

Opinion No. 65-28

February 10, 1965

BY: OPINION OF BOSTON E. WITT, Attorney General Roy G. Hill, Assistant Attorney General

TO: Mr. John Humphrey, Jr., Assistant District Attorney, Tenth Judicial District, Fort Sumner, New Mexico

QUESTION

QUESTIONS

1. During the fiscal year in which provision has been made in the County budget for a third class county for a deputy assessor or treasurer, can the Board of County Commissioners dispense with the services of either of these deputies or refuse to pay the salary of either of these deputies?
2. Can the Board of County Commissioners of a third class county dispense with the services of a deputy assessor or treasurer by not including a salary for such deputy in the County budget?
3. Can the Board of County Commissioners of a third class county provide for a part-time deputy assessor or treasurer by only budgeting a part of such deputy's salary as set by law?

CONCLUSIONS

1. No.
2. No.
3. No.

OPINION

{*50} ANALYSIS

Your first question is answered, I believe, by a decision of our Supreme Court. **Taylor v. Board of Comm'rs of Union County**, 44 N.M. 605, 107 P. 2d 121. In that case the Board of County Commissioners, hereafter referred to as the Board, enforced a reduction in the salary of a duly appointed, qualified and acting deputy county clerk. His salary was \$ 125 per month and was budgeted at \$ 1500 per year. Union County was a second class county and the following provisions covered the salaries in question:

"Upon the basis of the foregoing classification, the annual salaries of the county officers in the several counties of the state, for the terms for which such officers were elected, are hereby fixed as follows. . . .

"Counties of the Second Class. . . . County Clerk, Twenty-two hundred dollars, and fifteen hundred dollars additional for a deputy or deputies. Sec. 33-32-2, N.M. Sts. 1929."

The Supreme Court said it knew of no authority in the Board to demand and enforce a reduction in salary even with the consent and assistance of the clerk. The Court noted that the only discretion in the clerk was to use the funds provided to employ one or more deputies. And, the Court further concluded that the Board was not authorized to change appellee's {51} salary except as provided by law. The Court here had reference to the Bateman Act, Ch. 42, Laws 1897, presently found at Sections 11-6-6 through 11-6-12, N.M.S.A., 1953 Compilation and certain sections that are compiled today as Sections 15-43-20 and 15-43-25, N.M.S.A., 1953 Compilation.

With the exception of a change in the section number referred to, the Bateman Act reads the same now as when the above case was decided. It provides:

"In the event that there is an insufficient amount of money collected during any current year with which to pay for the services, fees, and salaries of the several officers mentioned in section 1228 [11-6-7], then and in that event the said officers and all creditors shall receive in full payment of their respective claims each his pro rata share of the money collected, . . ."

Likewise, Sections 15-43-20 and 15-43-25, supra, remain unchanged. These provide:

"15-43-20. COUNTY SALARY FUND. -- The treasurers of the several counties in the state shall create a fund to be known and designated as the County Salary Fund, to which shall be credited all moneys received from the sources mentioned in the preceding section."

"15-43-25. SALARY FUND -- DEFICIENCY -- DISPOSITION OF SURPLUS -- Should the county salary fund at any time be insufficient to pay the salaries and expenses provided for to be paid therefrom, or any part thereof, the deficiency shall be paid from the current expense fund, which fund shall be reimbursed to the extent of any deficiency so paid as soon thereafter as funds shall be available in the county salary fund. . . ."

It should also be noted that in **Taylor v. Board of Comm'rs. of Union County**, supra, the Court said it did not need to decide whether a deputy county clerk is an officer in the constitutional sense because the Bateman Act applies to officers and creditors alike and the available salary fund should have been apportioned pro rata among all if, when supplemented by the current expense fund, there was a deficiency. This was the authorized manner of handling the deputy's salary mentioned above.

Your first question differs from the one put to the Supreme Court only because it applies to deputy treasurers and assessors instead of a deputy clerk. This difference is not significant. The pertinent sections of Section 15-43-4.6, N.M.S.A., 1953 Compilation, (P.S.) which covers salaries for third class counties read as follows:

"Based upon the classifications created and the conditions imposed by section 15-43-1 New Mexico Statutes Annotated, 1953 Compilation, the annual salaries of officers of counties of the third class are:

. . .

