

Opinion No. 63-84

July 17, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

TO: TO: Mr. John W. Gott Director Department of Finance and Administration Santa Fe, New Mexico

QUESTION

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Where a justice of the peace has failed to account for money owing the state, what procedures should be taken to suspend or remove the officer from his position?

CONCLUSION

See analysis.

OPINION

{*182} ANALYSIS

The question you have posed may be answered in two ways. Laws of New Mexico 1963, Chapter 300, Section 16, effective July 1, 1963, specifically provides for the removal of a justice of the peace; whereas, prior to July 1, 1963, he could only be removed or suspended under the statutory provisions for removal or suspension of public officers. (See §§ 5-3-1 through 5-3-31, N.M.S.A., 1953 Compilation).

Laws 1963, Chapter 300, Section 19, amends Section 36-19-22, N.M.S.A., 1953 Compilation (P.S.) to read, in part:

"A. Each justice of the peace **shall** file a standardized monthly report with the director of the administrative office of the courts not later than the date each month established by regulation of the director. The report shall itemize all fines, fees, forfeitures, costs and public money received and disbursed by him during the previous month, or indicate that none was received or disbursed. . ." (Emphasis supplied)

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"C. . . . The **director** shall enforce the laws relating to administration of courts of justices of the peace and the attorney general shall investigate and assist him whenever requested to do so." (Emphasis supplied)

Sub-section A partially quoted above makes it clear that a justice of the peace is required to account regularly for moneys owing the State. It is now well settled that the word "shall" generally means "must" and is not merely permissive in nature. See **In Re Armijo's Will**, 57 N.M. 649, 261 P. 2d 833 (1953); Attorney General's Opinion No. 59-193 dated November 23, 1959.

Laws 1953, Chapter 300, Section 20, amends Section 36-19-24, N.M.S.A., 1953 Compilation (P.S.) and provides for monthly remittances:

"Each justice of the peace shall pay to the director of the administrative office of the courts, not later than the date of each month established by regulation of the director, the amount of all fines and costs imposed and forfeitures collected by him during the previous month in criminal cases and the amount of all costs collected {^{*183}} by him during the previous month in civil cases . . . Not later than the last day of each month, the director of the administrative office of the courts shall remit to the state treasurer for credit to the current school fund of the state the amount of all fines and forfeitures received from justices of the peace."

From the foregoing it is clear that justices of the peace must submit a monthly report and must remit to the court administrator on a monthly basis all fines, costs and forfeitures collected. Note the language in the Sections quoted: ". . . not later than the date of each month established by regulation of the director. . ." Section 16, Chapter 300, Laws 1963, repealing and replacing Section 36-19-19, 1953 Compilation, provides:

"The director of the administrative office of the courts may promulgate and enforce regulations with respect to supervision and administration of justices of the peace. Any justice of the peace who violates any regulation promulgated by the director is guilty of a misdemeanor and shall be fined not more than one thousand dollars (\$ 1,000) and removed from office."

Thus, after July 1, 1963, if a justice of the peace violates the director's regulation regarding due date for submission of standardized monthly reports and monthly remittances, and the director's finding that he violated the regulation is judicially upheld in removal procedures provided in §§ 5-3-1 through 5-3-21 and § 5-3-31, N.M.S.A., 1953 Compilation, Section 36-19-9, *supra*, provides that he **is** guilty of a misdemeanor and shall be fined **and** removed from office. Although, the language of § 36-19-19, *supra*, (being Laws 1963, Ch. 300, § 16) seems to say that if the director finds that a justice of the peace has violated a regulation the director has promulgated, the justice of the peace would be guilty and removed from office automatically, Section 5-3-31, N.M.S.A., 1953 Compilation must be considered. That Section provides that no precinct officer (among other classifications of public officers) can be removed from office in any manner except according to the provisions of Sections 5-3-1 thru 5-3-31 N.M.S.A., 1953 Compilation, which provide for judicial hearing. See Sections 5-3-5 through 5-3-21, *supra*, for removal procedure and Sections 5-3-22 through 5-3-30, *supra*, for suspension procedure.

Section 36-19-23, N.M.S.A., 1953 Compilation (P.S.) also provides a separate penalty for failure to comply with Laws 1963, Chapter 300, Section 19, amending Section 36-19-22, N.M.S.A., 1953 Compilation (P.S.), regarding the submission of standardized monthly reports. Section 36-19-23, *supra*, provides:

"Any justice of the peace who fails to comply with the provisions of the preceding Section (36-19-22) is guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than five hundred dollars (\$ 500) nor less than fifty dollars (\$ 50.00) or by imprisonment in the county jail not more than ninety (90) days nor less than thirty (30) days, or by both fine and imprisonment in the discretion of the judge."

Thus, if a justice of the peace fails to submit his standardized monthly report, he is liable to be found in violation of two statutory sections and subject to fine and imprisonment under one (section 36-19-23) and fine and removal {**184*} from office under the other (section 36-19-19).

If you have in mind a specific situation which occurred or was about to occur at the time you sent in your request for opinion, the pre-July 1, 1963 procedure should be followed. You should first refer to § 5-3-3, N.M.S.A., 1953 Compilation to establish that a justice of the peace is an officer subject to removal. He is. The statute reads:

"Any county, precinct, district, city, town or village officer elected by the people, . . . may be removed from office on any of the grounds mentioned in this chapter and according to the provisions hereof."

Section 5-3-4, N.M.S.A., 1953 Compilation, calls out the causes for removal of local officers. Subsection (2) provides that a failure, neglect, or refusal to discharge the duties of office is a cause, and subsection (4) states that "failure to account for money coming into his hands as such officer" is a cause. Hence, the facts of your situation would present sufficient cause for removal.

Section 5-3-22, N.M.S.A., 1953 Compilation, provides for suspension from office if the accusation presented cannot be considered immediately in a judicial hearing.

Sections 5-3-5 through 5-3-21, N.M.S.A., 1953 Compilation, set out the mechanics of presenting and hearing a removal action; Sections 5-3-22 thru 5-3-30, *supra*, provide the suspension procedures.

Regardless of whether the situation you have described in your request arose before or after July 1, 1963, the procedures outlined in Sections 5-3-1 thru 5-3-31, N.M.S.A., 1953 Compilation, should be followed. The important change made by section 36-19-19 being Laws 1963, Chapter 300, Section 16, is that the justice of the peace **must** be removed from office if the court upholds the director's findings that the justice of the peace has violated a regulation regarding the due date for submission of reports or remittances. There is no question of guilt to be decided; if the court affirms the director's finding that the regulation was violated, the justice of the peace **is** guilty.

By: James E. Snead

Assistant Attorney General