

Opinion No. 17-2028

July 25, 1917

BY: HARRY L. PATTON, Attorney General

TO: Hon. A. G. Whittier, State Traveling Auditor, Santa Fe, New Mexico.

Chapter 58, Laws of 1917, Providing for the Employment of Additional Assistance for County Clerks, Is Invalid.

OPINION

I have had under advisement for some time your letter in which you ask for a construction of Chapter 58, Laws 1917, which is entitled "An Act Relating to the Employment of additional Assistants for the Several County Clerks of the State."

There is but one section to the Act, and the same reads as follows:

"Whenever the total cash receipts on account of fees collected by any of the County Clerks in any county within this state shall exceed the amount of salary, deputy hire and expenses now allowed by law, one-half of the amount of such excess may be expended, or so much thereof as may be necessary in behalf of employing additional deputies; such additional deputies herein authorized to be employed shall not be employed except by consent and approval of the Board of County Commissioners and then only upon recommendation of the State Traveling Auditor, who shall first certify that he has investigated the conditions and requirements of such County Clerk and that the employment of additional deputy or deputies is essential and necessary to the efficiency of the public service.

"Provided, further, that the basis for the employment of such additional deputy hire shall be upon the amount of such excess revenue derived on account of fees collected for the three months preceding such employment of additional deputy or deputies, and the amount of revenue derived shall be ascertained quarterly and the additional deputies authorized determined accordingly.

"Provided, further, that the salary of such additional deputies shall be fixed by the respective Boards of County Commissioners and the salary of no such additional deputy shall exceed seventy-five dollars a month; and such salaries shall be paid in the same manner as now provided by law for the payment of county officers."

Your first question is as follows:

"Does the condition as to total cash receipts on account of fees, pertain to the work done by the county clerk, as such, (recording, filing, etc.) or to fees received by reason

of all his activities as clerk, which includes fees received as ex-officio clerk of the district court and clerk of the probate court?"

Article VI, Section 22 of the Constitution provides for the election of a county clerk and further provides that he shall, in the county for which he is elected, perform all the duties "now performed by the clerks of the district courts and clerks of the probate courts." Under the Constitution, there is but one office, although the incumbent has various duties to perform. Prior to the adoption of the Constitution, the clerk of the probate court was ex-officio recorder of the county and clerk of the board of county commissioners, and perhaps had other duties to discharge. Under the Constitution, to these duties were added those performed by clerks of the district courts.

Under the language of Chapter 58, Laws 1917, in determining the amount of receipts, we are governed by the "total cash receipts on account of fees collected by any of the county clerks." In my opinion, this includes all receipts collected by the county clerk in the discharge of the various duties of his office, including the duties of clerks of the district court, and of the probate court.

In your second question you ask for a construction of the words, "expenses now allowed by law," and ask whether or not the law means that the fees must exceed salaries, deputy hire, and such expenses as fuel, light, stationery, books, etc.

The Act says that whenever the receipts "shall exceed the amount of salary, deputy hire and expenses now allowed by law," one-half of such excess may be expended as provided for in the Act. This clearly includes salary and deputy hire, and the only question in this connection to be determined is, What are expenses now allowed by law? Section 7 of Chapter 12, Laws of 1915, requires that the Board of County Commissioners shall purchase for and provide the several county officers with all necessary stationery, postage, and office supplies. I am of the opinion that, in computing this excess, the amount which has been expended for the benefit of the county clerk for expenses under the provisions of the section last quoted, should be taken into consideration. If such expenses are not considered, I can conceive of no expenses which could have been contemplated by the Act of 1917.

You further suggest, considering the fact that the salary provided for in the Act is based upon a percentage of the fees, that this violates Article X, Section 1, of our Constitution, which provides that:

"No county officer shall receive to his own use any fees or emoluments other than the annual salary provided by law."

While I confess that this is a grave question, in considering the constitutionality of this act, I shall not attempt to answer this question, for the reason that other graver questions are presented, to which I shall give attention.

Article X, Section 1, of the constitution reads, in part, as follows:

"The legislature shall at its first session classify the counties and fix salaries for all county officers."

The Constitution clearly delegates to the legislature the authority to fix salaries for all county officers. This duty was discharged by the legislature by the enactment of Chapter 12, Laws 1915, which classified the counties and fixed the salaries of the various county officers according to the classification of the various counties. It will doubtless be necessary to first determine whether or not the deputy clerk contemplated by the provisions of the Act of 1917 is a county officer. Under my construction of the opinion in the case of *State v. Montoya*, 20 N.M. 104, 146 Pac. 956, our Supreme Court held that a deputy assessor, the same might likewise be applied to a deputy county clerk. In this case, the court had under consideration the question as to whether or not the Board of County Commissioners had authority to pay a deputy assessor out of public funds. The court, in its opinion, said:

"It could be argued, with as much force, that the County Commissioners could pay officers such salaries as might be agreed upon, as that they can pay the deputies of such officers a salary, in the absence of a statute, where such deputies are required to take an official oath and fall within the designation of county officers. In the case of *Delgado vs. Romero*, 17 N.M. 81, 124 Pac. 649, Ann. Cas. 19140C 1114, this court held that the compensation of county officers is dependent upon the enactment by the legislature of a salary law, from which conclusion we see no reason to depart. Such being the case, and a deputy assessor, under the statute, being required to take an official oath, which under the authorities, brings him within the designation 'public officer,' or 'county officer,' it necessarily follows that he cannot claim compensation from the county in the absence of a statute fixing the same and authorizing the payment out of the county treasury."

