

Opinion No. 54-5995

July 27, 1954

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. C. C. Chase, Jr. District Attorney Third Judicial District Las Cruces, New Mexico

{*451} We are in receipt of your letter of June 11, 1954, in regard to the resignation by the County School Superintendent and his immediate reappointment as County School Superintendent, and you ask whether or not such procedure will warrant an increase in salary pursuant to Chapter 104 of the 1953 New Mexico Session Laws.

Article 4, Section 27 of the New Mexico Constitution reads as follows:

"(Extra Compensation.) -- No law shall be enacted giving any extra compensation to any public officer, servant, agent or contractor after services are rendered or contract made; nor shall the compensation of any officer be increased or diminished **during {*452} his term of office**, except as otherwise provided in this constitution." (Emphasis ours.)

The case on whether or not a person may receive a change in salary after the Legislature alters the salary either upward or downward after the resignation of an incumbent and the appointment of a successor when that successor is a different person raises a distinct conflict in the law. In the case of **Wilson vs. Shaw**, 194 Iowa 28, 188 N.M. 940, the Iowa Court held that a person could not receive an increased salary where he succeeded the elected official after the resignation of that official. It was held in the case of **State ex rel Henneford vs. Yelle**, 12 Wash., 2d 434, 121 P. 2d 948, that the Governor could not reduce the salary of a Tax Commissioner who was appointed to fill out an unexpired term below that received by his predecessor. The same holding was rendered by the Nebraska Court in **Darnell vs. Broken Bow**, 139 Neb. 844, 29 N.W. 274 136 ALR 101, but a contrary view was held in the State of Wisconsin in **State ex rel Bashford vs. Frear**, 138 Wisc. 136, 120 N.W. 216, 16 Anno. Cases 1019. It is to be noted that each of these cases involved an appointive or an elective officer resigning and **another person** being appointed to fill that vacancy. In the case of **Kearney vs. State Auditor**, 189 Mich., 666 155 N.W. 510, the Michigan Court held that under a constitutional provision the salaries of public officers cannot be increased or decreased and that the resignation of an incumbent and his immediate appointment to succeed himself was a subterfuge and was doing by indirection what could not be done directly. They held:

"The statute of relators was fixed in that particular for life or so long as, and whenever they might hold that office * * * while the word 'term' applies to the office rather than the person holding it, after his election or appointment the right of tenure for the term attaches to him, and in common thought and parlance the office and term together

become an attribute of and characterize the incumbent during the time for which he is entitled to the office."

In the case that you put, the person resigned and was reappointed immediately to that office, in a manner very similar to that in the Kearney case cited above. We do not believe that the Constitution makers contemplated permitting a subterfuge of this nature and to permit an incumbent to resign thus avoiding the constitutional prohibition against the increase during his term. Therefore it is the opinion of this office that the increase cannot be paid to the County School Superintendent after his resignation and reappointment when that person is the same as the person elected to the office.

We sincerely hope that this answers your inquiry.

By: Fred M. Standley

Assist. Attorney General