

Opinion No. 55-6121

March 3, 1955

BY: RICHARD H. ROBINSON, Attorney General

TO: D. M. Smith, Jr., State Comptroller, Santa Fe, New Mexico

In your letter dated February 23, 1955, you enclose a letter from the County Clerk of San Miguel County and request our opinion concerning the questions submitted therein regarding county employees' pay for annual leave that may be accumulated and also regarding vacation pay to employees who forego their vacation due to the urgency and amount of work, such pay presumably to be in addition to their regular salary.

There seems to be no doubt but what county, as well as state employees are entitled to annual leave or vacations and in the case of state employees the vacation period is fixed by regulation of the State Comptroller and is twelve working days annually. Since the boards of county commissioners are given control and management of financial matters in the counties, it is presumed that they could also fix the same vacation period.

§ 9-9-10, 1953 Comp., recognizes that all public employees are entitled to vacation time by authorizing fifteen days military leave for service in the National Guard, etc., in addition to vacation time with pay to which such employees are otherwise entitled. § 40-8-12, 1953 Comp., prohibits payment of public money for salaries where personal services have not been rendered and excepts payments covering lawful vacation periods.

§ 15-43-4, 1953 Comp., fixes salaries of county officers and maximum limits of salaries to a deputy or deputies. Since the salaries of elective county officers may not be increased during their term, they could not be paid an additional amount for their lawful vacation period which they elected not to take, otherwise such payments would amount to an increase in their salary which is prohibited under the Constitution.

Likewise, if the total amount authorized for deputies salaries is being paid to the deputies, they could not exceed that amount although they might waive their vacation period and work an additional time in the office.

If the total amount authorized by law is not being used for deputies' salaries, an additional amount could be paid for work performed during and in lieu of a vacation period not to exceed the amount authorized. Employees of counties other than officers or deputies may also be paid for such work when funds therefor are available within the budget.

Under § 11-6-6, 1953 Comp., commonly called the Bateman Act, funds belonging to a current year may not be used for any other purpose than paying current expenses of that year. Therefore, vacation time could not be accumulated beyond the current year

and be paid for out of the succeeding year's budget. It is thus apparent that county officer and employees are entitled to a lawful vacation period, but if they waive the same and elect to work during their vacation period county officers may not be paid an additional amount for such work and deputies who are receiving the full amount authorized by statute may not be paid an additional amount for such work due to the limitation in the salary act. Such persons are, therefore, required to take their annual vacations with pay during each current year.

By C. C. McCulloh

Assistant Attorney General