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Attorney General Bob Ferguson

COUNTIES—CHARTERS—ELECTIONS—ATTORNEY, PROSECUTING—Authority Of Counties To Provide By Charter For The Prosecuting Attorney To Be Elected As A Nonpartisan Office

Article XI, section 4 of the Washington Constitution does not prohibit a county from providing in its charter for the election of the prosecuting attorney as a nonpartisan office.

November 4, 2015

The Honorable Mark B. Nichols Prosecuting Attorney
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Cite As:
AGO 2015 No. 6

Dear Prosecutor Nichols:

By letter previously acknowledged, you have requested our opinion on the following question:

> **May a county operating under the home rule form of government convert the Office of County Prosecuting Attorney from partisan to nonpartisan by charter?**

BRIEF ANSWER

Yes, home rule counties have wide latitude in structuring their government in their home rule charters and have statutory authority to designate county positions as nonpartisan.

ANALYSIS

Washington counties can choose whether to govern under a standardized commission form of government or under a home rule charter, which allows the county to create its own form

of government. The home rule approach is authorized by article XI, section 4 of the Washington Constitution, as amended by Amendment 21 and approved by the voters in 1948. Under the home rule approach, a county adopts a charter "for its own government subject to the Constitution and laws of this state[.]" Const. art. XI, § 4. The home rule amendment "expressed the intent of the people of this state to have 'the right to conduct their purely local affairs without

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supervision by the State, so long as they abided by the provisions of the constitution and did not run counter to considerations of public policy of broad concern, expressed in general laws.'" *Henry v. Thorne*, 92 Wn.2d 878, 881, 602 P.2d 354 (1979) (quoting *State ex rel. Carroll v. King County*, 78 Wn.2d 452, 457-58, 474 P.2d 877 (1970)).

Counties have wide latitude in adopting home rule charters, subject to specific limitations in article XI, section 4, which specify that the positions of prosecuting attorney, the county superintendent of schools, judges of the superior court, and justices of the peace are to be treated differently from other positions in three respects.[1] First, the home rule charter cannot "affect the election" of those positions. Second, the terms of those elective officers do not terminate at the time of the adoption of a home rule charter, in contrast to all other county elective officers. And third, the powers, authorities, and duties granted to and imposed on county officers by general law, which vest in the county legislative authority unless expressly vested in specific officers by the home rule charter, specifically do not include those powers, authorities, and duties vested in the prosecuting attorney, the county superintendent of schools, and the judges of the superior court and justices of the peace.

In construing these limitations, our office has previously opined that "counties lack the power to alter or diminish the authority of the prosecuting attorney through the home rule charter process" and that "[t]he prosecuting attorney in a home rule county thus enjoys the same statutory and constitutional authority as prosecuting attorneys in noncharter counties." AGO 1986 No. 1, at 6. In that opinion, we were asked whether the legislative authority of a home rule county could condition its appropriation to the prosecuting attorney's office on a particular allocation of resources within that office. We answered the question in the qualified affirmative, concluding that the "delicate balance" between the county legislative authority's budget powers and the prosecuting attorney's independent discretion means that both offices must exercise their discretion to respect the others' powers and not eliminate the others' prerogatives.

We are now asked whether home rule counties may convert the office of prosecuting attorney from partisan to nonpartisan. "Partisan office" is defined by statute as a "public office for which a candidate may indicate a political party preference on his or her declaration of candidacy and have that preference appear on the primary and general election ballot in conjunction with his or her name." RCW 29A.04.110. This statute specifies that the following are partisan offices:

(1) United States senator and United States representative;

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(2) All state offices, including legislative, except (a) judicial offices and (b) the office of superintendent of public instruction;

(3) All county offices except (a) judicial offices and (b) those offices for which a county home rule charter provides otherwise.

RCW 29A.04.110.

The first question we must address is whether the office of prosecuting attorney is a state or county office for purposes of RCW 29A.04.110. This is because if the office is a state office, then it must be partisan as a matter of statute. RCW 29A.04.110(2). County prosecutors have been deemed "state officers" entitled to defense and indemnification from the state when prosecuting under state criminal laws. *Whatcom County v. State*, 99 Wn. App. 237, 250, 993 P.2d 273 (2000). But in the election context, the office of prosecuting attorney is consistently treated as a county office. For example, candidates for prosecuting attorney must file their declaration of candidacy with the county auditor, not the secretary of state (*see* RCW 29A.24.070(3)), and the office of prosecuting attorney is not included in the definition of "state office" in the campaign finance and reporting laws (*see* RCW 42.17A.005(44)). It accordingly makes little sense to consider county prosecuting attorneys as state officers for this purpose.

