or distinction may be made in a law, provided the discrimination or distinction has a reasonable foundation or rational basis and is not entirely arbitrary."

Actually we see no discrimination in the act at all except that which may result from an individual's own action or inaction. While the license year begins on April 1st, this act was approved by the governor on March 3, 1964 and everyone was aware, or easily could have been aware, that there would be an increase in hunting and fishing license fees on the effective date of the act. It was well publicized that if persons wished to purchase their licenses at the lower rate they should do so prior to May 26th.

Furthermore, if any discrimination can be found, it is permissible under the doctrine of **State v. Thompson** supra. Such discrimination was not arbitrary; it had a rational basis. The legislature desired to increase hunting and fishing license fees. This it was clearly entitled to do. It apparently did not want to change the April 1 to March 31 license year. This was also its prerogative. This being the case, if our courts hold as the Arizona court did, there was no way to make the increase effective on April 1. The increase either had to go into effect ninety days after adjournment or on the date of its approval by the governor had it passed as an emergency measure. Neither of these dates could have been April 1. The legislature had to adjourn no later than February 25th (Article IV, Section 5) and the governor had to approve the bill within 20 days after the adjournment (Article IV, Section 22). Consequently if there is any discrimination, which we certainly doubt, it was unavoidable.

In your second question you ask whether Chapter 17, Laws 1964, First Special Session, is unconstitutional as ex post facto legislation since it did not go into effect until some time after the license period had started to run.

The answer is in the negative. The scope of the prohibition against ex post facto laws is limited in its application to laws of a criminal nature. **Calder v. Bull,** 3 U.S. 386; **Ogden v. Saunders,** 12 Wheat 213, 6 L. Ed. 606. And in any event this legislation is not retroactive in operation. It operates prospectively from May 25, 1964.

In your third question you indicate that the effective date of Chapter 17, Laws 1964, First Special Session, was May 25th rather than May 26th, the latter date being the one when the increased license fees were first charged.

The First Special Session of 1964 convened at noon on January 27, 1964 and adjourned at noon on February 25, 1964. Since the act contained no emergency clause, it became effective ninety days after adjournment of the session. Article IV, Section 23, New Mexico Constitution.

The rule in computing this time period is well established in this jurisdiction. In the case of **Garcia v. J. C. Penney Co.,** 52 N.M. 410, 200 P. 2d 372, our Supreme Court quoted with approval the following passage from **Sutherland on Statutory Construction:**

"The rule now supported by nearly all the modern cases is that the time shall be computed by excluding the day, or the day of the event, from which time is to be computed and including the last day of the number constituting the specific period. Thus, if an act is to take effect in thirty days from and after its passage, basing on the first day of March, it would go into operation on the 31st day of that month. It would commence to operate at the first moment of the last day of the thirty, ascertained by adding that number to the number of the date of passage."

Computing the time period under this method, adjournment day, February 25th, is excluded. Adding the four days in February (since it was leap year) with the thirty one days in March, thirty days in April and twenty five days in May, we have the ninety day period. Thus, the act became effective on May 25, 1964, although you advise that the increased fees were not actually charged until May 26th.

Such being the case, you ask whether the Director of the Game Department can be held personally liable for the amount of money which should have been collected on all licenses sold on May 25th. The answer is no.

No doubt the mistake as to the effective date of the act here in question was a direct result of the rather general confusion as to the date of adjournment of the First Special Session of 1964.

It is a policy of law that where a public officer is acting in good faith within the scope of his duties he should not be subjected to liability for damages because of a misconstruction of a statute. **White v. Towers,** Cal., 22 P. 2d 920, subsequent opinion 235 P. 2d 209; **Whatcom County v. Langlie,** Wash., 246 P. 2d 836. Public officials are liable personally when and only when, in the exercise of the powers conferred upon them, they have acted wilfully or maliciously. **Dallas County Flood Control Dist. v. Fowler,** Tex., 280 S.W. 2d 336; **Strahan v. Fussell,** La., 50 So. 2d 805. We have no such situation here.

Since the April 1st effective date is a nullity, you inquire whether this causes the entire act to fail since it contained no severability clause. The answer is no.

Severability clauses have come to be regarded as little more than a formality of legislative draftsmanship. **2 Sutherland, Statutory Construction,** § 2410 (1943.) The presence or absence of a severability clause merely provides one rule of construction which may be considered and may sometimes aid in determining legislative intent. More important is whether the invalid part of an act may be separated from the valid portions without impairing the force and effect of the remaining parts, and if the legislative purpose in the valid portion can be given force and effect without the invalid part. **Bradbury & Stamm Construction Co., v. Bureau of Revenue,** 70 N.M. 226, 372 P. 2d 808.

The purpose of the act in question was to increase hunting and fishing license fees. The effective date provision was subsidiary and not essential to the unity of the general legislative scheme. **Pennsylvania Railroad Co., v. Schwartz,** Pa., 139 A. 2d 525.

In Maryland the legislature passed an act and provided that it would take effect on April 1st. Under that State's constitution the act was to take effect on June 1st, since it did not pass as an emergency measure. The court held that if the legislature provides that an act which under the constitution cannot take effect until June 1, (because not passed as an emergency measure) is to take effect sooner, the act stands but the effective date provision is stricken. **Allied American Mutual Fire Insurance Company v. Commissioner of Motor Vehicles,** Md. 150 A 2d 421. Accord: **Industrial Commission v. Frohmiller,** Ariz., 140 P. 2d 219; **In Re Borough of Sharpsburg,** Pa., 60 A. 2d 557.

Since the act provides for a ten dollar fee for a nonresident, nongame license and does not require residents to obtain a non-game license, you ask whether this results in a violation of the constitutional privileges and immunities clause. The answer is negative.

It has been generally recognized that a state may enact laws which discriminate against nonresidents in the enjoyment of the privileges of hunting and fishing. **State v. McCullagh,** Kan., 153 Pac. 557; **State v. Niles,** Vt., 62 Atl. 795. The state may, if it sees fit, impose on nonresidents a larger license fee for the privilege of hunting and fishing within its borders than it imposes on its own residents. **Lacoste v. Department of Conservation,** La., 92 So. 381, affirmed 263 U.S. 545.

The basis for the doctrine is stated as follows in **State v. Starkweather,** Minn., 7 N.W. 2d 747:

"It is settled law that the state may impose upon nonresidents a larger license fee than it imposes upon residents. The discrimination in the case of hunting and fishing is justified under the police power on the ground that game, fish, and fur-bearing animals when not reduced to possession belong to the state, as a part of its natural resources, which it can protect and save for its own citizens."

In your last question you ask whether the act abrogates the lease agreement between the State Land Commissioner and the Game Department since the act mentions posting as permissible. Our conclusion is that the act does not, in any way, abrogate the lease agreement.

Actually the act mentions posting "as provided by law." We find nothing in the statutes relating to state land which covers the posting of such lands for hunting or fishing. Neither does the lease agreement even mention posting. We fail to see any conflict between the act and the lease agreement.

We conclude then that Chapter 17, Laws 1964, First Special Session, is valid and is in full force and effect save the effective date clause.