Opinion No. 63-86

July 19, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

TO: Mr. J. Vernon Bloomfield Chairman Board of County Commissioners San Juan County Aztec, New Mexico

QUESTION

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1. It has recently been learned that the small claims court judge appointed in San Juan County does not have the statutorily required two years residence in the county. In view of this fact can the Board of County Commissioners in San Juan County legally pay the salary of the judge and the expenses incurred in the operation of the court?

2. Is there now an automatic vacancy in the office?

3. If the residence requirement is met while the judge is still serving his term of office and no de jure officer has been appointed, is the judge's title to the office validated at that point?

CONCLUSIONS

1. Yes.

2. No.

3. Yes.

OPINION

*{*189}* **ANALYSIS**

Section 16-5-3, N.M.S.A., 1953 Compilation, provides, among other requirements, that a small claims court judge "shall have been a bona fide resident of the county wherein he is elected for not less than two (2) years immediately prior to his election."

It has recently been learned that the small claims court judge appointed in San Juan County does not meet this requirement. Accordingly you inquire whether the Board of County Commissioners can legally pay the judge's salary.

Prior to getting into this matter we wish to point out that while the judge in question was appointed rather than elected, Section 16-5-3, supra, also provides that persons

appointed to this particular office must be "qualified under the terms of this act." Thus the two-year residence requirement applies not only to persons elected but also to persons appointed.

Since we are dealing with a position created by the legislature, as distinguished from a constitutional office, we have no problem of the legislature imposing qualifications for holding office which are more stringent than those contained in the constitution. The legislature could and did, impose a residence requirement as a prerequisite to eligibility for small claims judge. See 42 Am. Jur., Public Officers, Section 45.

We now turn to the legal implications of the appointment of a small claims judge who was ineligible for the office due to his failure to meet the residence requirement.

First it must be noted that "a person who is ineligible to hold an office because he does not reside, or has not resided a sufficient length of time, in the locality, may nevertheless become an officer de facto." Constantineau, **De Facto Doctrine,** Section 161; **State v. Fountain,** 14 Wash. 236, 44 Pac. 270.

A person having color of title to an office and openly performing the duties thereof is to be regarded as a de facto officer even though he is not eligible for the office. **Juliani v. Darrow,** 58 Ariz. 296, 119 P.2d 565. **Shriber v. Culberson,** Tenn., 31 S.W. 2d 659. A de facto officer is to be distinguished from an ordinary usurper or one not having some color of title to an office, and the de facto officer is one whose title is not good in point of law but who is in fact in unobstructed possession of an office and is publicly discharging the duties of the office in such a manner and under such circumstances as not to present the appearance of being an intruder. **Huff v. Sauer,** Minn., 68 N.W. 2d 252; **Schoffield v. Hebel,** 301 Ky. 358, 192 S.W. 2d 84; **City of Laurence v. McDonald,** 318 Mass., 520, 62 N.E. 2d 850.

The official acts of a de facto officer involving the interests of the public and the rights of third persons are entirely valid. **Morgan v. State,** 66 Okl. Cr. 205, 90 P. 2d 683; **Michigan City v. Brossman,** 105 Ind. App. 259, 11 N.E. 2d 538. This principle is quite obviously based on public policy, convenience, necessity and justice. **National Bank of Washington v. McCrillis,** 15 Wash. 2d 345, 130 P. 2d 901. It would be most unreasonable to expect members of the public to inquire beforehand into the title of the officers with whom they propose to deal to ascertain whether or not reliance can be placed on their assumed authority. Constantineau, **De Facto *{*190}* Doctrine,** Section 3.

Under the facts in the present situation as we understand them, the judge in question is a de facto officer (as distinguished from a de jure officer, i.e., one who is legally entitled to the office but is kept out of possession thereof). Having established this, the question becomes whether a de facto officer is entitled to the compensation provided by law for the particular office.

Judicial precedent on this matter is not entirely harmonious among the states. However, in this particular jurisdiction, as in a considerable number of others, the rule is that a de facto officer who in good faith discharges the duties of an office while there is no contesting de jure officer for that office may collect the compensation provided by law for the office. **Juliani v. Darrow,** 58 Ariz. 296, 119 P. 2d 565; **O'Malley v. Parsons,** 59 Idaho 635, 85 P. 2d 739; **Stevens v. Allamuchy,** 22 N.J. Misc., 106, 36 A. 2d 128; **Peterson v. Benson,** 38 Utah 286, 112 Pac. 801 **Naylor v. Carter,** 167 Okl. 125, 27 P. 2d 843.

