

Opinion No. 42-4169

October 20, 1942

BY: EDWARD P. CHASE, Attorney General

TO: Mr. C. R. Sebastian State Comptroller Santa Fe, New Mexico

{*262} We are in receipt of your letter of October 14, 1942, in which you asked the following questions:

1. Is it legal for a county school superintendent to receive his salary as such, though he is also receiving pay as a private in the United States Army?
2. Has the Board of Education the power to stop the payment of the salary to the clerk in the office of the county school superintendent for the reason that the county school superintendent receives his salary check, and then endorses it over to the clerk under a private arrangement?

Reference is made to the opinion of this office addressed to you and dated August 21, 1942, dealing with other questions arising out of the same situation.

In answer to your first question, I find that the only limitation upon the right of the county school superintendent to receive {*263} payment in addition to his salary is Article X, Section 1 of the New Mexico Constitution, which is as follows:

"* * * * and no county officer shall receive to his own use any fees or emoluments other than the annual salary provided by law, and all fees earned by any officer shall be by him collected and paid into the treasury of the county."

The meaning of the word "emolument," as defined by Black's Law Dictionary, is:

"The profit arising from office or employment; that which is received as a compensation for services, or which is annexed to the possession of office as salary, fees and perquisites;"

Thus, unless the word "fees" is broad enough to cover a private's pay in the Army, this limitation has no effect.

While this section does not specifically limit the effect of this prohibition to fees received from or on account of a county office, as does Article XX, Section 9, Constitution of New Mexico, covering state officers, it appears to me that as this section requires that all fees earned by any officer shall be by him collected and paid into the treasury of the county, the framers of our Constitution meant, by the word "fee," fees received for or on account of his office.

I am, therefore, of the opinion that it is not illegal for the county school superintendent to receive his salary as such, and also receive pay as a private in the United States Army.

As to the question of the clerk's salary, much of what is said above is applicable.

It does not appear from what you have said that the payment by the superintendent of his salary to the clerk is additional compensation for or on account of his office, but is, if anything, payment for the performance of the duties of the county school superintendent, and hence, is outside of his employment as clerk. Also, as this payment is by private arrangement, it would be difficult, if not impossible, to show that this payment had any connection with either position.

It will be noted that the constitutional provision set forth above applies only to county officers. An officer has been defined by the Supreme Court of New Mexico, in *State vs. Quinn*, 35 N.M. 62, as follows:

"To constitute a position of public employment a public office of a civil nature, it must be created by the Constitution or through legislative act; must possess a delegation of a portion of the sovereign power of government to be exercised for the benefit of the public; must have some permanency and continuity, and not be only temporary or occasional; and its powers and duties must be derived from legislative authority and be performed independently and without the control of a superior power, other than the law, except in case of inferior officers specifically placed under the control of a superior officer or body, and be entered upon by taking an oath and giving an official bond, and be held by virtue of a commission or other written authority."

Employment of the clerk is provided for in Section 120-405, New Mexico Statutes Annotated, 1929 Compilation. It will be seen, on examining this section that only a portion of the duties of the clerk are set forth by the legislature, the clerk being placed under the control of the superintendent, {*264} with such other duties as may be assigned to him. Further, no oath or bond is required of the clerk, and he does not hold office by virtue of a commission or other written authority.

Thus, while this section has never been construed by our Supreme Court, I am of the opinion that the clerk in the office of the county school superintendent is not an officer within the contemplation of Article X, Section 1, of the New Mexico Constitution.

Further, if the clerk were found to be accepting additional emoluments for or on account of his office, it would not empower the Board of Education to stop his salary as clerk, as long as he was so employed, since it would be the receipt of the additional emoluments, and not the salary, that is prohibited.

I am, therefore, of the opinion that the Board of Education has no power to stop the clerk's salary.

Trusting that the foregoing sufficiently answers your inquiry, I am

By ROBERT W. WARD,

Asst. Atty. General