

Opinion No. 90-05

March 12, 1990

OPINION OF: HAL STRATTON, Attorney General

BY: Elizabeth A. Glenn, Assistant Attorney General

TO: Mark I. Bannister, Sr., District Attorney, Tenth Judicial District, P.O. Box 1141, Tucumcari, New Mexico 88401

QUESTIONS

1. May a county commission set the hours that offices of other elected county officials must stay open?
2. May a county commission, its personnel director or other agents exercise supervision over the employees of other elected officials and require those employees to work hours contrary to those established by the officials?
3. May a county commission increase the hours worked by county employees without additional compensation?
4. May a county commission use the budget to control staffing of other elected officials without good cause?
5. In a lawsuit between a county commission and other elected county officials concerning employment terms and conditions, must the county pay both parties' attorneys fees?

CONCLUSIONS

1. Yes.
2. Yes, to the extent permitted by statute, provided the board's supervision over elected officials' employees does not interfere with the duties of those officials.
3. Yes.
4. A county commission may use its control over the county budget to restrict staff employed by other elected officials if its acts reasonably.
5. Each party is responsible for its own fees. The county is responsible for legal fees of its elected officials and employees only to the extent required by statute.

ANALYSIS

The questions presented stem from actions taken by a county commission to require the county clerk, county treasurer and county assessor to keep their offices open from 8:00 a.m. to 5:00 p.m. and to require employees in those offices to work from 8:00 a.m. to 5:00 p.m. with one hour for lunch. Before the commission's action, the working hours of the affected offices had been 8:30 a.m. to 4:30 p.m. with a one hour lunch period. The commission reasoned that its action required the offices to have a 40 hour work week like those of other county employees. We understand that while for bookkeeping purposes wages are calculated on an hourly basis, the employees concerned earn an annual salary.

1. A county commission's authority to control or interfere with the activities of other elected county officials is limited. This office has determined that state law does not grant general superintending control over elected officials to boards of county commissioners. AG Op. No. 87-18 (1987). In addition, a board of county commissioners is prohibited from employing and paying a person to perform services which the law requires be performed by a county official. **Fancher v. Board of Comm'rs**, 28 N.M. 179, 210 P. 237 (1922) (county commission could not employ private persons to perform duties imposed by statute on county clerk and state tax commission); **State ex rel. Miera v. Field**, 24 N.M. 168, 172 P. 1136 (1918) (finding ultra vires a contract between county board and person employed to perform duties required of county assessor).

On the other hand, offices of county officials are provided at county expense, NMSA 1978, § 4-44-34 (Repl. Pamp. 1984), and county boards have broad authority to control county property. They are authorized to "make such orders concerning the property belonging to the county as they may deem expedient," NMSA 1978, § 4-38-13 (Repl. Pamp. 1984); "build and keep in repair all county buildings, and ... to provide suitable rooms for county purposes," *id.*, § 4-38-16; and "represent the county and have the care of the county property and the management of the interest of the county in all cases where no provision is made by law." *Id.* § 4-38-18. In general, unless limited by statute or the constitution, a county board may enact ordinances to discharge the power of the county "to provide for the safety, preserve the health, promote the prosperity and improve the morals, order, comfort and convenience" of the county and its inhabitants. NMSA 1978, § 4-37-1 (Repl. Pamp. 1984).

This office has concluded that, because of its powers over property, a county commission has absolute discretion to determine when county offices should be open. AG Op. No. 6221 (1955) (county commission empowered to close county offices on Saturday). Other opinions make it clear, however, that the commission's powers may not be used arbitrarily to interfere with an officer's ability to perform his statutory duties and responsibilities independently from the commission. AG Op. No. 87-18 (1987); AG Op. No. 69-50 (1969) (while county board has authority to manage county property, this does not mean the board may arbitrarily decide how space assigned to the county sheriff may be used). Accordingly, we conclude that a county commission may establish hours for county offices, provided it acts reasonably and does not detrimentally affect the ability of county officials to perform their duties.

