Opinion No. 89-24

August 17, 1989

OPINION OF: HAL STRATTON, Attorney General

BY: Andrea R. Buzzard, Assistant Attorney General

TO: Honorable Thomas A. Rutledge, District Attorney, Fifth Judicial District, P.O. Box 1448, Carlsbad, NM 88220

QUESTIONS

1. Is the amendment to Rule 200.70 of the Public Employees Retirement Association ("PERA Rule 200.70") concerning nominations to the Public Employees Retirement Board ("Board"), as implemented by the Board, legal?

2. Were the procedures used by the Board, when it adopted the amendment and invalidated the nomination process, proper since nominations had already occurred?

3. Does PERA Rule 200.70, as amended, comply with Subsection 10-11-130(B)(4) NMSA 1978 (Repl. 1987)?

CONCLUSIONS

1. Yes, because the Board complied with procedural rule-making requirements and the rule does not conflict with the Board's statutory authority.

2. Yes, because the amendment to Rule 200.70 did not operate retroactively to divest the county nominee of any vested right.

3. Yes, because Subsection 10-11-130(B)(4) does not oblige the Board to include more than one county employee on the Board.

ANALYSIS

The first question asks whether the 1988 amendment to PERA Rule 200.70, pertaining to the election of non-retired Board members, is legal. We conclude that the amendment is legal because the Board complied with procedural rule-making requirements and the rule does not conflict with the Board's statutory authority.

On August 26, 1988, the Board adopted an emergency amendment to PERA Rule 200.70. On October 17, 1988, the Board adopted it as a permanent amendment to Rule 200.70. Both amendments were filed with the state records center shortly after adoption. The substance of both amendments is the same: county employees may not be nominated for or elected to municipal Board member positions, except for the

municipal Board member position designated as "county member."[1] Thus, of the Board's four municipal member positions,[2] one position must be filled by a county employee and the other three must be filled by municipal employees who are not county employees.

In adopting as a permanent rule the amendment to PERA Rule 200.70, the Board complied with PERA Rule 200.10's[3] rule-making procedures, which require that public notice be given at least thirty days before the rules hearing[4] and that the notice state the date and place of the hearing and subjects involved. The Board also complied with Rule 200.10(B)(1)(b)'s direction that the Board issue a concise statement of its principal reasons for adopting a contested rule. The Board issued this statement:

The Board adopts Rule 200.70 to designate clearly one municipal board member position as the "county member position" and to confine the nominating and voting procedures for that position to county employers and employees.

The Board designates clearly the remaining three municipal board member positions as non-county board member positions and confines the nominating and voting procedures for those positions to non-county municipal employers and employees.

The reasons the Board adopts this rule are:

1. The 1987 Legislature required this Board to assure that the municipal membership of the Board would include a county member.

2. The 1987 Legislature evidently believed that fair representation among the Board's municipal membership required that a county member be included in that membership.

3. The Board has satisfied its statutory obligation in this regard.

4. City employees outnumber county employees by about 7 to 1.

5. Therefore, the Board designates the remaining three municipal member positions as positions to be occupied by municipal employees other than county employees.

6. The Board is required by law to adopt regulations to govern the conduct of elections to this Board.

7. This rule provides fair representation to counties; is consistent with the Board's statutory authority; and is consistent with the Board's earlier procedures to assure that a January 1988 municipal member position would be occupied by a county employee.

The Board enacted the amendment to PERA Rule 200.70 in conformity with the procedures that PERA Rule 200.10 imposes. And, although the Administrative Procedures Act ("APA"), Sections 12-8-1 to 12-8-25 NMSA 1978 (Repl. 1988), does not apply to the Association, the Board nonetheless satisfied Section 12-8-4's rule-making prerequisites.[5]

Rule 200.70 conforms to the Board's statutory authority. The legislature has delegated to the Board the task of structuring its elections. "The elections of elected members of the retirement board ... shall be conducted according to rules and regulations the retirement board shall from time to time adopt." Subsection 10-11-130(C). Although the Board must guarantee that at least one municipal Board member is a county employee, the Board is not obliged statutorily to assure that county employees remain eligible to occupy the remaining three municipal Board member positions.

The Board adopted rules in 1987 to ensure that a municipal board member, whose four-year term would commence January 1, 1988, would be a county employee.[6] The Board retains policy-making authority in Board election matters. PERA Rule 200.70 does not conflict with the Board's statutory authority. The rule is intended to grant city employees, whose voice greatly outnumbers county employees, fair representation on the Board. And the 1987 Legislature, by enacting chapter 253, invited demarcation between city and county member-representatives on the Board by statutorily prescribing that one municipal Board member must be employed by a county. We conclude, therefore, that PERA Rule 200.70 is consistent with the Board's statutory authority.