B. Treasurer and ex-officio tax collector, four thousand two hundred twenty-four dollars (\$ 4,224), with two thousand five hundred thirty dollars (\$ 2,530) additional for a deputy or deputies;

C. Assessor, four thousand two hundred twenty-four dollars (\$ 4,224), with two thousand five hundred thirty dollars (\$ 2,530) additional for a deputy or deputies; . . ."

Of particular importance is subsection H. of Section 15-43-4.6, supra, which reads as follows:

"In those counties of the third class wherein funds are not available within the budget after making the full five {⁵²} [5] mill levy sufficient to pay the salaries provided in this section 15-43.4.6 New Mexico Statutes Annotated, 1953 Compilation, all of such salaries shall be proportionately reduced in amounts sufficient to stay within the available funds."

This section when read in conjunction with those relied on in the **Taylor** case, supra, makes it clear that the Board of County Commissioners may not refuse to pay the salary of a deputy treasurer or deputy assessor. Subsection H quoted just above makes it imperative that all the salaries in 15-43-4.6 be proportionately reduced to stay within the available funds.

Your first question also asks if the Board of County Commissioners may dispense with the services of either of those deputies covered in question one. There is no statutory authority which would allow such action. In fact, Section 11-2-36, N.M.S.A., 1953 Compilation makes the following provisions regarding county treasurers:

". . . Hereafter the state treasurer and the treasurer of each county of this state shall each appoint a deputy treasurer, or more than one [1] if so provided by law, which deputy may be removed at the pleasure of the treasurer so appointing such deputy . . ."

There is no statute which covers so clearly the right of the assessor to do his own hiring. We do have however, Attorney General Opinion No. 59-4 (unpublished) which held that county assessors, except in second class counties, could select their own regular deputies. This position was based on the fact that Section 15-43-4.5, Subsection C.,

N.M.S.A., 1953 Compilation (P.S.) which sets the salaries for second class county assessors provides that deputies may be employed at the discretion of the Board of County Commissioners. This is also true of second class county treasurers. However, Section 15-43-4.6, N.M.S.A., 1953 Compilation (P.S.) which covers third class counties does not place the discretion to hire deputy assessors or treasurers in the Board of County Commissioners.

It is therefore our conclusion that the Board of County Commissioners does not have the authority to dispense with the services of a deputy assessor or deputy treasurer.

Your second and third questions will be considered together since they both relate to the power of the Board of County Commissioners to control the hiring of deputies through the budget. As noted above, Section 15-43-4.6, supra, defines what amounts of money may be used for deputy assessors and deputy treasurers in third class counties. As also noted above, the power to hire such deputies is within the discretion of the assessor or treasurer. Thus we have the question of whether or not the Board of County Commissioners must provide for the salaries of the deputies desired by the assessor or treasurer.

Section 15-43-20, N.M.S.A., 1953 Compilation provides that the treasurers of every county shall create a County Salary Fund. Section 15-43-21, N.M.S.A., 1953 Compilation provides as follows:

"The boards of county commissioners shall hereafter levy a tax sufficient to pay the salaries and expenses of county officers whose emoluments and expenses have heretofore been paid out of the salary fund as created by chapter 12 of the 1915 Session Laws of New Mexico [15-43-1, 15-43-2, 15-43-4, 15-43-11, 15-43-13, 15-43-16, 15-43-18 to 15-43-20, 15-43-24 to 15-43-28].

Section 15-43-24 provides in pertinent part as follows:

"Except as hereinbefore and hereinafter otherwise provided, the salaries of all county officers and the salaries {^{*53}} of deputies, as fixed by law, and the expenses, as fixed by law, shall be paid monthly out of the county salary fund, upon warrants drawn by the county commissioners, . . ."

Section 15-43-23, N.M.S.A., 1953 Compilation provides that a surplus in the salary fund shall not be transferred to any other fund but shall be transferred to the salary fund for the next year. Finally, Section 15-43-25, supra, provides that a deficiency in the salary fund shall be paid from the current expense fund.

No where do we find any authority in the Board of County Commissioners of the third class counties to control the salaries of deputy county assessors or treasurers through the budget. As concluded above the assessor and treasurer have the power to hire their deputies and Section 15-43-4.6, supra, provides what amount of money they may use. Then, from the sections covered just above we see that the Board of County

Commissioners is required to provide the funds for the County Salary Fund which shall be used to pay the salaries allowed by Section 15-43-4.6, supra. This duty is mandatory upon the County Commissioners. We must therefore conclude that the answer to both your second and third question is no.