Opinion No. 72-55

October 12, 1972

BY: OPINION OF DAVID L. NORVELL, Attorney General Oliver E. Payne, Deputy Attorney General

TO: Mr. James L. Brandenburg, District Attorney, Second Judicial District, Bernalillo County Courthouse, Albuquerque, New Mexico

QUESTIONS

QUESTIONS

An Assistant District Attorney is assigned to represent all county officials, including the Bernalillo County Medical Center, and is paid partly from the District Attorney's budget and partly from county funds.

Is the payment by the county illegal?

CONCLUSION

No.

OPINION

*{*87}* ANALYSIS

The differing legal viewpoints which have recently been expressed on this question as reported by the news media may have arisen because the Supreme Court's decision in **Hanagan v. Board of County Comm'rs,** 64 N.M. 103, 325 P.2d 282 (1958) is not being read by everyone in the light of the pertinent statutes as they **now** exist.

The **Hanagan** case did not involve the question of cooperative hiring. The fact situation in the **Hanagan** case was that the District Attorney and one of his assistants, under a contract with the Board of County Commissioners, handled the legal matters involved in the issuance and sale of a general obligation bond issue. For their services, the Board agreed to pay them a **fee** equivalent to one percent of the proceeds of the bond issue, when and if the bonds were sold. The trial court upheld the contract and this decision was reversed by the State Supreme Court.

The Court first pointed out that Article XX, Section 9, New Mexico Constitution, provides:

"No officer of the state **who receives a salary,** shall accept or receive to his own use any compensation, fees, allowance, or emoluments for or on account of his office, in any form whatever, **except the salary provided by law."** (Emphasis added.)

The real purpose of this section was to abolish the fee system. **Delgado v. Romero,** 17 N.M. 88, 124 P. 649; **Ward v. Romero,** 17 N.M. 88, 125 P. 617. Whether a specific salary is provided for a state officer or not, the provision's purpose is achieved since in most cases he does "receive a salary" and is therefore precluded from accepting other compensation, etc. for or on account of his office.

Assuming that an assistant district attorney is a state officer within the ambit of Article XX, Section 9, **supra,** his salary is the amount agreed upon between he and his employer. Since his specific salary is not "provided by law," there is language in the **Delgado** case, **supra,** saying a presumption is created that he is donating his services. But the employer-employee agreement effectively rebuts such a presumption.

We conclude that since Article XX, Section 9, **supra,** does not set salaries or identify the sources thereof, it does not preclude a state officer from drawing his **total negotiated salary** from more than one source. If such a prohibition exists, it would have to be by virtue of a statutory provision. It does, however, prevent the contingent fee arrangement that was present in **Hanagan.**

Keep in mind that the **Hanagan** case involved the District Attorney as well as an assistant district attorney and that, then as now, the District Attorney's salary was "prescribed by law." But as to an assistant district attorney, the Court's decision turned expressly on the language contained at that time in Section 17-1-4, N.M.S.A., 1953 Comp. and thereby impliedly on the **then** salary provisions for assistants in Section 17-1-3, N.M.S.A., 1953 Comp. Section 17-1-4, **supra,** quoted by the Court in **Hanagan** then provided:

*{*88}* "No district attorney shall receive to his own use any salary, fees or emoluments other than as herein prescribed. **No other or additional allowance shall be made or paid for or on account of any assistant or assistants heretofore or hereafter appointed by any district attorney."** (Emphasis added.)

In order to understand what the Legislature meant by the underlined portion of Section 17-1-4, **supra,** it is also necessary to look at the salary provision of Section 17-1-3, **supra,** which then set forth a total figure for salaries for assistants and other personnel in the district attorney's offices. In the case of the Second Judicial District, Laws 1957, Chapter 54, Section 1, compiled as Section 17-1-3, provided in pertinent part as follows:

.. From and after July 1, 1957, the salaries of the several district attorneys **and allowances for assistants, and salaries of other personnel** in the state of New Mexico are hereby fixed as follows:

* * *

"In the second judicial district, three thousand dollars ($ 3,000) salary per annum [for the district attorney] with **seventy-six thousand one hundred dollars [$ 76,100] for three or more assistants** and other personnel . . ." (Emphasis added.)

Thus, at the time of the **Hanagan** case, an assistant district attorney could not, under Section 17-1-4, **supra,** receive any "additional allowance." He was limited by Section 17-1-3, **supra,** to the salary agreed upon with the district attorney out of the total allowed for assistant district attorney salaries in the judicial district. But, in 1968, the portion of Section 17-1-4, **supra,** underlined by us above and relied upon the the Court in the **Hanagan** case was deleted by a legislative amendment to the section, and since that time it simply reads:

"No **district attorney** shall receive to his own use any salary, fees or emoluments other than the salary and per diem and travel allowances prescribed by law." (Emphasis added.)

All reference to assistant district attorneys was omitted. In addition, Section 17-1-3, **supra,** as it existed at the time of the **Hanagan** case, was repealed in 1968 and replaced with the present section which makes no mention of assistant district attorneys' salary amounts, reading simply:

"District attorneys and their employees shall be allowed per diem and shall be reimbursed for their necessary travel expenses incurred while absent from their district headquarters upon official business, at the same rates and under the same conditions as prescribed by law or regulation of the state board of finance for state employees. These expenses shall be paid from the appropriation to the district attorney of the judicial district for which the business is transacted."

In the past, the various counties were **required** to contribute a specified sum annually to the district attorneys' offices to help in paying salaries for "juvenile attorneys, assistant district attorneys, and other personnel for the district attorney." Section 17-1-6, N.M.S.A., 1953 Comp., repealed by Laws 1957, Chapter 241, Section 1; Sections 17-1-6.1 through 17-1-9, N.M.S.A., 1953 Comp., repealed by Laws 1968, Chapter 69, Section 69; and see the 1968 amendment to Section 17-1-5, N.M.S.A., 1953 Comp., Laws 1968, Chapter 69, Section 54. While counties no longer **must** contribute to the financial operation of a district attorney's office, we do not believe there is any legal prohibition in Section 17-1-5, **supra,** or in any other statute, to the cooperative hiring of an assistant district attorney whereby his **total negotiated salary,** comes from two sources of funds, a portion from the county and a portion from the appropriation to the district attorney's office.

What emerges from our study of the long legislative history of district attorney and assistant district attorney salary provisions is a picture of confusing patchwork. Since there is every reason to believe that the 1973 Legislature will consider the district attorney salary matter for the reason pinpointed in Attorney General Opinion No. 72-45, it would be the recommendation of this office that the Legislature consider assistant

*{*89}* district attorney salary provisions at the same time so that the legislative intent will be clear.