2. A county board has some authority to supervise employees of other elected officials, including the power to regulate their hours of employment. The county manager's office may assist the board in this function. See NMSA 1978, § 4-38-19(B) (Repl. Pamp. 1984) (a board of county commissioners may employ and set the salary of a county manager "to serve as personnel officer, fiscal director, budget officer, property custodian and to act generally as the administrative assistant to the board").

Our conclusion is based on an opinion issued by this office which determined that a county commission could enact a personnel ordinance governing the terms and conditions of employment of persons hired by other elected county officials, provided the ordinance did not impair the performance of the officials' statutory duties and responsibilities. AG Op. No. 81-29 (1981). The opinion found support in the commission's authority to set the salaries of persons employed by elected officials, NMSA 1978, § 4-38-19 (Repl. Pamp. 1984), and to pay those salaries according to its approved budget. *Id.* § 4-38-17. See also **Sarpy County Pub. Employees Ass'n v. County of Sarpy**, 220 Neb. 431, 435, 436, 370 N.W.2d 495, 498, 499 (1985) (power to set salaries of county employees includes authority to prescribe working conditions). The opinion also determined that a county commission's power to regulate county employees hired by elected officials could be implied from its authority to manage the interests of the county where not otherwise provided by law, NMSA 1978, 4-38-18 (Repl. Pamp. 1984), and from the grant to counties of "the same powers that are granted municipalities except for those powers that are inconsistent with statutory or constitutional limitations placed on counties." *Id.* § 4-37-1. As the opinion points out, a municipality may establish by ordinance a merit system regulating municipal employees and may provide for rules and regulations governing classification, service ratings, pay scales, working hours and methods of employment, promotion, demotion, suspension and discharge. NMSA 1978, § 3-13-4 (Repl. Pamp. 1985).

As with the county commission's authority to determine office hours, the authority to regulate employment terms and conditions may not be exercised unreasonably. Cf. **Burch v. Foy**, 62 N.M. 219, 308 P.2d 199 (1957) (attempted statutory classification imposing different minimum wage for similarly situated employees was arbitrary discrimination). The commission also may not act in a manner amounting to supervisory control over other elected officials. Although the board sets employee salaries, elected officials recommend their employees' salaries and retain authority to hire persons to carry out the duties and responsibilities of the offices to which they are elected. NMSA 1978, § 4-38-19(A) (Repl. Pamp. 1984). A county commission may not usurp this authority by effectively controlling the tasks and responsibilities of elected officials' employees.

We conclude, therefore, that although a county commission may not supervise, dictate or otherwise interfere with the substantive duties of employees hired by other elected officials, it may regulate the procedural terms of employment for those employees, including hours.

3. Unless established under an employment contract, the working hours of elected county official's employees may be increased without additional compensation. County boards

may set the salaries of such employees and deputies as it feels necessary to discharge the functions of the county, except that elected county officials have the authority to hire and recommend the salaries of persons employed by them to carry out the duties and responsibilities of the offices to which they are elected.

NMSA 1978, § 4-38-19 (A) (Repl. Pamp. 1984). Under this provision, although elected county officials may hire employees and recommend their salaries to the board, the board retains the ultimate authority to set employee salaries. AG Op. No. 81-29 (1981); AG Op. No. 75-64 (1975) (board of county commissioners was authorized to adjust the salary of the deputy county assessor).

Whether a public employer can modify compensation and other employee benefits depends on the employment relationship between the parties. In general, an ordinance or rule governing terms and conditions of public employment does not create a binding contract,

but is intended merely to declare a policy to be pursued until the Legislature declares otherwise. If contractual rights are to be created by statute, the language of the statute and the circumstances must manifest a legislative intent to create private rights of a contractual nature enforceable against the State.

