

## Opinion No. 15-1494

April 3, 1915

**BY:** FRANK W. CLANCY, Attorney General

**TO:** Hon. Manuel U. Vigil, District Attorney, Albuquerque, New Mexico.

**As to salaries to be paid county officers under the provisions of Chap. 12 of the Laws of 1915.**

### OPINION

{\*77} I have this morning received your letter of the 1st instant. You say that there is some difference of opinion as to the power of the Board of County Commissioners to fix the compensation of jailers at a higher rate than the old salary of \$ 50.00 per month, which, I believe, was fixed by the third paragraph of Section 11 of the act {\*78} of 1897, said section appearing on page 305 of the Compiled Laws, for any of the time prior to the passage of the recent county salaries bill. I notice that that old statute did not exactly fix the salary for the jailer, but directed that there should be paid to the sheriff not more than \$ 50.00 per month for jailer, and not more than \$ 40.00 per month for one guard at the jail. This left the law in such shape that the sheriff might have hired a jailer at even a smaller amount and appropriated the difference between that and the amount allowed by the county commissioners to his own use. The new law seems to consider the jailer as something in the nature of a county officer. It is entitled "An Act relating to county officers," and in view of the constitutional provision that the subject of every bill shall be clearly expressed in its title, I feel constrained to hold that the legislature has declared county jailers to be county officers.

This act was passed in compliance with Section 1 of Article X of the Constitution, which required the legislature, at its first session, to classify the counties and fix salaries for all county officers, which should apply to those elected at the first election under the Constitution. Section 9 of the new law clearly contemplates the payment of all officers whose salaries are fixed by that act, not only for the future, but for the time in the past since the organization of the state government. Your suggestion that the compensation of jailers, having been fixed by statute of which there had been no repeal until the passage of the salaries bill, would be limited to the old salary up to the time of the passage of the new act, would, I believe, as a general proposition be quite sound, but there are two objections to it, the first of which is that the old statute, as already pointed out, did not fix what should be paid to the jailers, but what should be paid to the sheriffs for the jailers and guards, and the other is that this law must be considered in a somewhat different light from ordinary legislation, enacted as it is in pursuance of the mandate of the Constitution, which declares that the salaries, when fixed, shall be applicable to the officers elected at the first election under the Constitution. It is true that jailers are not such elective officers, but I am unable to see how we could properly apply to them a different rule from that which is applied to the other officers provided for in the

salaries bill, and give effect to the legislative intent. It appears to me that there is now created by this new law a new county office, and that under the Constitution it was the duty of the legislature to fix the salary of that new county officer. The legislature did not exactly fix the salary, but only indicated a maximum within which the compensation of the jailer and guards is regulated by the county commissioners.

You further ask whether it does not follow, because the Constitution prohibits the increasing or decreasing of an officer's salary during his term of office, that the increase in the salaries of the county school superintendents, county commissioners and probate judges is inoperative as regards the present incumbents. A part of what I have already said is applicable to the consideration of this question. While it is true that these officers had salaries fixed by the territorial laws, and that Section 27 of Article IV of the Constitution declares that the compensation of any officer shall not be increased or decreased during his term of office, yet that {\*79} prohibition is qualified by the words "except as otherwise provided in this constitution," and as to county officers I think their salaries are "otherwise provided in this constitution," by Section 1 of Article X thereof. As already stated, that section makes it the duty of the legislature to fix salaries for all county officers, which should apply to those elected at the first election under the Constitution. It is also true that by Section 4 of Article XXII of the Constitution it is provided that all laws of the territory not inconsistent with the Constitution shall remain in force until they expire or are altered or repealed, and under this provision the acts of the legislative assembly of the territory, as to the salaries of officers referred to, might be considered as remaining in force until the adoption of the salaries bill under the constitutional mandate, which would then supersede the territorial laws and would relate back to the beginning of the terms of those officers. If the legislature had seen fit to fix lower salaries for these officers, I am of opinion that under Section 9 of the act, if they had drawn the salaries fixed by the territorial statutes, they would be compelled to account for the surplus which they had received above the amount of the new salaries fixed, and would be compelled to pay that surplus into the treasury.