The second question asks whether the Board acted properly when on August 26, 1988, it adopted, as an emergency rule, the amendment to PERA Rule 200.70 and invalidated the nomination process just completed for the municipal member four-year term. That process had resulted in the nomination of a county employee to one of the remaining three municipal member positions. That county nominee did not qualify under PERA Rule 200.70, as amended, because the county-member position was occupied. Under PERA Rule 200.70, as it existed before amendment, it was unclear whether the Board intended county employees to be eligible to occupy any or all of the three remaining municipal member positions.[7] Because the Association's nomination process in August, 1988, had included the solicitation of nominations from county employers, the question is whether PERA Rule 200.70, as amended, operates to divest the county nominee of a right to the office of Board member.[8] We conclude that PERA Rule 200.70 does not operate to deny the county nominee a right to a seat on the Board because the county nominee had no vested right to the office of Board member or to nomination to that office.

A "vested right" is a constitutionally protected property right which a subsequent statute may not impair or repeal. See Stone v. City of Hobbs, 54 N.M. 237, 241, 220 P.2d 704, 707 (1950); Rubalcava v. Garst, 53 N.M. 295, 298, 206 P.2d 1154, 1156 (1949); Rodgers v. City of Loving, 91 N.M. 306, 308, 573 P.2d 240, 242 (Ct. App. 1977). In New Mexico, however, no property right attaches to board-member positions of state agencies. In Mitchell v. King, 537 F.2d 385 (10th Cir. 1976), the Tenth Circuit Court of Appeals upheld the trial court's dismissal of a civil rights suit filed by a member of the Board of Regents of the Museum of New Mexico whose services the Governor of New Mexico had terminated. The court held that the regent had no federally protected property interest in the office and observed that the board of regents serve without compensation and exercise policy-making powers over the Museum's affairs.

In State ex rel. Duran v. Anaya, 102 N.M. 609, 698 P.2d 882 (1985), the New Mexico Supreme Court upheld the dismissal of a suit filed by members of the State Board of Barber Examiners who were discharged from their positions by the Governor of New Mexico. The court held that the board members had no constitutionally protected property interest in their positions. The Court stated: "The [board members] are policy-making persons and a policy-making public servant has no property interest in his position." Id. at 612, 698 P.2d at 885. See also Morris v. Gonzales, 91 N.M. 495, 576 P.2d 755 (1978) (holder of an office created by the constitution does not have a vested right in the office and does not hold by contract; the office may be abolished by a constitutional amendment); In re Thaxton, 78 N.M. 668, 437 P.2d 129 (1968) (same); Montoya v. McManus, 68 N.M. 381, 362 P.2d 771 (1961) (right to hold office is not a property right nor is it a vested one); Reese v. Dempsey, 48 N.M. 417, 152 P.2d 157 (1944) (no vested interest in a public office, although the privileges of one holding office are, within certain limitations, entitled to the protection of law).

Courts of other jurisdictions have ruled similarly. In Corn v. City of Oakland, 415 N.E.2d 129 (Ind. App. 1981), the court upheld the city's authority to abolish a city elective office created by city ordinance, notwithstanding the incumbent's nomination for and re-election to a successive term of that office. The court rejected the incumbent's claim that he had a vested right to the office which the repealing ordinance unconstitutionally impaired, stating: "Offices are neither grants nor contracts, nor obligations which can not be changed or impaired." Id. at 133. (quoting State ex rel. Yancey v. Hyde, 129 Ind. 296, 302, 28 N.E. 186, 187 (1891)).

In State ex rel. Pecyk v. Greene, 102 Ohio App. 297, 114 N.E.2d 922 (1953), candidates for the office of city council, who had been properly nominated, sued the city to compel that their names be placed on the general election ballot. Although they had been properly nominated in accordance with the existing charter provisions, an amendment to that charter disqualified them as candidates for the general election. The charter amendment was adopted on the same day the candidates' nominations had been made and was effective four days after the candidates' nominations. The candidates contended that the charter amendment retroactively impaired their vested rights. The court disagreed, stating:

That principle of law has no application here for the reason that no person holding office under our system of government has any vested right to the same.... There being no vested right in a public office, can there possibly be a vested right in the mere nomination to office?

Id. at 304, 114 N.E.2d at 927. See also Moore v. Watson, 429 So.2d 1036 (Ala. 1983) (appointee to county pension board has no constitutionally protected property interest in that non-salaried office).