Wage Appeal v. Board of Personnel Appeals, 676 P.2d 194, 199 (Mont. 1984) (prior law governing Highway Patrol officers' salary did not create vested contract rights impaired by subsequent statute repealing prior law and effectively reducing officer's expected compensation). Absent a binding contract, an employee's right to compensation vests only after the required services for a pay period are performed, and "the government may alter the salary of a public employee prospectively, prior to the vesting of the salary right." *Id.* at 199-200. See also **Abbott v. City of Tempe**, 129 Ariz. 273, 279, 630 P.2d 569, 575 (Ct. App. 1981) (ordinance providing for certain holiday and vacation pay benefits did not limit power of city to prospectively reduce or modify non-vested benefits); **Keeling v. City of Grand Junction**, 689 P.2d 679, 680 (Colo. Ct. App. 1984) (because salaries fixed by one city council are subject to change by subsequent councils and receipt of salary was contingent on continued employment with city, public employees did not have a vested contractual right in continuance of particular rate or method of compensation); **Grants v. Nellius**, 377 A.2d 354 (Del. 1977) (legislature could rescind statutory cost-of-living salary supplement not designed to compensate state employees for past services rendered or to induce individuals to enter and remain in public service).

We believe these principles apply to the actions of a county commission in changing the hours of elected county officials' employees. Unless the employees can show that their hours were bargained for as part of an employment contract or that their right to a 35

hour work week otherwise had vested, we conclude the county commission may use its discretion to set employee hours prospectively without being restricted by the preexisting policy, even if it arguably affects the employees' compensation. Cf. **State ex rel. Coll v. Carruthers**, 107 N.M. 439, 447, 759 P.2d 1380, 1833 (1988) (Legislature had no authority to alter terms of existing employment contracts between the health and education department and mental health providers); **Hayner v. Board of Comm'rs**, 29 N.M. 311, 313, 222 P. 657, 658 (1924) (there was no vested right to have statute providing for a bounty on specified animals continued in force in the future, but bounty already earned by performing conditions stipulated in the statute held secured against legislative invasion).¹

4. In general, the board of county commissioners controls county finances. Counties and other political subdivisions annually submit a budget for approval of the Local Government Division of the Department of Finance and Administration. NMSA 1978, § 6-6-2 (Repl. Pamp. 1987). Once approved, the budget is binding on all officials and governing authorities. Id. § 6-6-6. See also NMSA 1978, § 4-44-31 (Repl. Pamp. 1984) (expenditures from county general fund allowed only in accordance with approved budget). The county board also is charged with settling the county's accounts and allowing accounts chargeable against the county, NMSA 1978, § 4-38-16 (Repl. Pamp. 1984), and with levying taxes for general county purposes, including officer and employee salaries. Id. § 4-38-17.

As noted, the board of county commissioners is authorized to set salaries for all county employees, including those employed by other elected officials, and thus has the opportunity to control staff by adjusting the county's budget. A county board may not use its budget to control the salaries of county employees when the salaries are established by statute. AG Op. No. 65-28 (1965) (county board could not, through adjustments in its budget, eliminate deputy treasurer or assessor, or create part-time positions, when a salary was provided by law for those employees). Current provisions, however, only set forth the salaries of county officers. NMSA 1978, §§ 4-44-4 to -14 (Repl. Pamp. 1984 & Cum. Supp. 1989). Thus, no statute controls a county commission's discretion to affect staffing by setting employee salaries.²

Again, in exercising its discretion over salaries, a county commission may not act arbitrarily. See **Sarpy County Pub. Employees Ass'n v. County of Sarpy**, 220 Neb. 431, 435, 370 N.W.2d 495, 498 (1985) (county board may not act arbitrarily in exercising its authority to approve employee salaries set by elected officials). Cf. **City of Roswell v. Mitchell**, 56 N.M. 201, 242 P.2d 493 (1952) (policy of installing parking meters is a matter solely for the city, unless it has acted arbitrarily or fraudulently); **Oliver v. Board of Trustees**, 35 N.M. 477, 1 P.2d 116 (1931) (actions of town board in matters submitted to its discretion are conclusive, absent a showing of fraud or conduct so arbitrary as to be the equivalent of fraud). In a case involving a county commission's discretion to refuse to hire employees requested by the county sheriff, Colorado's highest court held that the commission's refusal was justified when the sheriff's request could not be reasonably accommodated within the budget. **Tihnovich v. Williams**, 196 Colo. 144, 582 P.2d 1051 (1978) (en banc). According to the court, pertinent

considerations guiding a county commission in approving additional employees or salary increases for employees of county officials include "the amount of revenue available, the needs of other county departments and the ability of the county's taxpayers to fund additional requests, as well as the requesting department's need for the expenditures." 196 Colo. at 151, 582 P.2d at 1056. Unless the commission, in light of all the circumstances, abuses its discretion by acting arbitrarily or unreasonably in deciding on salary increases or additional employees, its decision will be upheld. *Id.*

Accordingly, we conclude that, though a county commission has the authority to control staff of elected officials to some extent through the budget, it must act reasonably in light of other demands on the budget and the needs of the officials.