In the New Mexico case of **State v. Otero,** 33 N.M. 310, 267 Pac. 68, the same question here involved was dealt with and the Court had this to say:

"In this case there is no de jure officer, none having been appointed. In such a case there is a line of well-considered cases holding that a de facto officer is entitled to recovery.

We are inclined to follow this doctrine in this case. It is to be remembered that relator appears with an appointment regular on its face, emanating from the proper authority, and apparently valid. The invalidity of the appointment is made to appear by reason of the collateral fact that he is a member of the Legislature, and is ineligible to hold the office. His appointment is entirely regular and legal, but for this ineligibility. . . . The services have been rendered and the expense incurred, and the state has received the benefit of the same, and no de jure officer is claiming to be injured, there never having been any de jure officer appointed. Under such circumstances it would be inequitable and unjust to allow the state to accept the benefits of the service and refuse to pay for the same."

Since the judge here involved is a de facto officer and there is no de jure officer claiming the position, none having been appointed or elected, the answer to your question is that the compensation provided by law for the position should be paid to the judge in question. And, of course, the expenses incurred in the operation of the court should be paid.

There are other facets of this problem about which you did not specifically inquire but which are inherent under the circumstances.

The fact that it has now been learned that the judge in question does not have the necessary residence qualifications does not create a vacancy in the office by operation of law. Except when a vacancy in a public office occurs by reason of a specific statutory provision, it occurs only when(1) the term has expired; (2) the incumbent has died; (3) the incumbent has resigned; (4) or the incumbent has been removed by proper legal proceedings. **Stowers v. Blackburn,** *{*191}* W.Va. 90 S.E. 2d 277. None of these events having occurred, it is necessary to examine our statutory provisions relative to the vacancy of a county office. There is only one provision in the statute governing vacancies that could conceivably be applicable. Under Section 5-3-1, N.M.S.A., 1953 Compilation, an office of this type does become vacant "by failure of the officer to qualify

as provided by law." The word "qualify" as used in this type of statute does not refer to eligibility for the office but rather to the performance of the acts which the chosen person is required to perform before he can enter into office, usually the taking of an oath and the filing of a bond. **Bradley v. Clark,** 133 Cal. 196, 65 Pac. 395; **Archer v. State,** 74 Md. 443, 22 Atl. 8; **State v. Albert,** 55 Kan. 154, 40 Pac. 286; **Toy ex rel. Elliott v. Voelker,** 273 Mich. 205, 262 N.W. 881.

We understand that the judge in question became a bona fide resident of San Juan County in November of 1961. Since he will soon meet the two-year residence requirement, another question that may as well be answered now is the following: What is the effect of the removal of a disqualification to hold a particular office during the de facto officer's term?

Again the courts are not agreed on their treatment of this problem, some holding that such removal of the disqualification completely validates the de facto officer's title to the office, while others take a contrary view. The result frequently depends on the nature of the disqualification which is removed. See A. L. R. 828.

When the disqualification which is removed is the lack of a specified period of residence, we feel the better view is that acquisition of the necessary residence during the term of office validates the incumbent de facto officer's title to the office in situations where there is no de jure officer contesting for the office. **Widincamp v. Wood,** Ga., 144 S.E. 900; **Ex Parte Dones,** 10 P.R.L. 170; **State v. Carroll,** 57 Wash 202, 106 Pac. 748.

In the last cited case the court stated as follows:

"Hence, in this case, even though the relator were not qualified to accept the office tendered him when first made, he accepted it as far as he was able, and continued in the performance of its duties until after his disqualification was removed. If, therefore, the appointment did not legally take effect when first made and accepted, it became legally effective when relator continued in the performance of the duties of the office after his disqualification was removed."

Our conclusion is that if the judge in question is still in office and is still performing the duties of the office, and if no de jure officer for this position has been appointed by the Governor in the interim, the de facto officer's title to the office will be completely validated upon his acquiring the required residence.

A de facto officer's title to an office cannot be made an issue in any action or proceeding to which he is not a party, but such an officer may be ousted in a direct proceeding against him. Constantineau, **De Facto Doctrine,** Section 429; 67 **C.J.S., Officers,** Section 143; **Martain v. Grandview Independent School District,** Tex., 266 S.W. 607; **Owen v. Reynolds,** Va., 1 S.E. 2d 316.

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