

## Opinion No. 33-668

October 13, 1933

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

**TO:** Dr. J. Rosslyn Earp, Director Bureau of Public Health, Santa Fe, New Mexico.

{\*85} Your letter of September 30th, 1933, after setting forth the correspondence from the Board of County Commissioners of Bernalillo County, which states that Doctor James A. Scott, County Health Officer of Bernalillo County, was discharged as of October 1, 1933, and your reply thereto, asks this office for an opinion as to whether or not a vacancy occurs in the office of County Health Officer in Bernalillo County on October 1st, 1933.

The law which pertains to the appointment of County Health Officers, their tenure of office, etc., is found in Section 110-312, 1929 Code, and is as follows:

"County health officers. Each board of county commissioners shall appoint and employ one county health officer, whose appointment and employment shall be subject to approval by the state board of public welfare. He shall receive such compensation for his services as the board of county commissioners shall determine, and in addition he shall receive, and the board of county commissioners shall provide for, all actual and necessary travel, office and other expenses incurred in enforcing the health laws and regulations within his jurisdiction. The board of county commissioners shall provide a suitable office for the county health officer at the county seat.

The jurisdiction and powers of the county health officer shall extend to all incorporated municipalities within the county, as well as to the unincorporated area of the county. He shall possess the same powers with respect to the preservation of the public health and the administration and enforcement of the health laws as those conferred {\*86} upon the state department of public welfare, except that said powers shall be exercised within his jurisdiction only and in subordination to and with the approval of the state department of public welfare. He shall be charged with the execution within his jurisdiction of the health laws and all rules and regulations promulgated by the state board of public welfare, be under its supervision and control and make such reports to the state department of public welfare as it may direct.

Every county health officer appointed or employed in accordance with the provisions of this section shall hold office until his successor is appointed and approved, except that in case of death, removal for cause or disability the board of county commissioners shall within thirty days from and after such death, removal or disability hold a meeting to appoint a county health officer; Provided, that in case the office of county health officer shall remain vacant for more than thirty days, the director of public health, with the approval of the state board of public welfare, shall appoint a county health officer in and for such county, at a compensation not to exceed the compensation paid to the previous

incumbent; such appointment shall have the same validity and effect as an appointment duly made by the board of county commissioners and approved by the state board of public welfare."

It is to be noted that there is provided no particular term of office, and that the officer appointed holds office until his successor is appointed and approved. Under the circumstances, if Doctor Scott may be dismissed by the County Board, he holds office until his successor is appointed and approved.

The manner of appointing a county health officer is clearly set forth in said quoted statute, that is, the Board of County Commissioners shall employ and appoint such officer, subject to the approval of the state board of public welfare. In other words, the local board nominates the officer, but his appointment is subject to approval by the state board of public welfare. It must, however, be determined in the present case if the state board of public welfare has any power to prevent such officer from being removed or whether the county board can act independently upon such a matter, and if so, within what limits.

The Act quoted suggests that a vacancy occurs only in three cases, death, removal for cause or disability. I am inclined to the view however that the law simply describes the method of filling a vacancy caused by such events and does not limit to these the other causes which might cause a vacancy in said office.

The law regarding the appointment of a county health officer does not provide for a definite tenure. Consequently the following rule is applicable:

"When the term of office is not fixed by law, the officer is regarded as holding at the will of the appointing power, even though the appointing power attempts to fix a definite term."

46 C. J. 964.

It is apparent, that the office of county health officer was created by the legislature, such to be appointed by the board of county commissioners, with the approval of the state board of public welfare, without providing for a fixed term or a method of removal. The Constitution and Statutes are entirely silent upon that question with reference to this officer.

"The power of appointment generally carries with it, as an incident, the power to remove, but the power of removal may be impliedly or expressly restricted by constitutional provisions or statute, and the general rule does not apply when a definite term is attached to an office by law, or where it is provided that the officer shall hold during good behavior."

46 C. J. 985.

"The power of removal of officers not holding for a definite term, incident to the power of appointment, is an arbitrary one, and no formalities, such as {\*87} the presentment of charges or the granting of a hearing to the person removed, are necessary to its lawful exercise."

46 C. J. 989.

"In the absence of statutory or constitutional provision making a health officer removable for cause only or fixing his term of office, such officer holds at the pleasure of the appointing authority."

29 C. J. 247

29 Pa. Dist. 946

35 Pac. 389

"The general rule is that when an office is created to be filled by appointment, if the legislature does not designate the term of office, the appointee will hold only during the pleasure of the appointing power, and may be removed at pleasure, at any time without notice or hearing."

22 R C L 562.

The above is sufficient authority to conclude that the appointing power, in cases of county health officers, has, in the absence of constitutional and legislative provisions fixing the terms of office, causes for removal and procedure therefor, the power to remove from office such officers at its pleasure, at any time, without notice or hearing. The rule is applicable in this state, as I view it, for reason that the constitution and statutes in such cases are silent as to terms of office, causes for removal and methods of procedure, and, in so far as I can find, neither the constitution nor statutes conflict or prohibit same in any way.

One other question may be raised, Who is the appointing power, where the law provides: "Each board of county commissioners shall appoint and employ one county health officer, whose appointment and employment shall be subject to approval by the state board of public welfare"? As is often the case, the appointing power is curbed somewhat by subjecting its appointment to approval by some other body, but such control is limited, in my opinion, to the power of appointment and in no way effects the power of removal. It is an approving power, for the state board cannot appoint a county health officer except in absence of an appointment, in cases of vacancy, by the county commissioners after a period of 30 days, it can only assent or dissent to such appointment.

I believe the case of State ex rel Ulrick vs. Sanchez, 32 N.M. 265 is in point. It is true that there the Court was dealing with an express power of removal granted, in certain

cases, by our State Constitution, but, in principal the case is fully applicable here, for, as we have determined, the power of removal is in the appointing power, with reference to county health officers, in the board of county commissioners.

The reasons or motives for removal in the present case may be good or may be bad, I do not know, as I am simply passing upon the question of right or power as exercised by the Board of County Commissioners of Bernalillo County.