5. We found nothing in the statutes requiring a county board to pay attorneys fees to employees who sue the county in a dispute over employment terms. Under pertinent provisions regarding litigation in which a county is interested, the district attorney is required to represent the county, except that the board of county commissioners is authorized to contract with private counsel to represent the county in civil matters. NMSA 1978, § 36-1-19 (Cum. Supp. 1989). Unless covered by insurance, the Tort Claims Act requires a county to provide a defense, including attorneys fees, for public employees when liability is sought for torts or any violation of property rights or rights secured by federal or New Mexico law allegedly committed by the employee acting within the scope of his duties. NMSA 1978, § 41-4-4(B) (Repl. Pamp. 1989). These statutes do not require that the county provide legal representation for persons who file suit against the county or county commission or reimburse those persons for amounts spent to obtain counsel. Cf. **Johnson v. Board of County Comm'rs**, 676 P.2d 1263 (Colo. Ct. App. 1984) (award of attorneys fees to county sheriff, deputies and employees in dispute with county board over overtime compensation denied absent statute providing for county to pay costs of litigation instituted by the sheriff).

In general, absent a statute or court rule, each party to a lawsuit must pay its own attorneys fees. **McClain Co. v. Page & Wirtz Constr. Co.**, 102 N.M. 284, 285, 694 P.2d 1349, 1350 (1985); **Martinez v. Martinez**, 101 N.M. 88, 93, 678 P.2d 1163, 1168 (1984). Because there is no provision authorizing or requiring a county to pay attorneys fees for county officials and their employees in litigation against the county, we conclude that the county need not provide funds for that purpose.

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GENERAL FOOTNOTES

[n1](#) The county board's position that county officials' employees should work an eight hour day seemingly is supported by the state constitution which provides: "Eight hours shall constitute a day's work in all cases of employment by and on behalf of the state or any county or municipality thereof." N.M. Const. art. XX, § 19. The New Mexico

Supreme Court, however, has determined that this provision is not self-executing, but requires legislation to give it effect. **Jaramillo v. City of Albuquerque**, 64 N.M. 427, 329 P.2d 626 (1958) (affirming judgment that art. XX, § 19 alone did not prevent city employees from working 10 hours a day for four days each week). There is no statute governing county employee hours, and absent legislation, art. XX, § 19 is simply "a declaration of principle or policy as to the number of hours employees of the class named should work to be entitled to a day's wages." 64 N.M. at 430, 329 P.2d at 628. See also AG Op. No. 67-89 (1967) (there is no specific requirement, either constitutional or statutory, requiring that state employees work eight hour day). Cf. **Greub v. Firth**, 717 P.2d 323 (Wyo. 1986) (where statute stated that 40 hours per week constituted a lawful week's work, full-time county employees were not entitled to additional compensation when their hours were raised from 35 to 40 hours per week). But see **Cyr v. Board of County Comm'rs**, 780 P.2d 986, 989 (Wyo. 1989) (statute establishing 40 hour week merely stated standard interval of full-time employment and did not prohibit employment contracts which set a different interval as full-time employment).

[n2](#) A county board's authority to adjust salaries is limited by N.M. Const. Art. IV, § 27, which prohibits laws giving retroactive salary increases to public officers and employees and proscribes increases and decreases in officers' compensation during their terms of office. See, e.g., AG Op. No. 87-5 (1987) (city council members serving during the term in which an ordinance is passed increasing councilors' salaries may not benefit from the increase during that term even if they personally undertake extra duties while in office); AG Op. No. 62-28 (1962) (public employee pay increases cannot be granted for services already rendered).