Opinion No. 57-01

January 3, 1957

BY: OPINION of FRED M. STANDLEY, Attorney General Paul L. Billhymer, Assistant Attorney General

TO: Mr. Abner Schreiber, Assistant District Attorney, First Judicial District, Los Alamos, New Mexico

QUESTIONS

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1. Under the provisions of Section 11-6-1, N.M.S.A., 1953, where the county commissioners authorize any purchases, disbursements, or expenditures of sums of money, is the required action of the county clerk in such matters merely ministerial?

2. If the county clerk refuses to attest a warrant does this legally preclude payment of an obligation approved by the Board of county commissioners?

CONCLUSION

1. No.

2. Yes, unless the action of the county clerk is arbitrary.

OPINION

ANALYSIS

The important part of Section 11-6-1 N.M.S.A., 1953 Compilation reads as follows:

"It shall be unlawful for the board of county commissioners, the county clerk, or any other county official authorized to make purchases to disburse, expend or obligate any sum in excess of fifty per centum (50%) of the approved budget for the fiscal year during which the terms of office of any such official will expire; . . ."

At first glance it would appear that the duties of the county clerk with reference to disbursements or expenditures by the county commissioners is merely ministerial and there is nothing other than the act of signing of his name which is required of the clerk. The statutes which cover the clerk's duties in this matter are as follows:

Section 15-39-5 N.M.S.A. 1953:

". . . Fourth. To sign all orders issued by the board for the payment of money and to record in a book to be provided for that purpose the receipts of the county treasurer of the receipts and expenditures of the county . . . ."

Section 15-39-7 N.M.S.A. 1953:

"Such clerk shall not sign or issue any county order unless ordered by the board of commissioners authorizing the same; and every such order shall be numbered, and the date, amount and number of the same and the name of the person to whom it is issued shall be entered in a book kept by him in his office for that purpose."

Section 15-44-4 N.M.S.A. 1953:

"County orders shall be signed by the chairman and attested by the county clerk, and shall specify the nature of the claim of service for which they were issued, and the money shall be paid from the County Treasurer on such orders and not otherwise."

From the wording of these statutes it would appear that the county clerk is merely a ministerial officer, and when the county commissioners approve an account, the clerk must sign the warrant.

However, it seems that the Legislature by the enactment of Sections 11-6-1 through 11-6-5, N.M.S.A., 1953, changed the duty of the clerk from that of being merely ministerial. It is to be noted that only the county commissioners and the county clerk are specifically mentioned in Section 11-6-1. All the other county officials are covered by a blanket provision. Not even is the county treasurer specifically mentioned when actually it is this officer in the strict sense who expends the money.

The county commissioners are really responsible for all the expenditures of the county money, and any time money is spent or obligated contra to this section upon their approval, there would be a violation. It is our opinion that the Legislature did not intend to rest the responsibility alone with the county commissioners. It meant to place an additional responsibility upon the county clerk in cases of the disbursements and expenditures of county funds, namely, the county clerk would be responsible for participating in such prohibited expenditures or disbursements by signing such warrants.

Attention is called to a similar situation in the case of State vs. Aragon, 55 N.M. 423, 234 P. 2d 358, wherein a defense was interposed to the illegal expenditures of public funds under another statute that the defendant had acted only as secretary of a school board and thus had not actually disbursed the funds. Justice McGhee reviewed the New Mexico statutes on disbursements of public funds, including § 11-6-1, and pointed out that the "mere approval of bills and vouchers and the issuance of warrants was a disbursement of public funds." This is a reasonable construction of this section inasmuch as the county clerk has in that office all the records of the county so far as expenditures are concerned. (§ 15-39-5) The county clerk should not be allowed to

claim that with reference to accounts his action is ministerial and thus allow public funds to be illegally spent. The purpose of the act was to prevent the spending of county funds in such way that the incoming county officials would be without operating money. One with knowledge of the status of county expenditures cannot stand by and sign warrants which violate this section. The law certainly would not tolerate such absurd result.

Attention is further called to a portion of Section 11-6-5, which reads as follows:

". . . Any official whose duty it is to allow claims and issue warrants therefor, who issues warrants or evidences of indebtedness contrary to the provisions of this act shall be liable to their respective counties or municipalities for such violations and recovery may be made against the bondsmen of such official."

We are convinced that the county clerk is part of the issuing machinery for warrants. In other words the county clerk in view of these provisions has more than a name signing function with reference to the issuing of county warrants. The county clerk must be sure that § 11-6-1, is not violated before affixing his signature to the warrant. In view of this latter § 11-6-5, above quoted, and the implications of State vs. Aragon, supra, we do not believe that a county clerk could avoid his responsibility for having signed a warrant upon the order of the county commissioners if it could be shown that such signature was responsible for the unauthorized expenditures or disbursements of public funds prohibited by § 11-6-1.

We think another approach to this problem may offer an indication of the answer to these questions. Could a successful mandamus suit be maintained to compel a county clerk to carry out his functions with reference to claims approved by the county commissioners, even where he raised the violation of § 11-6-1 as reason for failure to act? We believe that proof of a violation of § 11-6-1 by the county clerk would be a complete defense to a mandamus proceedings. (55 C.J.S., Mandamus, Section 10C, page 35) Kiddy vs. Board of County Commissioners of Eddy County, 57 N.M. 145, 255 P. 2d 678. See also this case for a discussion of the question of ministerial duty. In other words a public official cannot be compelled to act in such a manner that the law is violated. Certainly to this extent it is imperative that the county clerk determine that the law is not violated by his action. If the county clerk blindly signed warrants where the records of his office showed that such warrants violated § 11-6-1, such clerk would also violate this statute.

Generally the act of attestation is merely the witnessing of the execution of a document or the witnessing of the signature of another. 7 C.J.S., Attestation, page 692. However, under § 15-44-4, it seems that this attestation by the clerk is absolutely required for a valid warrant.

The only way that a claim against this county can be paid is by an order (warrant) issued in conformity with this section by its own terms. It is our opinion that the failure of the county clerk to sign the warrant would prevent the payment of the claim.

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