My predecessor, Hon. Frank W. Clancy, in an opinion delivered to Hon. Manuel U. Vigil, District Attorney, on April 3, 1915, Opinions of the Attorney General No. 1494, held that, while the county jailer was not otherwise designated by statute as a county officer, inasmuch as provision was made in the county salary law of 1915 for the compensation of jailer, such office was to be considered as a county office. Likewise, provision is made by Section 2 of said Chapter 12, Laws 1915, for the compensation of deputy county clerk. From all of this, I am of the opinion that a deputy county clerk is a county officer within the meaning of our Constitution. The Constitution expressly provides that the legislature shall fix the salaries of all county officers. In the face of this express provision, may the legislature delegate the authority to the Board of County Commissioners to fix the salary of a county officer? It is a general rule of law that where there is an express Constitutional provision that the legislature shall provide laws for certain matters, the legislature cannot delegate its powers in respect to those matters to a Board of County Commissioners. A further Constitutional provision should be considered in this connection. Article IV, Section 27, of the Constitution contains the following clause:

"nor shall the compensation of any officer be increased or diminished during his term of office, except as otherwise provided in this Constitution."

It might be contended that this is not an increase of the compensation of the county clerk, but that such compensation would go to his deputy. This question is thoroughly discussed in the California case which I shall hereafter cite in this connection. Also, in this connection, I desire to cite Section 6 of Chapter 12, Laws 1915, which reads as follows:

"No county officer shall accept or receive to his own use, or for or on account of any deputy or deputies, clerk or clerks appointed by him or employed in his office, or for or on account of expenses incurred by him or by any such deputy or deputies, clerk or clerks, or for or on account of his office, any salary, compensation, allowance, fees or emoluments in any form whatsoever, other than as by this act allowed."

From this Section, it may be seen that the county officer is not only prohibited from accepting or receiving to his own use any salary or compensation, except as provided in the Salary Act, but that he is prohibited from accepting or receiving any compensation "on account of any deputy or deputies, clerk or clerks, appointed by him or employed in his office." All of this adds weight to the theory that this is additional compensation received by the county clerk. The following case is clearly in point in many of the particulars under discussion: *Dougherty v. Austin*, 94 Cal. 601, 28 Pac. 834, 29 Pac. 1092, 16 L. R. A. 161. The facts in that case disclose that the legislature of the State of California passed an Act authorizing the employment of additional deputies for the county clerk, and authorizing the Board of Supervisors of the County to fix the salary. The Constitution of that State provides that the legislature shall, by general and uniform laws, provide for the election or appointment of county officers, and that it shall regulate the compensation of all of such officers in proportion to duties. Pursuant to such Constitutional provision, the legislature passed a general salary law which contained the following provision:

"The salaries and fees provided in this Act shall be in full compensation for all services of every kind and description rendered by the officers therein named, either as officers or ex-officio officers, their deputies or assistants, unless in this Act otherwise provided."

The court, in its opinion, held that the power to fix salaries as conferred by the Constitution upon the legislature, could not be delegated to the Board of Supervisors. In this connection, the court says:

"There can be, under well settled principles of Constitutional law, but one answer to this question, and that is one which denies to the legislature any right to thus delegate to any other body or tribunal what is most clearly a legislative power, the exercise of which the Constitution has confided to that department of the State alone."

The opinion then quotes fully from *Cooley on Constitutional Limitations*, p. 117, in which Mr. Cooley says:

"One of the settled maxims of Constitutional law is that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain; and by the Constitutional agency alone the laws must be made until the Constitution is changed. The power to whose judgment, wisdom and patriotism this high prerogative has been entrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust."

In addition to this authority, I submit that our Supreme Court so held in the cases of *Delgado v. Romero*, *supra*, and *State v. Montoya*, *supra*. In *Delgado v. Romero*, the court said:

"If the compensation of county officers is dependent upon the enactment by the legislature of a salary law, under the above statement of the law, which is sound, he cannot recover for his services until such a law is passed, and then only as provided by such act."

In the *Montoya* case, the court said, as quoted above:

"this court held that the compensation of county officers is dependent upon the enactment by the legislature of a salary law, and from which conclusion we see no reason to depart."

In *Dougherty v. Austin*, *supra*, the court in its opinion further holds that the legislature had no power to increase the compensation of the county clerk in the face of the Constitutional provision of that State which says that "the compensation of any county, city, town or municipal officer shall not be increased after his election or during his term of office." It further held that the legislature, not having the power itself to do so, much less had power to authorize the Board of Supervisors to increase the salary of the county clerk during his term of office. The court, in discussing the question as to whether or not this was an increase in the compensation of the county clerk, says:

"The county, by order of the board, pays \$ 600 per annum as part of compensation for the performance of the duties of the clerk's office. From a pecuniary standpoint, such course is a very substantial benefit to the county clerk. The deputy is under his control, is empowered by law to act in the place and stead of his principal in all matters. The principal is liable for his salary, and a payment by the county of such deputy's salary is for all practical purposes, a payment to the principal, and in this case necessarily results in an increase of the principal's compensation to the extent of \$ 600 per annum. It is perfectly immaterial to the clerk whether his salary is increased to \$ 3,100 per annum and from that sum he pays his deputies \$ 600 per annum, or that it remains at \$ 2,500 and the county pays the deputy the \$ 600. The clerk reaps the full benefit of the \$ 600 in both cases."

From a careful consideration of this question, and in the light of the authority cited and other authority which I have consulted, I am of the opinion that this Act violates Article X, Section 1 of the Constitution of New Mexico, which provides that the legislature shall fix the salaries of county officers. I am also of the opinion that Article IV, Section 27, of the Constitution is violated, wherein it provides that the compensation of an officer shall not be increased during his term of office.