

## Opinion No. 49-5257

November 30, 1949

**BY:** JOE L. MARTINEZ, Attorney General

**TO:** T. K. Campbell District Attorney Third Judicial District Las Cruces, New Mexico

{\*99} I have your letter of October 21, 1949, asking whether the Board of County Commissioners of Dona Ana County should pay former sheriff A. L. Apodaca his salary for the period of time during which he was suspended from office by the State Comptroller.

According to my understanding of the facts, the State Comptroller suspended Sheriff Apodaca under the provisions of Chapter 181 of the Laws of 1939. Pursuant to said Chapter 181 Sheriff Apodaca requested a hearing before the State Comptroller which was granted. After said hearing, the State Comptroller continued the suspension. Sometime later a trial for the removal of Sheriff Apodaca from office was held. This trial was based on a grand jury accusation which, among other charges, included those upon which the State Comptroller had based his suspension. This hearing ended in a mistrial; however, the charges upon which the State Comptroller based his order for suspension were dismissed by the court and did not reach the jury for its consideration. Subsequent to the trial Sheriff Apodaca requested reinstatement of the State Comptroller. Shortly after this request, the State Comptroller reinstated Sheriff Apodaca. The matter of the payment of salaries to suspended officials is regulated by Section 10-333 of the 1941 Compilation which provides as follows:

"After such hearing (before the state comptroller) the state comptroller shall have discretion to continue such suspension for any of the causes above enumerated, and if such suspension is continued no salary shall be received by such officer pending such suspension unless reinstated by the order of the district court as hereinafter provided."

It will be noted that Sheriff Apodaca did not petition the District Court for an order of reinstatement. However, the sheriff, in effect, by petitioning the State Comptroller for reinstatement, asked for a re-hearing of his cause. Upon such re-hearing or reconsideration, the State Comptroller rescinded his order of suspension. The above quoted statute did not contemplate two hearings before the State Comptroller. It is felt that the intent of this statute was to allow the suspended officer salary for the period of his suspension, should the State Comptroller or the Court find that the suspension was not justified. In the present case, after the trial on the removal proceedings brought by the grand jury, the State Comptroller by his action in reinstating the sheriff, indicated that he felt that his original suspension of Mr. Apodaca was not justified. Therefore, it is the opinion of this office that Mr. Apodaca is entitled to receive the salary provided by law for the position of Sheriff of Dona Ana County covering the period during which he was suspended.

Even though it might be contended that the reinstatement of Sheriff Apodaca was not "after such hearing", as contemplated by Section 10-333, supra, it is the opinion of this office that suspended officials are nevertheless entitled to salary during the period in which they are suspended.

Article 20, Section 2 of the Constitution of the State of New Mexico provides as follows:

{\*100} "Every officer, unless removed, shall hold his office until his successor has duly qualified."

The effect of this section of our Constitution upon the instant case is obvious -- A. L. Apodaca was Sheriff of Dona Ana County until such time as he was removed from office. The action of the State Comptroller in suspending Mr. Apodaca did not amount to his removal from office. The one and only proceeding for his removal ended in a mistrial, and, therefore, until the date of his resignation A. L. Apadoca was Sheriff of Dona Ana County, even though he had been suspended from acting as such by the State Comptroller of the State of New Mexico.

It is well settled that compensation of a public official is merely incidental to the lawful right or title to the office. In this regard, 43 A. J. Public Officers, Sec. 342, states:

"Compensation does not constitute any part of the public office to which it is annexed. **It is a mere incident to the lawful title or right to the office, and belongs to the officer so long as he hold the office.** When an office with a fixed salary has been created, and a person duly elected or appointed to it has qualified and enters upon the discharge of his duties, he is entitled, during his incumbency, to be paid the salary, fees, or emoluments prescribed by law." (Emphasis ours)

Thus, it may be seen that every public official is entitled to the compensation prescribed for the office which he holds until such time as he is removed from that office, and this is by virtue of express provision of the Constitution of the State of New Mexico. If Section 10-333 of the 1941 Compilation is in conflict with Article 20, Section 2 of our Constitution, then it must fall. It is, however, a well established principle of statutory construction that if a statute is susceptible of two interpretations, one of which is constitutional and the other unconstitutional, the constitutional construction must be followed. Section 10-333 provides that the suspended official shall receive no salary "pending such suspension". It is submitted that this language does not necessarily mean that no salary shall ever be paid the official covering the period of time during which he is suspended. As previously pointed out, such a construction would be in contravention of the Constitution of this state. It would be legal, however, for the Legislature to provide that the suspended official should not receive his salary until such time as the suspension should be terminated, either by reinstatement or by removal from office. Thus, if the suspended official had come into illegal possession of moneys of the state, or a subdivision thereof, the public welfare would be protected by a claim against the salary due and owing the official to the extent the official might have misappropriated public moneys.

Since any other construction of this statute would render it unconstitutional and void, it is the opinion of this office that Sheriff Apodaca is entitled to his salary covering the period of time during which he was suspended by order of the State Comptroller. If Dona Ana County has any claim against Mr. Apodaca regarding fees or public moneys which he may have received by virtue of his office, the amount of such claim may be deducted from the amount of salary due and owing him.

Trusting the foregoing sufficiently answers your inquiry, I am