

## Opinion No. 33-591

April 27, 1933

**BY:** E. K. NEUMANN, Attorney General

**TO:** Honorable Juan N. Vigil, State Comptroller, Santa Fe, New Mexico.

{\*45} This has reference to the letter of March 25, 1933 addressed to you by Honorable Byron O. Beall, Chief Tax Commissioner, concerning the appointment of Juan J. Clancy as Delinquent Tax Collector for Guadalupe County during the years 1929, 1930 and two months of 1931. Attention is called to Section 3, Chapter 114, Laws of 1929, as amended by Section 3, Chapter 6, Special Session of 1929, which provides that no person holding any other "office of public trust," etc., shall be appointed or act as delinquent tax collector. During the period that Mr. Clancy was delinquent tax collector he also drew a salary as a teacher in the Guadalupe County Schools.

The question is raised as to what action, if any, should be taken in this connection. The first thing to consider is whether or not the position of teacher in the public schools is an "office of public trust." I think it is very doubtful, to say the least, that the position of school teacher can be considered as a public office. I do not think it is an "office" in the sense that word is used in Sections 1 and 2 of Article 20 of the New Mexico Constitution. At least I do not believe it has been the practice in this state for teachers to take and subscribe to an oath of office. I have been so advised by the State Superintendent of Public Instruction.

Section 20-804 of the 1929 Code, as amended by Chapter 119, Laws of 1931, gives the County Board of Education the power to "employ and discharge" teachers in the rural schools. Section 120-903 of the 1929 Code, as amended by Chapter 119, Laws of 1931, seems to make a distinction between a "state, county or municipal officer" and a "teacher." It seems to me that the Legislature has generally regarded the position of school teacher as an "employment," rather than a "public office" or "office of public trust." See *Alexander vs. School District No. 1*, 84 Ore. 172, 164 P. 711; *State vs. Quinn*, 35 N.M. 62, 290 P. 786. In *Mechem on Public Officers*, Sec. 2, an "office" is distinguished from an "employment" as follows:

"A public office differs in material {\*46} particulars from a public employment, for, as was said by Chief Justice Marshall, 'although an office is an employment, it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to perform a service without becoming an officer.' "We apprehend that the term 'office,' said the judges of the supreme court of Maine, 'implies a delegation to a portion of the sovereign power to, and the possession of it by, the person filling the office; and the exercise of such power within legal limits constitutes the correct discharge of the duties of such office. The power thus delegated and possessed may be a portion belonging sometimes to one of the three great departments and sometimes to another; still it is a legal power which may be rightfully exercised, and in

its effects it will bind the rights of others, and be subject to revision and correction only according to the standing laws of the state. An employment merely has none of these distinguishing features. A public agent acts only on behalf of his principal, the public, whose sanction is generally considered as necessary to give the acts performed the authority and power of a public act or law. And if the act be such as not to require such subsequent sanction, still it is only a species of service performed under the public authority and for the public good, but not in the exercise of any standing laws which are considered as rules of action and guardians of rights."

"The officer is distinguished from the employee,' says Judge Cooley, 'in the greater importance, dignity and independence of his position; in being required to take an official oath, and perhaps to give an official bond; in the liability to be called to account as a public offender for misfeasance or non-feasance in office, and usually, though not necessarily, in the tenure of his position. In particular cases, other distinctions will appear which are not general'."

In view of the foregoing, I repeat that it is extremely doubtful that there has been any violation of Section 3, Chapter 6 of the violation, the question of recovery of commissions paid to Mr. Clancy as delinquent tax collector would depend to a large extent on his personal liability. While I have not seen nor examined his bond (if he had one) there would probably be no right to recover under it on the grounds stated.

Unless further facts can be disclosed showing a definite liability, either on the part of Mr. Clancy or his bondsmen and the possibility of recovery of moneys paid him, I would suggest that no action be taken in the matter.

By: QUINCY D. ADAMS,

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