

Opinion No. 12-918

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BY: FRANK W. CLANCY, Attorney General

TO: Office of the Attorney General of New Mexico

SALARIES OF COUNTY OFFICERS.

Letter sent to all district attorneys on the subject of salaries of county officers.

OPINION

{*55} I have received a number of requests from county officers and others for opinions and advice as to what, if anything, can be done for the relief of county officers in view of the failure to provide by legislation for their salaries in accordance with the requirements of Section 1 of Article X of the Constitution as construed by the Supreme Court of the State. As the district attorneys are the legal advisers of county officers and in no way under the control of the attorney general, I have felt compelled to decline to give opinions to county officers, but it has appeared to me that there would be no impropriety in giving some expression of my views to the district attorneys themselves in the hope of bringing about some uniformity of procedure throughout the state, if these officers should agree with me, and advise their county officers accordingly.

The section of the constitution above referred to provides, in substance, that the legislature should at its first session fix salaries for all county officers, and forbids any county officer receiving to his own use any fees or emoluments other than the annual salary, requiring all fees collected to be paid into the county treasury. The two houses of the legislature passed a bill providing for such salaries, but so late in the session that it did not reach the governor in time for him to give it sufficient examination to enable him either to sign or return it with objections. In the exercise of his part of the legislative power committed to him by the constitution, he felt compelled to disapprove the bill, so that no statutory provision has been made in accordance with the direction of the constitution.

I took the view before the legislature met that until legislation could be had under the constitution, the territorial laws providing compensation for county officers and district attorneys, should be considered as remaining in force, and that all such officers could properly be paid in accordance therewith. Two cases were instituted in the district court of San Miguel County for the purpose of testing the correctness of my opinion, and the supreme court took the view that while the constitutional provision that the legislature should fix salaries was not self-executing, yet the other clause forbidding county {*56} officers to receive to their own use any fees or emoluments other than the annual salary provided by law, was self-executing, and such officers could receive no compensation for their services until it should be fixed by the legislature. This decision, however, as far

as county officers are concerned, is applicable only to such officers as were compensated by fees or commissions in the past, such as the treasurer, assessor, county clerk and sheriff. One of the two cases from San Miguel County was as to the fees of the county clerk, and the other as to fees of the district attorney. As to the latter the court held that the office of district attorney was one created by the constitution, for which no compensation had been provided, and that district attorneys could receive no pay until the legislature should fix that compensation. The court does not class them as county officers, however, and the section of the constitution, hereinbefore mentioned, does not apply to them, but under other constitutional provisions they must have salaries and no fees.

To those county officers who have not in the past received compensation in any other form than salaries for services rendered, the negative clause of the section of the constitution above referred to, which the court has held to be self-executing, does not seem to have any application. As far as they are concerned they stand as though there were nothing more in the constitution on this subject than the order to the legislature to classify the counties and fix the salaries of county officers, which it is conceded is not self-executing. By Section 4 of Article XXII of the constitution, all laws of the territory, not inconsistent with the constitution, are to remain in force as the laws of the state. The laws of the territory fixing the compensation of salaried county officers, are not inconsistent with the constitution, and therefore should be considered as remaining in force. This is applicable to county commissioners, probate judges and county school superintendents who receive annual salaries, and I can see no objection to their continuing to receive the salaries heretofore provided. The compensation of the county surveyor I believe can still continue as heretofore provided by law, although it is not an annual salary. The legislature in the bill which was not approved by the governor appears to have taken this view, as the bill made a provision for the payment of county surveyors for their services substantially like the one on the statute book, and as far as I am informed the governor made no objection to this provision. The county surveyor is paid by the day for each day's labor, and it would be so difficult, if not impossible, to provide any uniform annual salary for county surveyors, that it is reasonable to hold that the constitution could not have intended to put those county officers on a flat salaried basis. No competent surveyor could be found to act under such a system unless the annual salary was made sufficiently large to compensate for all of his time, and in the poorer counties and in counties where there is not great demand for the services of the surveyor, such a salary could not be given.

As to the other county officers, whose compensation has been derived from fees or commissions, we are compelled to take the position that they can receive nothing to their own use for their services until the legislature acts. It does not follow, however, that the county government must practically stop for this reason. These officers {*57} will at some time when the legislature provides, receive salaries for their services, but such salaries cannot be considered as including necessary actual expenses incurred in the conduct of their offices. For instance, it is the duty of the sheriff to take charge of the county jail, to provide for the keeping and feeding of prisoners committed to his custody, and in performing this duty he must necessarily pay out money for food, fuel, bedding

and possibly clothing. The county must provide jailers and guards for the jail. It is not practical for the sheriff to perform all of his official duties in person and he must necessarily employ deputies to act for him, and they must be paid for their services. I am clearly of opinion that all such expenses can properly be paid by the county commissioners from the county treasury, including nothing, however, in the way of compensation to the sheriff himself. The county clerk must necessarily at times, and in some counties at all times, employ assistants adequately and properly to attend to the work of his office, and it cannot be reasonably contended that he from his private funds should advance money for such expenses. It is certainly quite enough of a burden that he should be compelled to wait on the legislature for his own pay without expecting him to pay out large amounts of money to keep the county government running. The same reasoning applies to the offices of treasurer and assessor in those counties where it is impracticable for one man to perform all the work of the office.

While the district attorneys are in a different class, yet it would seem that actual and necessary traveling and office expenses incurred and paid by them in the discharge of their duties can be properly repaid, either from the general fund of the county benefited or from the court fund, if the expenses are incurred in the maintenance of the district courts and the conduct of business therein.

It now occurs to me in closing that I should say as to county commissioners that I do not believe they can at present properly receive the mileage provided by statute for attending board meetings, but in harmony with the suggestion made as to other officers, they might properly receive payment of their actual and necessary traveling expenses.

While I have, as hereinbefore stated, no control over the official action of district attorneys, yet I venture to hope that what I have herein set forth, which you will consider in the nature of suggestions and recommendations, will meet with your approval, and if they do that they may be made to serve as a basis of some uniformity of procedure in the various counties at the present time.

Some suggestions have been made by different persons as to the possibility of permitting those officers heretofore paid by fees, to retain in their own hands some portion, if not all of such fees, with the expectation of having a settlement or adjustment after the legislature shall act, each one holding himself responsible for the amount of money received. I cannot believe that this would be desirable or proper. It would lead to great confusion, discrepancies and difficulties, and as one of the district attorneys has stated to me in substance, it would not be in accordance with good public policy or in keeping with honest and efficient service to the county or state, and would create a sort of carelessness on the part of the officials as to the illegal and irregular use of public money, and such a feeling must {*58} inevitably tend towards a disregard of the exact limitations of law.