

Opinion No. 44-4455

February 10, 1944

BY: EDWARD P. CHASE, Attorney General

TO: Honorable Quincy D. Adams, District Attorney, Albuquerque, New Mexico

I have your letter of January 24, 1944, wherein you state that you were recently appointed District Attorney for the Second Judicial District of the State of New Mexico, and that you have been, for the past two years, the regular attorney for the A. T. & S. F. Railway Company for New Mexico. You further state that as a part of your compensation as attorney for the railway company you receive a railroad pass for use both intrastate and interstate travel. Under this fact situation you request an opinion from this office concerning whether or not it is permissible for you to hold and use this pass under the provisions of Section 14 of Article 20 of the New Mexico State Constitution, which provides as follows:

"It shall not be lawful * * * for any district attorney * * * during his term of office to accept, hold or use any **free pass**; or purchase, receive or accept transportation over any railroad within this state for himself or his family upon terms not open to the general public; * * *"

Section 37 of Article 4 of the New Mexico Constitution provides:

"It shall not be lawful for a member of the legislature to use a pass, or to purchase or receive transportation over any railroad upon terms not open to the general public; and the violation of this section shall work a forfeiture of the office."

It is noted that while Section 14 of article 20 uses the words "free pass" Section 37 of Article 4 uses the word "pass." Otherwise these two provisions are similar.

This office has on three previous occasions passed on Section 37 of Article 4, but this is the first time that we have been called upon to give a similar opinion concerning the provisions of Section 14 of Article 20. These three previous opinions have held that a regular employee of a railway company who became a member of the Legislature could continue to hold his pass, since the pass, in such instance, was part payment for the services of such regular employee. See Reports of the Attorney General of New Mexico, January 1, 1933 to December 31, 1934, Page 52, No. 40; January 1, 1939, to December 31, 1940, page 34, Opinion No. 3098; and January 1, 1937 to December 31, 1938, page 56, No. 1545.

Although these three previous opinions are probably sufficient upon which to base an opinion under Section 14 of Article 20, we have, in view of the fact that these three previous opinions failed to cite authorities for their position, considered the matter as an original question. Our research has disclosed that similar provisions are found in Article

12, Section 244 of the Constitution of Alabama. Article 4 ii, Section 23, Constitution of Arizona; Article 27, Section 7, Constitution of Arkansas; Article 12, Section 19, Constitution of California; Article 16, Section 31, Constitution of Florida; Article 19, Section 15, Constitution of Louisiana; Article 12, Section 24, Constitution of Missouri; Article 7, Section 188, Constitution of Mississippi; Article 13, Section 5, Constitution of New York; Article 15, Section 1, Constitution of Oklahoma; Article 12, Section 161, Constitution of Virginia; Article 2, Section 39 and Article 12, Section 20, Constitution of Washington; Article 13, Section 11, Constitution of Wisconsin.

We have examined the latest available annotated constitutions of the various above mentioned states and have not found either a case or an Attorney General's opinion holding that a regular employee of a railroad or other agency came within the constitutional prohibition against receiving a pass when such pass is a part of his regular payment for services.

I quote from the first and second syllables of the Virginia case of Commonwealth v. Gleason, 69 S. E., Page 448:

"Section 161 of the Constitution of Virginia of 1902 (Code 1904, p. cclix) prohibits transportation companies from giving any frank, free pass, free transportation, etc., to any state, county, district, or municipal officer, etc.; any officer accepting the same forfeiting his office thereby. A councilman of the city of C. was also an employee of a railway company, and from them received passes, which were given in consideration of his services and as a part payment for employment. Held, that his acceptance of such passes was not prohibited by the Constitution."

"A 'free pass' within Const. 1902, (161 Code 1904, p. cclix), prohibiting any state, county, district, or municipal officer from accepting a free pass under penalty of forfeiture of his office, is 'one which is not gained by importunity or purchase; gratuitous.'"

It is noted that the Virginia constitutional provision also used the words "free pass" which are contained in our Section 14 or Article 20.

In the case of Dempsey v. N. Y. C. & H. R. R. Co., 146 N. Y. 290, the Court of Appeals of that state had a similar provision under consideration and upon the question said:

"It will be observed that a public officer is forbidden to receive and use a free pass, it being the obvious intention of the Constitution to prohibit the public officers of the State from receiving from corporations privileges or favors -- in other words gifts -- that might improperly influence them in the discharge of their official duties."

The court further said:

"In the case at bar we have the plaintiff, a railroad policeman, traveling over the lines of the defendant in the discharge of his responsible duties in preventing depredations

upon the property, by thieves and trespassers, and receiving as compensation for his services, seventy-five dollars a month and an annual pass, which he was at liberty to use, not only in his official, but in his private business.

"This is in no sense a free pass within the meaning of the constitution, but, on the contrary, it is a pass for which the plaintiff has paid a full consideration and cannot be regarded as a gratuitous passenger.

"We have not overlooked the argument advanced by the learned counsel for the appellant that such construction will render it easy to evade this provision of the constitution by contracts between corporations and public officers for private services by the latter, which shall be paid for in transportation. We do not think any such danger exists as each case must be decided upon its own facts and the courts will see to it that the provisions of the constitution are properly enforced."

The 1922 Opinions of the Attorney General of New York, at page 56, held that while local health officers come within the classification of public officers, a local health officer acting as local railroad surgeon may receive, for his own use, such pass and compensation for services performed by him for transportation company.

In the 1912 Opinions of the Attorney General of New York, page 158, it is held that it was not a violation of the constitution for an employee of a railroad or express company to receive or use pass issued by railroad company as part compensation for services of such employee, or to be used by him in his employment, notwithstanding that such employee is public officer.

The 1922 Opinion of the Attorney General of New York cited, in support of such opinion, the cases of Dempsey v. N. Y. C. & H. R. R. Co., supra, and Smith v. N. Y. C. R. R. Co., 24 N. Y. 227. A similar result is arrived at by the Attorney General of Wisconsin in the reported opinions of 1904, page 412. This opinion also relies upon the case of Dempsey v. N. Y. C. & H. R. R. Co., supra, and was also considering a constitutional provision very similar to Section 14 of Article 20 of the Constitution of New Mexico.

In view of the above authorities it is my opinion that since you receive your pass as an incident to your employment as attorney for the railroad it is not a free pass within the prohibition of our Constitution and, therefore, no provision of our Constitution is violated by your holding and using the above mentioned pass.

Hoping that the above fully answers your question, I remain,

By HARRY L. BIGBEE,

Asst. Atty. General