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Office of the Arizona Attorney General

January 7, 1999
Re: I99-001(R99-001)

Question Presented

At the November 3, 1998, general election, Arizona's electorate passed Proposition 302, which contained the following language proposed by the Commission on Salaries for Elected State Officers:

Each state legislator shall be paid \$24,000 per annum, and as further compensation, per diem reimbursement commensurate with and as provided by law for non-elective Arizona state employees.

On January 6, 1999, you requested a formal legal opinion on the effect of the payment provisions in Proposition 302. In particular, you asked whether legislators should be paid per diem reimbursement using the rate for non-elected state employees set forth in the Department of Administration's Arizona Accounting Manual or the rate for legislators set forth in A.R.S. § 41-1104.

Summary Answer

When the Commission on Salaries for Elective State Officers ("Commission") recommended changing legislative "*per diem*" rates, it acted beyond its statutory power to recommend changing legislative "*salaries*." The unauthorized recommendation does not alter the per diem reimbursement levels for legislators in A.R.S. § 41-1104. Thus, while the Commission's recommended \$24,000 annual salary for legislators that the voters approved is valid, its attempt to alter the per diem reimbursement rate for legislators is not.

Background

The Arizona Constitution originally stated that "[u]ntil otherwise provided by law, members of the Legislature shall receive seven dollars per day They shall also receive mileage one way, by the shortest practicable route, at the rate of twenty cents per mile." Former ARIZ. CONST. art. 4, pt. 2, § 22. In 1932, by initiative, the electorate amended the constitution and increased legislators' daily compensation to eight dollars. *See* Historical Note, ARIZ. CONST. art. 4, pt. 2, § 1. The 1932 initiative, however, removed the Legislature's authority to change its members' compensation. Former ARIZ. CONST. art. 4, pt. 2, § 1.

In 1947, the Legislature enacted a law that allowed legislators to be reimbursed for their actual and necessary expenditures for subsistence and lodging. *See Earhart v. Frohmiller*, 65 Ariz. 221, 178 P.2d 436 (1947). This reimbursement law was challenged as being an increase in compensation in violation of the Constitution. *Id.* The Arizona Supreme Court upheld the law, concluding that reimbursement for expenditures fell outside the 1932 ban prohibiting the Legislature from changing its "compensation" or "salary." *Id.* at 226, 178 P.2d at 438.

In 1958, the Legislature placed on the ballot, and the people approved, an amendment to the Arizona Constitution that provided for an annual legislative "salary of one thousand eight hundred dollars as compensation for services" Former ARIZ. CONST. art. 4, pt.2, § 1, ¶(2)(a). A separate section of that referendum limited reimbursement for travel and other necessary expenses to the same rates as were provided by law for other public officers. *Id.* at ¶ 2(b).

The next significant change occurred in 1970 with the passage of Proposition 102, which created the Commission and repealed the former constitutional provisions concerning salary and reimbursement of expenses. ARIZ. CONST. art. 5, § 12. That section and A.R.S. § 41-1904 authorized the Commission to recommend "legislative salaries" that are to be submitted to qualified electors at the next general election

after each salary recommendation is made. Legislative reimbursement continued to be governed by then A.R.S. § 41-1103(1968)(later renumbered as A.R.S. § 41-1104).

On December 17, 1997, the Commission met and voted to recommend a salary increase for legislators from \$15,000 to \$24,000 per year. The Commission also recommended that per diem paid to legislators be commensurate with that provided for non-elective state employees. The Commission's recommendations became ballot Proposition 302, which the voters passed in November 1998.

Analysis

1. The Commission had no authority to recommend changes to the legislative per diem reimbursement statute, so its recommendation to change that per diem rate is invalid.

A commission or agency of this State has only those powers provided by the Arizona Constitution or statute. *Kendall v. Malcolm*, 98 Ariz. 329, 334, 404 P.2d 414, 417 (1965). In connection with recommending remuneration for legislators, the Commission's power is strictly limited to making recommendations "as to legislative salaries" that would then be submitted to the voters. A.R.S. § 41-1904(D).

By the time the Commission was created in 1970, Arizona courts had distinguished between "salary" or "compensation" and "reimbursement." *See Earhart v. Frohmiller*, 65 Ariz. at 226, 178 P.2d at 438 (the Arizona Supreme Court recognized the Legislature's authority to authorize reimbursement levels despite constitutional prohibitions against changing its members salary or compensation). Additionally, the 1958 constitutional amendments treated salary and reimbursement separately. Former ARIZ. CONST. art. 4, pt. 2, §1, ¶¶(2)(a) and (2)(b). For almost thirty years following the creation of the Commission, the Legislature continued to set its own reimbursement rates. *See* 1968 Ariz. Sess. Laws ch. 180, § 2 (currently codified at A.R.S. § 41-1104). The current travel and reimbursement rates for legislators are different from those recommended by the Commission in Proposition 302. *See* A.R.S. § 41-1104.

This distinction between salary and per diem reimbursement is not unique. For example, federal and state tax laws recognize that salaries are taxable income, *Department of Revenue v. Arthur*, 153 Ariz. 1, 734 P.2d 98 (App. 1986); 26 U.S.C. § 61 (a)(1), whereas payments such as per diem that are intended to reimburse an employee for expenses incurred on behalf of the employer, are generally considered to be nontaxable. 26 U.S.C. § 62 (a)(2) and (c)(2); 1.62-2(c)(4). Similarly, large portions of A.R.S. Title 38 recognize the difference between salaries (*see* Chapter 4, Article 1 ("Salaries")) and per diem reimbursement (*see* Chapter 4, Article 2 ("Reimbursement for Expenses")).

