

Opinion No. 13-1144

December 20, 1913

BY: FRANK W. CLANCY, Attorney General

TO: Honorable C. W. G. Ward, Las Vegas, New Mexico:

COMPENSATION OF COUNTY OFFICERS.

County commissioners not to receive mileage. Suit against commissioners of Guadalupe County.

OPINION

{*324} Upon my return from El Paso, I find your letter of the 16th inst. enclosing copy of complaint in the case of Duran, et al., vs. County Commissioners, and of the order of the court to show cause why injunction should not issue. I had previously received a line from Mr. George Sena, enclosing a copy of your letter to him of the 10th, which had been forwarded to me at El Paso. Of course, I could say nothing about the matter until I could see the complaint.

On July 4th, 1912, I sent a letter to all district attorneys on the {*325} subject of payment of county salaries and of office expenses of those officers whose compensation had previously been from fees or commissions, and in that letter I stated that I did not believe that county commissioners could properly receive any mileage for attending meetings but that they might properly receive their actual and necessary traveling expenses. In response to this letter you wrote me on the 9th and 13th of July, to the effect that while you could not fully agree with me, yet you, in effect, advised county commissioners to follow my view rather than your own.

The complaint in the present case shows that the commissioners of Guadalupe County, in one particular at least, did not follow my advice as they allowed and paid mileage to their members and I can see no way of making even a plausible defense to that allowance.

In your letter to Mr. Sena, you stated that you thought that the complaint could be attacked by demurrer on the ground that a remedy exists at law, but this was written, evidently, before you had seen the complaint. If this action were brought to recover moneys improperly paid, the complaint would be open to such an objection, but the relief sought is only an injunction against further action of the kind complained of, and the facts of the previous allowances appear to be set up only as a foundation for asking the injunction. I suppose you may have had in mind that actions at law could be brought against the county commissioners upon their bonds required by Section 696 of the Compiled Laws, and possibly the court might sustain that view, although I do not feel entirely clear about it, having made no examination of the law as to injunctions about

the paying out of public money. I have an impression that the rule might be a little different as to such payments.

I suggest that you could, without any inconsistency as to your personal opinion of the merits, present such a demurrer.

As to the mileage allowed, I think there can be no doubt that the only proper course for the commissioners to pursue is the one which I advised with regard to a commissioner of Torrance county, in a letter which I wrote to Mr. Cleofes Romero on the 6th of last June. In that letter I expressed the opinion that even the mileage of five cents per mile was cut off, but that it would be proper for commissioners to receive their actual and necessary expenses in coming to and returning from meetings, to be allowed like other accounts upon itemized and verified vouchers. I advised that the county commissioners should put on the record of the proceedings of the board, a statement that he had drawn the mileage under a misapprehension of the law, believing he was entitled to it, and that now his attention having been called to the subject, he desired to repay the money improperly received. After the money had been put back in the treasury he might then present verified accounts of his actual and necessary expenses and have them allowed and the money paid to him. I do not believe there can be any doubt about this, and it seems to me it would be quite proper for you to advise these county commissioners accordingly. If this could be done before the return day, and a showing thereof made to the court, it would reduce the controversy to the question of payment of salaries only without being complicated with anything else. Why {*326} could not your demurrer be put on two grounds, first, the one you suggest of there being an adequate remedy at law, and second, on the ground that the payment of salaries heretofore fixed by statute is not in violation of any prohibition, constitutional or otherwise? You would, of course, say to the court that you, personally, had no faith in the second ground, but we would try, from this office, to furnish a brief statement of my view of the law, which you could submit for the consideration of the court and if the court overruled the demurrer the case would be ready for an appeal, which, I think, it would be well to take immediately.

You say that, in the case of the Treasurer of San Miguel County, you tested the question, but in that case you say that the court held that his emoluments were not a salary and there is no doubt in my mind of the correctness of that holding; but you also say it was held that even if it were a salary, he had no right to it until the legislature had fixed a salary under the Constitution and in accordance with the decision of the Supreme Court. This latter part was not necessary to the decision of the case and I do not think that it was a necessary conclusion to be drawn from the decision of the Supreme Court, which, as I recollect, is really limited to the question actually before it, which was as to the payment of fees to the county officers and not of salaries.

I shall be here until the end of the week and will be glad to hear further from you as to the course to be pursued. I will enclose a carbon copy of this letter, as possibly you may desire to send it to the clerk and commissioners of Guadalupe County if you recommend to the county commissioners that they immediately pay back the mileage received so as to make the case one relating only to salaries. You could, of course,

arrange with Mr. Clark to have the record show that the only question submitted for consideration, if the court should hold the first ground of demurrer to be bad, would be as to payment of salaries and he would probably stipulate with you as to the correctness of the amounts paid for salaries, if any are allowable in accordance with the territorial statutes.