

Opinion No. 18-2087

March 4, 1918

BY: HARRY L. PATTON, Attorney General

TO: Honorable Bonifacio Montoya, State Corporation Commission, Santa Fe, New Mexico.

Purpose of an Official Contingent Fund. Right of State Corporation Commission to Pay Legal Advisor a Salary Out of the Contingent Fund. Payment of Stenographer's Salary in Addition to the Appropriated Amount, from the Contingent Fund May Be Proper.

OPINION

We have your favor in which you state that for some time you have entertained serious doubts as to the propriety of certain practices of the State Corporation Commission with respect to the employment of its staff of assistants. The answer to this inquiry has been delayed by the unusual pressure of business in the office, and because of the difficulty of arriving at a definite conclusion regarding the questions you raise.

You ask my opinion as to what authority, if any, the State Corporation Commission has to employ a legal advisor under a permanent arrangement and pay such legal advisor a salary agreed upon, out of the contingent fund of the Commission, there being no express legislative authorization in the form of an appropriation for the pay of such legal advisor. You also ask whether the Commission is authorized to employ a stenographer at a greater salary than that named in the appropriation and pay the excess from the contingent fund.

In answer to your first question you are advised as follows: In making appropriations to your Commission, the legislature, in 1915, appropriated specifically for the salaries of the members of the Commission, of a chief clerk, of a rate clerk, of a corporation clerk, of a record clerk, of two stenographers, and another blanket item covering salaries of employes and other lawful expenses of the Commission. In 1917 the appropriation was divided into six items -- for the salaries of members of the Commission, of the chief clerk, of a rate clerk, of two stenographers, of a record clerk, and for contingent expenses. Thus it appears that during the term since January 1st, 1917, there has been no appropriation to your Commission for the employment of a legal advisor. It, therefore, becomes necessary to determine whether, after a legal advisor has been employed, his salary is an appropriate charge upon the contingent fund of your Commission. The item of contingent expense is designed to cover office expenses and expenses entailed in the proper discharge of the duties of the office, which are uncertain or unforeseen. Current expenses are defined by the Court of Appeals of the State of New York as "such as are possible or liable, but not certain to occur." In other words, it seems to me, that the contingent fund is furnished for the purpose of paying such expenses of the office as could not be previously estimated by the legislature. Taking such a view of the

meaning of the term "contingent expense" and of the purpose of the contingent fund, it seems to me that the regular and permanent employment of an assistant for whom no appropriation has been made, is improper and not contemplated by law. The State Corporation Commission, being a State office, is possessed of a legal advisor under the law in the person of the Attorney General of the State, and it seems to me that the salary of a legal advisor which has not been authorized by the legislature, is not a proper charge against a contingent fund, which is designed for the meeting of current and unforeseen and uncertain expenses of the office. Such is my view, and if I were a member of the State Corporation Commission, I would not authorize the employment of such a legal advisor as you inquire about.

However, there is another side to the question, which makes your inquiry difficult to answer. The members of the Corporation Commission, like any other State officers, are charged with the efficient administration of the office; the contingent fund is given to the officer to aid him in so executing the duties of his office. What expenses are and what are not necessary for the efficient administration of the office, must obviously be determined by the officer himself. The contingent fund is entrusted to the officer to be used by him in his discretion, as may be best in his judgment for the administration of the duties of his office. It is clear to me that the officer himself is obviously the best judge of what are proper expenditures from his contingent fund, and I do not know of any way in which his expenditures from such fund could be questioned, except in the case of gross misuse. Therefore, in order to say positively, as a matter of law, whether the employment of such legal advisor is or is not proper, it would have to be determined whether such employment is a gross misuse of the contingent fund, or whether it is a use such as might properly be made within the discretion of the officer. I have stated above that, in my opinion, such employment is unlawful and that if I were a member of the Corporation Commission, I would not be a party to it, but I am unable to formulate an opinion as to whether such employment is a gross misuse of the contingent fund. That would be a matter for judicial determination, and would depend upon all the facts surrounding the employment and the character of the duties of the office. It may be that the Commissioners, by showing various facts, could justify such an expenditure and could show that it was a proper charge upon the contingent fund, and not a gross misuse of the fund. From the facts, as I see them, it does not seem to me that the Commissioners could thus justify the employment, but, on the other hand, if the Commissioners can show facts and circumstances which justify the employment, and can show that their discretion has been properly exercised in making the employment, then, I do not see how the employment can be disturbed. In other words, the expenditure of the contingent fund rests so largely within the conscience of the officer, that it is very hard for anyone else to say that any particular expenditure is improper.

In your letter you make the point that the employment you mention is a regular and permanent employment, as distinguished from an occasional employment of an attorney in special cases. I think your point is well taken, and the permanent character of the employment, as pointed out by you, is one of the circumstances which inclines me to the opinion which I have expressed above.

Your second question might be answered by saying that when the legislature appropriates a specific amount for a stenographer's salary, such amount is to be deemed the lawful compensation to be paid to such stenographer, and that an excess of this amount could hardly be said to be a proper charge on the contingent fund. However, there is a circumstance which may very well justify this excess payment. In the last few months, owing largely to war conditions and the great demand for stenographers, the current salary of stenographers has materially increased and it is now very difficult to obtain competent stenographers at the salary which obtained some months ago. In view of this circumstance, it occurs to me that an excess payment to stenographers, over and above the sum named in the appropriation, might well be considered unforeseen expense, such as would properly be chargeable on the contingent fund.