The lengthy history distinguishing salary from reimbursement (including per diem) in Arizona leads to the conclusion that the Commission has constitutional authority to recommend *only* salary changes. The Commission has no authority to venture into other areas, such as recommending that Arizona voters approve entering treaties with foreign countries, imposing new taxes, or altering legislative per diem rates. This Office reached a similar conclusion in 1980. In Ariz. Att'y Gen. Op. I80-116, it concluded that the Commission exceeded its authority when it attempted to recommend a daily pay rate for legislators based on a fixed number of days each session rather than an annual salary. Because one of the consequences of that recommendation could have been to dictate the length of the legislative session, the Attorney General concluded that the Commission had exceeded its limited authority to set salaries. *Id.*

If an agency takes an action that is beyond its authority, the action is void. *Magma Copper Co. v. Arizona State Tax Comm'n*, 67 Ariz. 77, 86-87, 191 P.2d 169, 175 (1948). Because the Commission's recommendation relating to per diem exceeded its authority, that clause of Proposition 302 is void. Consequently, legislators should be paid per diem using the rates in effect for legislators prior to the passage

of Proposition 302; that is, using A.R.S. § 41-1104.⁽¹⁾

2. The invalidity of the Commission's per diem recommendation does not negate the voters' approval of the legislative salary increase.

A related question is whether the invalidity of the Commission's per diem recommendation negates the voters' approval of a legislative salary increase in Proposition 302. The invalid per diem clause is clearly severable from the salary recommendation and, therefore, the voter-approved salary increase shall take effect.

Under Arizona law, two provisions are severable if severance is consistent with the intent of those who created the law. *See Ruiz v. Hull*, 191 Ariz. 441, 459, 957 P.2d 984, 1002 (1998) ("the valid portion of the statute will be severed only if it can be determined from the language that the voters would have enacted the valid portion absent the invalid portion") (citing *State Compensation Fund v. Symington*, 174 Ariz. 188, 195, 848 P.2d 273, 280 (1993)). The unique manner in which Proposition 302 was developed requires review of the Commission's intent as well as the intent of the electorate to determine whether severance applies.

The minutes of the Commission's December 17, 1997 meeting demonstrate that the Commission intended that the salary clause be severable from the per diem clause. All four members present voted in favor of the salary and per diem recommendations. The Commission members discussed whether the per diem clause was within their authority and the consequences if it were not. Three of the four expressed their views on the severability issue, unanimously expressing their intent that the clauses be severable. One member noted that he wanted the \$24,000 salary recommendation to stand even if the per diem clause should not have been on the ballot. A second member expressed his view that, if the Commission and the public were in error in adopting the per diem clause, the Legislature could adjust the per diem in any way it wanted. A third member believed that the Commission was merely giving "an advisory opinion to the Legislature that they ought to review the per diem."

The only evidence of the electorate's intent is the language of the 1998 Publicity Pamphlet prepared by the Secretary of State. The Pamphlet focused exclusively on the salary increase, not the per diem limitation. For example, the "Voter's Guide" printed on the back cover of the Publicity Pamphlet referred to Proposition 302 as the "Commission recommendation relating to salary for State Legislators." It did not mention the per diem clause. Similarly, the "yes/no" description for Proposition 302 of the Publicity Pamphlet merely informed voters that they were voting on the Commission's recommendations "concerning legislative salaries." Publicity Pamphlet at 159. Again, it made no reference to the per diem limitation.

Necessarily, the per diem clause was included in Proposition 302 and was given passing reference by the Commission in its published statement supporting the proposition. Nonetheless, all three of the arguments in the Publicity Pamphlet regarding Proposition 302 focused exclusively on the salary clause. The arguments did not mention the per diem clause.

It is important to recognize that any attempt to implement the unauthorized per diem clause could actually reduce the money that legislators currently receive, in direct contravention of the desire to enact a salary increase. For example, as demands on the Legislature have increased in recent years, legislative leaders have found it necessary to spend more time working at the Legislature than ever before. Several times in this decade legislative leaders received annual per diem amounts in excess of \$9,000, the amount of the voter-approved salary increase, because of the heavy demands on their time. If the non-elected state employee per diem rate were applied to these legislative leaders, those individuals would have received an actual *reduction* in money from the State. The voters did not intend this result when they passed Proposition 302.

Proposition 302 had its origins with the Commission. The commissioners were the architects of the language and intended that the salary increase be allowed to stand even if the per diem clause were invalid. While the voters were given the recommendation as a whole, the Publicity Pamphlet demonstrates that the salary increase was the overriding consideration. Under these circumstances, the invalid per diem restriction must be severed from Proposition 302, allowing the salary increase, alone, to take effect.

Conclusion

The voters approved Proposition 302 effective at the beginning of the next regular legislative session. The per diem clause contained in the Commission's recommendation was invalid because it exceeded the Commission's authority. Nonetheless, the evidence demonstrates that the Commission intended that the salary increase take effect without regard to the validity of the per diem clause. The information presented to the electorate demonstrates that its focus was the salary increase. For all of these reasons, the legislative salary increase is valid, but the attempt to alter legislative per diem reimbursement is not. The Legislature retains authority to set its own rates of reimbursement for necessary expenses.

¹ The recent enactment of Proposition 105 does not alter this conclusion. Proposition 105 bars the Legislature from repealing an *initiative or referendum* measure passed by a majority of the voters and from most modifications of such measures. Proposition 105, however, does not apply to Commission recommendations under art. 5, § 12 of the constitution. By its terms, Proposition 105 only affects initiative and referendum matters enacted pursuant to art. 4, pt. 1, § 1 of the constitution.

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