Having concluded that the office of prosecuting attorney is a county office for purposes of our analysis, RCW 29A.04.110(3) would allow home rule counties to designate that office as nonpartisan, unless the constitution prohibits it. Therefore, the answer to your question depends on interpretation of the scope of a county's power under the home rule provisions of the state constitution.

The relevant constitutional language provides that the home rule charter shall not "affect the election of the prosecuting attorney, the county superintendent of schools, the judges of the superior court, and the justices of the peace, or the jurisdiction of the courts." Const. art. XI, § 4. The term "affect" is not defined in the constitution. In construing terms undefined in the constitution, courts apply their ordinary meaning. *Gerberding v. Munro*, 134 Wn.2d 188, 199, 949 P.2d 1366 (1998) (using a dictionary definition to construe an undefined term).[2] As relevant in this context, "affect" means "to act upon" or "to produce a material influence upon or alteration in." *Webster's Third New International Dictionary* 35 (2002).

Applying this ordinary meaning, we see two reasonable readings of this provision. The first, narrower reading would be that it simply bars county home rule charters from converting the position of county prosecutor into a non-elected, appointive position. That is, in prohibiting home rule charters from "affect[ing] the election of the prosecuting attorney" and other officers,

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article XI, section 4 prohibits changing the *elective nature* of the office. The second, broader reading is that the provision prohibits home rule charters from affecting *the election process* for prosecuting attorneys.

While both readings are plausible, our office has previously adopted the first interpretation. In a 2003 formal opinion that addressed (among other topics) whether a county could impose campaign finance restrictions on candidates for prosecutor, we wrote: "This provision simply requires that charter counties retain the office of prosecuting attorney and leave

undisturbed the elective nature of the office. The provision is not framed so broadly as to preclude all local regulations that affect the manner in which elections are conducted for the office of prosecutor so long as the county leaves the office elective." AGO 2003 No. 12, at 4.

Though the opinion cited no authority for this proposition, we have found nothing that would convince us to change our view. In particular, the legislative history of Amendment 21, which added this provision, contains no indication one way or the other about the framers' intent. Voters' Pamphlet 29-32 (1948). Additionally, in at least two cases our state Supreme Court has considered county charter provisions that at least arguably would have implicated this clause under the broader reading, one that changed elections for county offices to odd-numbered years (*Carroll*, 78 Wn.2d 452) and one that imposed new rules for elections to fill vacancies in county offices (*Henry*, 92 Wn.2d 878). Yet the Court never discussed the potential conflict between these changes and this clause. While the lack of discussion is certainly not a holding, it indicates that the Court did not consider the broader reading of this language obviously correct.

In short, because of our office's prior interpretation and the lack of any evidence that would prompt us to revisit it, we continue to conclude that the requirement that a charter "shall not affect the election of the prosecuting attorney" (Const. art. XI, § 4) "simply requires that charter counties retain the office of prosecuting attorney and leave undisturbed the elective nature of the office." AGO 2003 No. 12, at 4.

Given this conclusion, the answer to your question becomes quite simple. Because changing the position of prosecuting attorney from partisan to nonpartisan would not disturb "the elective nature of the office" (AGO 2003 No. 12, at 4), we believe that such a change complies with article XI, section 4.

In an abundance of caution (in case a court ever adopts the broader reading), however, we will also consider how this proposal would fare under the broader reading of this language. Ultimately, though we think it is a closer question, we reach the same result: we see no conflict with article XI, section 4.

To assess whether designating the office of prosecuting attorney as nonpartisan would "affect the election" in the broader sense of affecting the election process, we consider the differences between elections of partisan and nonpartisan offices. In doing so, we ask whether making the position nonpartisan would "act upon" or "materially influence" the manner in which the county prosecutor is elected.

