

Opinion No. 87-18

April 29, 1987

OPINION OF: HAL STRATTON, Attorney General

BY: Scott D. Spencer, Assistant Attorney General

TO: Honorable Stephen D. Stoddard, 326 Kimberly Lane, Los Alamos, New Mexico 87544

QUESTIONS

1. Does a county commission or county council have any general superintending authority over other elected county officials? If so, to what extent?
2. If they do not, what remedy is available to discipline these officials when they do not perform the duties of the office in an appropriate manner, even in violation of the law?

CONCLUSIONS

1. No.
2. Elected county officials who fail to perform their office's duties are subject to removal, civil suit, or criminal prosecution if they violate the law.

ANALYSIS

As a general rule, county boards pass supervisory power over county officials only when given by statute, and then only to the extent fixed by statute. See, *Kellogg v. Story County*, 253 N.W. 915, (Iowa 1934). Section 4-38-1 NMSA 1978 provides that the board of county commissioners shall exercise all of the county's powers. Pursuant to section 4-37-1 NMSA 1978 counties have the same powers as municipalities. Nowhere in state law is there a specific grant of general superintending control over elected county officials to the board of county commissioners. There are, however, specific provisions granting the board's authority over the performance of certain duties by certain elected officials.

With respect to the county assessor, the county commission has no general superintending authority over this official. The secretary of state taxation and revenue department or, if delegated, the director of the property tax division of the state taxation and revenue department has general supervisory authority over county assessors pursuant to section 7-35-3A NMSA 1978. The assessor is subject to removal if the director of the property tax division requests that the district attorney institute removal proceedings pursuant to section 4-39-6 NMSA 1978.

With respect to the county clerk, the county commission has no general superintending control over this official. The clerk has specific duties, however, that involve the board of county commissioners which are set forth in section 4-40-4 NMSA 1978. The statutory duties of county clerks are ministerial and are intended only to insure the regularity of county fiscal procedures. 1979 Opinion of the Attorney General No. 79-33. The clerk is responsible for providing the services to the county commissioners enumerated in the statutes and is subject to the general removal and suspension provisions discussed below for failure to perform his duties.

With respect to the county sheriff, the board of county commissioners exercises no general superintending authority over the person elected to this office. The county commissioners are, however, authorized to establish, by ordinance, a merit system for the hiring, promotion, discharge, and general regulation of the deputies and the employees of the county sheriff's office pursuant to section 4-41-6 NMSA 1978. That ordinance may, in the discretion of the board of county commissioners, provide for the classification of deputies and other employees, for their probationary periods, service ratings, pay scales, and ranges, for the number of hours of work per week; and for the methods of employment, promotion, demotion, and discharge of such deputies and employees. Sheriffs have the power to appoint deputies who shall remain in office at the pleasure of such sheriffs, except where the county has adopted an ordinance. Even in counties where such ordinances have been adopted, the undersheriff and executive secretary are exempt from the provisions of that ordinance pursuant to section 4-41-5 NMSA 1978. We do not construe that section to allow county commissioners to exercise superintending control over deputy sheriffs other than general regulation with respect to their employment. The county sheriff is subject to removal pursuant to the general removal statutes discussed below.

With respect to the county treasurer, the board of county commissioners has general superintending authority over that official with respect to dealing with county money. The county treasurer acts in a purely ministerial capacity and only can deal with that money in the manner prescribed by the county commissioners, which acts as the county board of finance. Op. Atty. Gen. 62-71 (1962); see section 6-10-8 NMSA 1978. The treasurer is subject to removal pursuant to the general removal statutes discussed below.

Pursuant to section 10-4-2 NMSA 1978, all elected county officials are subject to removal for the following reasons:

- A. conviction of any felony or of any misdemeanor involving moral turpitude;
- B. failure, neglect or refusal to discharge the duties of the office, or failure, neglect or refusal to discharge any duty devolving upon the officer by virtue of his office;
- C. knowingly demanding or receiving illegal fees as such officer;
- D. failure to account for money coming into his hands as such officer;

E. gross incompetency or gross negligence in discharging the duties of the office;

F. any other act or acts, which in the opinion of the court or jury amount to corruption in office or gross immorality rendering the incumbent unfit to fill the office.

Section 10-4-1 to 10-4-29 NMSA provides for removal proceedings that generally include grand jury indictment or district attorney charge and trial by jury. And pursuant to sections 10-5-2 NMSA 1978, the secretary of finance and administration may suspend any county official where an audit conducted by the state auditor reveals the following:

1. a fraudulent misappropriation or embezzlement of public money,
2. fiscal management of an office resulting in violation of law or willful violation of the fiscal regulations of the department of finance and administration for every local public body, or
3. willful failure to perform any duty imposed by any law which the secretary of finance and administration is charged with enforcing.

County officials also may be removed pursuant to section 10-2-12 NMSA 1978. That section provides that, if the board of county commissioners finds that no required bond has been posted or that the required bond is insufficient, it may summon the official to appear before the board and to show cause why he should not be required to give a new bond. If a new bond is not filed as ordered, the board shall certify that fact to the district court and to the district attorney who then has the duty to request a hearing in the district court for adjudication and for a declaration that a vacancy in the office exists pursuant to section 10-2-12.

In addition to those provisions, citizens whose rights have been violated by elected county officials may be able to sue the county and that official for recovery of damages. These damages may come from the county treasury. Issues involving the applicability of the Tort Claims Act and liability must be addressed on a case-by-case basis. Finally, any county official who violates the criminal law would also be subject to prosecution by the district attorney.

Respectfully submitted,

ATTORNEY GENERAL

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