

Opinion No. 39-3119

April 26, 1939

BY: FILO M. SEDILLO, Attorney General

TO: Mr. E. D. Trujillo, State Auditor, Santa Fe, New Mexico.

{*41} In your letter of April 26, 1939, you state that a salary voucher for payment from the Division of Field Administration, and which you refer to as Port of Entry, on which appears the name of Mr. Earl Stull, Director, has been presented to your office and you request an opinion as to whether payment of same would be in violation of Section 28, Article IV of the Constitution of New Mexico. Section 28, Article IV of the Constitution of the State reads as follows:

"Section 28. No member of the legislature shall, during the term for which he was elected, be appointed to any civil office in the state, nor shall he within one year thereafter be appointed to any civil office created, or the emoluments of which were increased during such term; nor shall any member of the legislature during the term for which he was elected nor within one year thereafter, be interested directly or indirectly in any contract with the state or any municipality thereof, which {*42} was authorized by any law passed during such term."

It is my understanding that Mr. Earl Stull was named by the Board of Supervisors as Director of the Division of Field Administration, a separate and distinct division of the New Mexico State Police, which was created by an act of the last legislature. At the time Mr. Earl Stull was a member of that body from Dona Ana County.

Under date of August 18, 1937, in Opinion No. 1744, addressed to The Hon. J. O. Garcia, State Auditor, Santa Fe, New Mexico, this office held, in regards to Mr. Rufus H. Wamel, who was then a member of the legislature that created the position of Director of School Transportation and who was subsequently appointed to said position, that if said position was a civil office then Mr. Wamel could not, under the Constitution, be legally appointed, and that the provision of the Constitution relative to a contract with the State of New Mexico, which was authorized by law passed during his term as a legislator and by the legislature of which he was a member, would disqualify him from holding office.

The opinion further held that the term "contract" as used in the constitutional provision includes a contract of employment and that this disqualified Mr. Wamel from holding said position.

The office of Director of the Division of Field Administration may or may not be a civil office. If it is a civil office then Mr. Stull, under the Constitution, may not be legally appointed. The fact that this office holds that the term "contract" as used in the Constitutional provision includes a contract of employment, it is my opinion that the

appointment of Mr. Stull, a member of the Fourteenth Legislature, to the office of Director of the Field Administration, a position created by said session of the legislature, is in violation of the provision of the Constitution.

In State ex rel. Baca vs. Otero, 33 N.M. 311, the question came up whether a member of the legislature, who had qualified and had been acting as a member of the legislature and at the same time was in possession of the office and performing the duties of Assistant Superintendent of Public Instruction of the State of New Mexico, could be paid for performing said duties of Assistant Superintendent. The court in this case held that where there is no de jure officer claiming an office, a de facto officer who has performed the service and paid his expenses in so doing, may recover the same from the State.

It is my opinion that services have been rendered and expenses incurred by Mr. Stull, as Director of the Division of Field Administration, a de facto officer (there never having been any de jure officer appointed to this particular position) and the State having received benefits of the same, Mr. Stull, therefore, should be allowed his claim for salary and expenses.