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The most significant difference between the election of partisan and nonpartisan offices arises in the primary. Under Washington's top-two primary system, an election for a partisan office must be preceded by a primary, from which the top two candidates will be certified to appear on the general election ballot. RCW 29A.52.112(2).[3] The party preference appears on the primary and general election ballots, but only if the candidate expresses a party preference. RCW 29A.52.112(4). For nonpartisan elections, a primary is only required if more than two candidates file for the position. RCW 29A.52.220.

We acknowledge that a candidate's indication of a party preference may affect how the

candidates campaign and how voters perceive the candidates. But, it does not rise to the level of affecting the election because there is so little difference in how elections are conducted for partisan and nonpartisan offices under the top-two primary system. This is largely because, in Washington, the primary is not used to choose party nominees. “The top two candidates from the primary election proceed to the general election regardless of their party preferences.” *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 453 (2008).

Similarly, the small differences in when a primary is, or is not, conducted have little practical effect on the election. By way of example, if there are three candidates for a partisan position, the primary would be held and the top two candidates would proceed to the general election, regardless of party preference. If there are three candidates for a nonpartisan position, the primary would be held and the top two candidates would proceed to the general election. The difference would arise only if there were two candidates for a position; in that case, a primary would be held for a partisan position, but not for a nonpartisan position. But we conclude that this difference is too small and uncertain to “materially” affect the manner of conducting the election. Whether a primary occurs or not, the same two candidates would be competing for election. *Cf. Carlson v. San Juan County*, 183 Wn. App. 354, 370, 333 P.3d 511 (2014) (observing that all regulations of elections “affect” voting in some way, but not all are subject to stringent review).

While it is theoretically possible that a court could construe article XI, section 4 to preclude charters from having *any* effect at all upon the election of the prosecuting attorney, we think that is highly unlikely. Such reasoning would conflict with the courts’ recognition of the broad authority of counties to formulate their own local governments through their locally-developed charters. *See Henry*, 92 Wn.2d at 881 (noting broad authority of counties to tailor their local affairs to charters); *see also Carroll*, 78 Wn.2d at 457-58 (same); *Carlson*, 183 Wn. App. at 368 (same). It would also call into question any number of small changes a county might make in its election process, from the form of its ballots to (formerly) the location of polling places or (currently) ballot drop boxes.

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We also considered that the process for filling vacancies in partisan and nonpartisan offices differs under article II, section 15. That provision requires vacancies in partisan county elective office to be filled by appointment by the county legislative authority from a list of names nominated by the county central committee of the party. In contrast, no such requirement exists for filling the vacancies of nonpartisan elected officers. While these are real differences in how vacant positions are filled for partisan and nonpartisan positions, we also conclude that they do not amount to “affect[ing] the election” of those positions. *Cf. Henry*, 92 Wn.2d at 881-82 (“The constitution does not express any public policy that would require counties to adopt a uniform approach to filling” vacancies in “offices that concern only the residents of a county.”).

Finally, our analysis under this broader reading is limited to Washington’s current system for conducting partisan and nonpartisan primaries and elections. Under a broader reading, article XI, section 4 invites a comparison between the general law and the terms of a county charter. If the general law changed, the analysis of whether the county charter complies with article XI, section 4 under the broader reading could change as well.

We trust that the foregoing will be useful to you.

ROBERT W. FERGUSON
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[1] Two of the four listed offices no longer exist, at least in the same form and under the same name. The former office of "county superintendent of schools" has been replaced by a system of "educational service districts." See Laws of 1969, 1st Ex. Sess., ch. 176, § 1 (enacting what is now RCW 28A.310.010, and explaining the transition from county superintendents of schools). The former office of justice of the peace has been replaced with a system of district courts, and by statute all references to justices of the peace are construed as references to district judges. RCW 3.30.010.

[2] Article XI, section 4 was amended in 1948. Const. amend. 21. Accordingly, there can be no issue of a need to turn to a nineteenth century dictionary to construe the word "affect." See State ex rel. Gallwey v. Grimm, 146 Wn.2d 445, 460, 48 P.3d 274 (2002) (cautioning against the use of anachronistic definitions).

[3] For an election to fill the unexpired term of a single county partisan office, the primary requirement does not apply if only one candidate has filed for the position. RCW 29A.52.112(2).