

## Opinion No. 54-6048

December 3, 1954

**BY:** RICHARD H. ROBINSON, Attorney General

**TO:** Mr. Robert D. Castner State Auditor Santa Fe, New Mexico

{\*520} In your letter dated November 23, 1954, you refer to the Director of Civilian Defense who has been hospitalized for several months and has been unable to attend to the duties of his office during that period, and you also refer to Public Service Commissioner Leroy Liebrand who was injured in an automobile accident July 9, 1954 and since that time has been unable to perform the duties of his office. You inquire whether it is legal to pay the salaries of these officials during the time of their illness and incapacity. You refer specifically to the Personnel Classification Plan and its regulations relative to vacation and sick leave and inquire as to the legality of payments in excess thereof.

The Personnel Classification Plan only applies to employees relative to vacations and sick leave and would not necessarily apply to public officers, as distinguished from employees. Section 41-812 of the 1941 Compilation, pocket supplement, provides as follows:

"Except in the case of payments covering lawful vacation periods and absences from employment because of sickness, any person who receives payment, or any person who makes payment or causes payment to be made from public money where such payment purports to be for wages, salary, or other return for personal services and where such personal services have not in fact been rendered, shall be guilty of a felony and shall be punished by a fine of not less than one thousand dollars (\$ 1,000.00) nor more than five thousand dollars (\$ 5,000.00) or {\*521} by imprisonment for not less than one (1) year nor more than two (2) years, or by both such fine and imprisonment."

It is apparent that absence from employment because of sickness is excepted from the criminal provisions of this section, and unless there is some other prohibition against payment of salary during a period of illness, the salary may legally be paid.

Since public officers, of which the Public Service Commissioner and the Director of Civilian Defense may be classified, are not specifically covered by the Personnel Classification Plan regulations, we must look to the general law to determine under what circumstances their salary may be paid. In 43 Am. Jur., "Public Officers", Section 379, this language appears:

"And it is the purpose of the law that the incumbent of an office shall devote his personal attention to the duties of the office to which he is appointed or elected. But this does not mean that he shall lose his title to the office or his right to the emoluments or salary connected with it because he may be absent or away from the office for a short,

occasional, or even a protracted, period of time and does not during such period of time personally give his time and attention to the duties of the office. This is true whether he is absent from office through illness or upon purely personal business, and even though during his absence the duties of the office devolve upon another officer who by law is entitled to compensation for performing them."

It is thus apparent that the two public officers mentioned in your letter are legally entitled to their salary even though due to illness they have been unable to perform any services. Whether or not such officers should accept the salary under such circumstances is a matter of policy for the officer and the administration to decide.

By: C. C. McCulloh

Assist. Attorney General