

## **Opinion No. 67-104**

September 6, 1967

**BY:** OPINION OF BOSTON E. WITT, Attorney General

**TO:** Louis E. DePauli District Attorney Eleventh Judicial District P.O. Drawer 38 Gallup, New Mexico 87301

### **QUESTION**

#### **FACTS**

McKinley County has set up a budget item of \$ 1,000 for the use of a coroner's office and \$ 1,000 for autopsies. A representative of the medical association has advised the county that at least \$ 18,000 would be necessary to pay a coroner in McKinley County. This cost is exclusive of the cost of office personnel and the cost of autopsies which must be performed by a qualified pathologist. Since there is no qualified pathologist in the Gallup area presently, all autopsies will have to be done either in Albuquerque or Farmington which will add considerably to the cost.

#### **QUESTIONS**

1. Are the provisions of Chapter 93, Laws of 1967, mandatory?
2. If the provisions of Chapter 93, Laws of 1967, are mandatory what is a county to do if it cannot find the necessary funds to provide for the office of coroner?

#### **CONCLUSIONS**

1. See analysis.
2. See analysis.

### **OPINION**

#### **{\*152} ANALYSIS**

Chapter 93, Laws of 1967, amended Sections 15-43-43 and 36-17-5, N.M.S.A., 1953 Compilation, to provide as follows:

"15-43-43. OFFICE OF CORONER -- CREATION -- QUALIFICATION. -- The office of coroner is created in each county with a population of thirty thousand persons or more in the last federal decennial census. In any other county, the board of county commissioners shall fix the compensation and appoint a licensed physician to hold the

office of coroner for a term of two years unless removed for cause. The coroner shall take the oath prescribed for state officers before he qualifies for office."

{\*153} "36-17-5. COUNTIES HAVING CORONERS. -- Section 36-17-1 through 36-17-6 New Mexico Statutes Annotated, 1953 Compilation, do not apply in counties with a population of thirty thousand persons or more in the last federal decennial census or in any county in which the office of coroner has been created by resolution of the board of county commissioners. In these counties the office of coroner completely supersedes the function of justice of the peace to inquire into causes of deaths."

In our opinion, the above amendment to Section 15-43-43, supra, has imposed upon the boards of county commissioners of all New Mexico counties having a population of 30,000 persons or more at the last federal census and those boards of county commissioners who create the office of coroner by resolution the mandatory duty to both fix the compensation for the office of coroner and appoint a licensed physician to hold that office. We arrive at this conclusion by noting that the legislature saw fit to provide that the board of county commissioners "shall" perform these duties. The Supreme Court of New Mexico has held that the fundamental rule in interpreting statutes is that the words "shall" and "may" should not be used interchangeably but should be given their ordinary meaning, **Application of Sedillo**, 66 N.M. 267, 347 P.2d 162 (1960). We feel it is clear that the New Mexico legislature intended such a result since it used the word "may" in giving the power to create the office of coroner by resolution to boards of county commissioners in those counties with less than 30,000 population. We also note that in the last sentence of the above quoted amendment to Section 15-43-43, supra, the legislature provided that the coroner "shall" take the oath prescribed for state officers before he qualifies for office. Therefore, it is clear that the legislature intended the appointment of a licensed physician to hold the office of coroner to be a mandatory duty placed upon the aforesaid boards of county commissioners.

Having determined that boards of county commissioners of counties falling within Section 15-43-43, supra, must appoint a licensed physician to the office of coroner, we turn to the consideration of how much county money must be set aside by the board of county commissioners for the office of coroner. The Supreme Court of New Mexico held in **Taylor v. Board of Commissioners of Union County**, 44 N.M. 605, 107 P.2d 121 (1940), that the Board of County Commissioners for Union County was without authority to demand and enforce a reduction in the salary of a deputy county clerk even though it was done with the consent and assistance of the clerk. The court arrived at this conclusion by referring to Section 33-3202, New Mexico Statutes 1929 (which is presently compiled as Section 15-43-4.6, N.M.S.A., 1953 Compilation, (P.S.)). This statute sets forth the annual salary for a deputy clerk in the amount of \$ 1,500. The Supreme Court of New Mexico concluded that the salary of a deputy clerk and all other salaries of county officers enumerated in that statute expressed a legislative intent for payment of county officers and employees which intent was not subject to change by a board of county commissioners. The court also discarded the argument that if the salary of a deputy clerk had not been lowered there would not have been sufficient monies in the county treasury to pay the salaries of all county officials in that year by noting that

the Bateman Act, presently found at Sections 11-6-6 through 11-6-12, N.M.S.A., 1953 Comp., and certain sections that are compiled today as Sections 15-43-20 and 15-43-25, N.M.S.A., 1953 Comp., provided for a pro rata abatement of all county officers salaries in the event that during the fiscal year an insufficient amount of money had been collected with which to pay for the services fees and salaries of those officers.

{\*154} However, unlike the statutory salary of \$ 1,500 provided for the deputy county clerk in the **Taylor** case, we are here concerned with the office of coroner for which no statutory compensation is fixed. While the board of county commissioners has the mandatory duty of fixing the compensation for the office of coroner the statute which compels the performance of this duty in no way indicates at what level that compensation must be fixed. Therefore, we are of the opinion that the boards of county commissioners which fall within Section 15-43-43, supra, have been given the discretion to fix any compensation which they may reasonably feel to be fit and proper for the office of coroner in their county.

Therefore, if the McKinley County Board of County Commissioners has exercised its discretion in setting the compensation for the office of coroner at \$ 1,000 for the use of the coroner's office and \$ 1,000 for autopsies, it cannot be said that it has failed in its statutory duty as to the setting of compensation for the office of coroner. Furthermore, if the Board of County Commissioners from McKinley County cannot, after due diligence, find a licensed physician who will accept the appointment to the office of coroner again it cannot be said that the board has failed in its duty as set forth by Section 15-43-43, supra.

By: Paul J. Lacy

Assistant Attorney General