

Opinion No. 79-33

September 20, 1979

OPINION OF: Jeff Bingaman, Attorney General

BY: Jill Z. Cooper, Deputy Attorney General

TO: Margaret W. Lamb, District Attorney, Eighth Judicial District, Post Office Drawer E,
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COUNTIES

The duties of a county clerk with respect to fiscal matters are ministerial.

QUESTIONS

Are the duties of a county clerk with respect to fiscal matters merely ministerial?

CONCLUSIONS

Yes.

ANALYSIS

This question had previously been considered in Opinion of the Attorney General No. 57-1, dated January 3, 1957, which is hereby specifically overruled. That opinion had essentially concluded that a county clerk's duties with respect to fiscal matters were more than ministerial. In particular, the opinion stated:

"The county clerk should not be allowed to claim that with reference to accounts his action is ministerial and thus allow public funds to be illegally spent. . . ."

"We are convinced that the county clerk is part of the issuing machinery for warrants. In other words the county clerk in view of these provisions has more than a name signing function with reference to the issuing of county warrants."

A reconsideration of the analysis in Opinion 57-1 requires a different conclusion.

The role of the county clerk in the disbursement of public funds is defined by the following statutes:

Section 4-40-4 NMSA 1978:

"D. to sign all orders issued by the board for the payment of money, and to record in a book to be provided for that purpose, the receipts of the county treasurer of the receipts and expenditures of the county."

Section 4-40-6 NMSA 1978:

"Such clerk shall not sign or issue any county order unless ordered by the board of commissioners authorizing the same; and every such order shall be numbered, and the date, amount and number of the same and the name of the person to whom it is issued shall be entered in a book kept by him in his office for that purpose."

Section 4-45-4 NMSA 1978:

"County orders shall be signed by the chairman and attested by the county clerk, and shall specify the nature of the claim of service for which they were issued, and the money shall be paid from the county treasurer on such orders and otherwise."

OPINION

Opinion No. 57-1, found that "[f]rom the wording of these statutes it would appear that the county {^{*80}} clerk is merely a ministerial officer." Indeed, the language in these statutes is mandatory and the clerk has no option to refuse to sign or attest orders of the board.

A ministerial act has been defined as "an act which an officer performs under a given state of facts, in a prescribed manner, in obedience to a mandate of legal authority, without regard to the exercise of his own judgment upon the propriety of the act being done." **State ex rel. Perea v. Board of Commissioners of De Baca County**, 25 N.M. 338, 340, 182 P. 865 (1919). The duties of the county clerk with regard to signing and attesting orders fall within this definition and may be fairly described as merely ministerial. The clerk is not required to exercise any judgment and has no authority to either approve or disapprove payments ordered by the board. See, e.g., **Kruse v. Lovette**, 52 Wash. 2d 215, 324 P.2d 819 (1958); compare, e.g., **Duncan Meter Corporation v. Gritsavage**, 361 Pa. 607, 65 A.2d 402 (1949).

Opinion No. 57-1 reached a contrary conclusion by relying upon **State v. Aragon**, 55 N.M. 423, 234 P.2d 358 (1951), and Section 6-6-7 NMSA 1978 to find that county clerks were responsible for the disbursement of public funds. These authorities do not, however, establish that responsibility in the office of county clerk.

State v. Aragon, supra, involved a charge against the secretary and chairman of a school board for the unlawful disbursement of school funds for services which had not been rendered. The secretary who approved the payroll and signed the warrant argued that she had not disbursed the funds. She maintained that only the county treasurer who actually paid out the money could be prosecuted under that statute. Nevertheless, the Court found that "the legislature has repeatedly treated the approval of bills and

vouchers and the issuance of warrants as a disbursement of public funds." 55 N.M. at 427. Thus, this case holds that an official is responsible for the disbursement of public funds if he either approves bills and vouchers or issues warrants. Neither of these functions are delegated to county clerks who possess only those powers expressly granted by law together with such powers as may necessarily be implied therefrom. See, e.g., **El Dorado at Santa Fe, Inc. v. Board of County Commissioners of Santa Fe County v. Central Clearing House, Inc.**, 89 N.M. 313, 551 P.2d 1360 (1976).

Section 6-6-7, **supra**, provides that:

"It shall be unlawful for the board of county commissioners, the county clerk or any other county officials authorized to make purchases to disburse, expend or obligate any sum in excess of fifty per centum [50%] of the approved budget for the fiscal year during, which the terms of office of any such official will expire. . . ."

Opinion No. 57-1 found that this provision was "meant to place an additional responsibility upon the county clerk in cases of the disbursements and expenditures of county funds, namely, the county clerk would be responsible for participating in such prohibited expenditures or disbursements by signing such warrants."

However, as county clerks are not authorized to disburse or expend public funds, the sanctions of Section 6-6-7 do not necessarily apply. Moreover, the fact that county clerks are specifically mentioned in {81} the context of these sanctions does not, in itself, constitute legislative authority for the county clerk to disburse public funds. Rather, Section 6-6-7 may be read as applying to county clerks only in the event that they, like county commissioners, were in the class of officers "authorized to make purchases."

In summary, the statutory duties of a county clerk are ministerial and are intended only to insure the regularity of county fiscal procedures. Section 4-40-4, **supra**, requires the clerk to sign orders issued by the board and record them; Section 4-40-5, **supra**, provides that a clerk shall not sign an order unless it has been ordered by the board; Section 4-45-1, **supra**, provides that before warrants can be drawn, the clerk or another officer, shall administer an oath to the payee swearing or affirming that the amount is legally owing; and Section 4-45-4, **supra**, requires that county orders shall be signed by the chairman and attested by the clerk. The language of these statutes is mandatory and county clerks have no authority to approve or disapprove payments. The legal responsibility for the disbursement of public funds vested in the board of county commissioners does not extend to county clerks. Pursuant to Section 4-38-29 NMSA 1978, only the board is held liable for the lawful expenditure of public funds.

ATTORNEY GENERAL

Jeff Bingaman, Attorney General