

Opinion No. 47-5052

July 11, 1947

BY: C. C. McCULLOH, Attorney General

TO: Fred J. Federici District Attorney Raton, New Mexico

Re: Salary of Taos County Treasurer, Mr. A. Cordova

OPINION

{*69} It appears that the above styled matter has been the subject of considerable correspondence, discussion and misunderstanding. It appears that your office, this office, the Comptroller's office and the County Commissioners have been going around in circles. In view of this situation, you have specifically requested this office for an opinion as to whether Mr. Cordova's salary should be paid. In your letter of July 2, 1947, addressed to Mr. Sebastian, you recite the following:

"While I was in Taos I made it a point to make careful observation of the County Treasurer's office, and I found that that office was open to the public at all times during business hours the same as the other County offices. I also made it a point to drop into the office both on business and more or less accidentally, and whether by coincidence or otherwise, I always happened to find Mr. Cordova in the office. Just how much time Mr. Cordova spends in the office I cannot say, but admittedly he does not spend a full day in his office every day, although in his absence his deputies seem to carry on the work.

"From my investigation I have not found any evidence that the public is not being properly served by the office. In other words, as I understand it, the complaint seems to be that Mr. Cordova, in addition to being County Treasurer, has some private business matters to which he attends, in addition to being a public official, and undoubtedly it is true that he does not stay in his office every day and when he does stay in his office he may not spend his full eight hours there. I am unable to estimate how many hours per week he spends in his office."

In view of these facts, your request is whether Mr. Cordova's salary should be paid under Chapter 71 of the Laws of 1945. Section 1 of this statute is as follows:

"Except in the case of payments covering lawful vacation periods and absences from employment because of sickness, any person who receives payment, or any person who makes payment [Illegible Word] causes payment to be made from public money where such payment purports to be for wages, salary, or other return for personal services and where such personal services have not in fact been rendered, shall be guilty of a felony and shall be punished by a fine of not less than One Thousand Dollars (\$ 1,000.00) nor more than Five Thousand Dollars (\$ 5,000.00) or by imprisonment for

not less than one year nor more than two years, or by both such fine and imprisonment."

You will note that the test applied is the payment of public money for personal services, where such personal services have not in fact been rendered. At the outset it must be remembered that the compensation of an elected public officer is not based on contract or on quantum merit, but is rather an incident to the office. The author in 46 C.J. 1015 says:

"The person rightfully holding an office is entitled to the compensation attached thereto. This right does not rest upon contract * * *. The right to the compensation attached to a public office is an incident to the {70} title of the office and not to the exercise of the functions of the office. Hence, the fact that officers have not performed the duties of the office does not deprive them of the right to compensation, provided their conduct does not amount to an abandonment of the office."

To the same effect see 43 Am. Jur. 136 where the author says:

"Compensation does not constitute any part of the public office to which it is annexed. It is merely incident to the lawful title or right to the office and belongs to the officer so long as he holds the office."

See also: Elliott v. Van Delender, Calif. 247 P. 523; Dinneck v. City of Vallejo, Calif. , 40 P. 2d 949; Martin v. City of Aurora, Ind. , 182 N. E. 259; Webb v. City of Hugo, Oklahoma, 37 P. 621.

Because the compensation of a public officer is considered as an incident to the office and not as compensation for services, if the statute provides no compensation, the officer is entitled to none. See Delgado v. Romero, 17 N.M. 81 and Ward v. Romero, 17 N.M. 88.

That the salary of a public officer is an incident to the office and not compensation for services is shown also by the cases holding that a de jure officer may sue and collect the salary collected by a de facto officer, even though the de facto officer actually performed the services. See Wilkerson v. City of Albuquerque, 25 N.M. 599, 185 P. 547 and Vigil v. Stroup, 13 N.M. 481, 110 P. 830.

It would therefore seem that since the salary of an officer is an incident to the office and not a return for personal services, that Chapter 71 has no application. There are a few cases holding that where the salary established by law is made dependent upon the performance of duties, under such statute an officer might be prohibited from drawing his salary. See Annotated Cases, 1918 B 439. However, even under these cases, it is held that where the Constitution protects the particular officer from any diminution of salary during his term of office a statute providing for a deduction from such salary for failure to perform the duties of the office or for the time he is absent therefrom cannot be invoked to defeat his claim. See Annotated Cases, 1918 B 440.

Article 4, Section 27 of our Constitution provides in part:

"Nor shall the compensation of any officer be increased or diminished during his term of office, except as otherwise provided in this Constitution."

In view of the fact that it appears that the office of the County Treasurer is open at all times, that Mr. Cordova does spend sometime in the office, and sees that the functions of the office are carried out; the fact that the salary of an elected public officer is an incident to the office and not compensation for services rendered, and that the salary of a public officer may not be diminished during his term, it is my opinion that the County Commissioners should pay Mr. Cordova's salary, at least until he abandons the office or is removed.

By ROBERT W. WARD,

Asst. Atty. General