The public office of member of the Public Employees Retirement Board, a state agency, is a non-salaried, policy-making position. Board members have no constitutionally

protected property interest in the position. We conclude, therefore, that the Board's procedures were legal.

The third question asks whether PERA Rule 200.70, as amended, complies with Subsection 10-11-130(B)(4). That Section states:

The retirement board shall consist of:

(1) the secretary of state;

(2) the state treasurer;

(3) four members under a state coverage plan to be elected by the members under state coverage plans;

(4) four members under a municipal coverage plan to be elected by the members under municipal coverage plans, provided at least one member shall be a municipal member employed by county; and

(5) one retired member to be elected by the retired members of the association.

Because the rule limits the municipal member composition to only one county member, the question is whether the Board's restriction to "only one" conflicts with the Board's obligation to assure "at least one" county member. We conclude that it does not, because the legislature has not required the board to include more than one county employee on the Board.

In construing the phrase "at least once" that appears in Section 22-10-7 (Repl. 1986): "All certified school personnel shall be paid at least once a month...," this office advised that school districts must, at a minimum, pay certified school personnel at least once a month. However, school districts have the flexibility to pay certified school personnel more often than once a month. Att'y Gen. Op. 88-72 (1988).

Similarly, the Board's statutory authority to conduct elections according to its rules and regulations provides the Board the flexibility to permit more than one county member to occupy a municipal member position on the Board, but the legislature has not mandated that it do so. The legislature requires that "at least one" municipal member on the Board be a county employee, but the legislature does not require that more than one be a county employee. Therefore, PERA Rule 200.70, as amended, complies with Subsection 10-11-130(B)(4).

ATTORNEY GENERAL

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GENERAL FOOTNOTES

n1 As amended on October 17, 1988, Rule 200.70 provides, in part:

B. The candidates nominated for the municipal board member term beginning in January 1988, hereinafter termed "county member position", shall be employed by a county.

C. [M]unicipal employers shall receive a municipal nominating ballot. Counties shall not receive ballots for municipal member positions except for a vacant county member position. Municipal employers other than counties shall not receive nominating ballots for the county member position.

...

I. County employees shall not vote in the elections for municipal members except to fill a vacant county member position. Municipal employees other than county employees shall not vote in elections for the county member position.

n2 Subsection 10-11-130(B) NMSA 1978 (Repl. 1987) provides that the Board's composition shall include "four members under a municipal coverage plan to be elected by the members under municipal coverage plans, provided at least one member shall be a municipal member employed by a county." The requirement that the Board's composition include a county employee was enacted by 1987 N.M. Laws, ch. 253, recodifying the Public Employees Retirement Act, Sections 10-11-1 to 10-11-140 NMSA 1978 (Repl. 1987).

n3 Rule 200.10, providing rule-making procedures, was adopted on October 17, 1988. Rules of the Public Employees Retirement Association ("Association") before that date did not provide regulatory requirements to adopt rules. Thus, those rules did not apply to the Board's August 26, 1988, emergency amendment.

n4 Public notice of the October 17, 1988 rules hearing appeared in The Albuquerque Journal on September 17, 18 and 19 and in The New Mexican on September 19, 20 and 21.

n5 Section 12-8-23 limits the APA's applicability: "The provisions of the [APA] apply to agencies made subject to its coverage by law, or by agency rule or regulation if permitted by law." The Association is not subject by law to the APA. Cf. Rivas v. Board of Cosmetologists, 101 N.M. 592, 686 P.2d 934 (1984) (citing the APA to invalidate action of a licensing board, but not discussing the fact that the board was not subject to the APA). Although the APA's reach is doubtful, Rule 200.10 incorporates Section 12-8-4's substance.

n6 The Board's Resolution No. 87-12 called for nominations for one county member for a four-year term. Thereafter, the Association solicited nominations from counties for the county member position and solicited nominations from non-county municipal employers to fill two other municipal Board member positions.

n7 That rule provided for a county member among the municipal Board member positions whose term would commence January 1, 1988. The rule did not address the remaining municipal positions, except to state that "each municipality shall be allowed one vote for the purpose of nominating a municipal board member" and "municipalities shall receive a municipal nominating ballot."

n8 Our analysis applies rules of statutory construction, because legislatively authorized rules of an administrative body have the force of law. Jaramillo v. Fisher Controls Co., 102 N.M. 614, 619, 698 P.2d 887, 892 (Ct. App. 1985); Brininstool v. New Mexico State Bd. of Educ., 81 N.M. 319, 322, 466 P.2d 885, 888 (Ct. App. 1970).