

Opinion No. 26-3907

August 9, 1926

BY: ROBERT C. DOW, Assistant Attorney General

TO: Hon. R. H. Carter, State Comptroller, Santa Fe, New Mexico.

This will acknowledge receipt of your request for an opinion relative to the expenditure of money in the administration of Chapter 48, Laws of 1923, an act creating the office of State Comptroller.

As I understand it the traffic in gasoline along the New Mexico-Texas border wherein large amounts of gasoline are and have been escaping the proper excise tax has made it necessary for you in cooperating with the State of Texas to employ the services of a man who is a resident of Texas; I understand also that the man employed is not a deputy or officer in your department, and that such nonresident is employed for the reason that a resident of New Mexico has no authority in Texas to request the production of records which must necessarily have to be obtained in the proper administration of the New Mexico excise gasoline tax law. I understand further that your office is cooperating with the Comptroller's Office of Texas, and that the Texas Office has agreed to appoint a Texas resident clothed with the authority to demand the production of records pertaining to sales of gasoline, and that by reason of such cooperation you are thereby enabled to obtain valuable services from such employee which services could not be rendered by a resident of New Mexico by reason of lack of authority as above outlined.

§ 2 of Article 7 of the Constitution of New Mexico, as amended, is, in part, as follows:

"Every citizen of the United States who is a legal resident of the State and is a qualified elector therein, shall be qualified to hold any public office in the State except as otherwise provided in this Constitution."

§ 3950 of the New Mexico Code is as follows:

"No clerk, stenographer, or employee shall be eligible to be appointed as such clerk, stenographer or employee, unless such person shall have been a bona fide resident of the State of New Mexico for two years prior to the date of such appointment."

If there is any prohibition against the employment of the services of such employee, it is contained in one of the two above provisions. Since such employee is not a deputy in your office, or a public office holder in New Mexico, the above provision of the Constitution would not prohibit you from paying for such services, provided they are rendered in the necessary administration of the Comptroller Act of New Mexico.

§ 3950, above referred to, is taken from the appropriation act of March 18, 1909, being § 11, Chapter 127, Laws of 1909. Upon reading the original law, as enacted, it clearly appears that said § 11 was intended to apply only for the purposes of that particular appropriation act for the year 1909, and was only intended to require that clerks, stenographers and employees should reside in the state for a period of two years before being qualified to be employed under said appropriation act, and it was not intended that such clerks, stenographers and employees not employed under the appropriation act for that year should possess such qualifications. Said Act of 1909 did provide that the 1909 appropriation should be a continuing appropriation in case any succeeding legislature failed to pass an appropriation law. Our last session of the legislature passed an appropriation law, and, therefore, the Act of 1909 could have no effect in prescribing the qualifications for employees under the appropriation act as passed by our last legislature.

It might be argued that inasmuch as § 3950 was carried forward into the 1915 Code that such section was then enacted into law and would have application in this instance. A similar question was decided in the case of *Ex Parte Bustillos*, 26 N.M. 450, wherein Judge Parker used the following language:

"So it appears the Legislature intended that old existing statutes taken or adopted and enacted into the Code should maintain the same relative status in the body of the law of the state as when originally enacted, and should acquire no new or controlling importance by reason of their present enactment into the section of the Code."

The question there presented was whether or not a statute was an "existing statute," or whether or not it was new matter included in the Code, and in answer to this the court said:

"On the other hand, if it was not an existing statute by reason of its unconstitutionality, it was enacted into the Code as new matter, as we have seen, was entirely allowable. In either event it became a component part of the laws of the state."

I am of the opinion, therefore, that § 3950 was an existing statute and was carried forward in the 1915 Code and became a component part of the laws of the state, but it must continue to maintain the same relative status in the body of the law of the state as when originally enacted and has acquired no new or controlling importance, and in view of this fact, I am, therefore, of the opinion that such section which prescribes the qualifications of clerks, stenographers and employees must necessarily relate only to the appropriation act of 1909, either for that particular year or for such years as no appropriations are made, and that such provision or our statute would not preclude you from contracting the services of an employee who is a non-resident, and where a resident of the state could not legally perform such services. Upon the question as to whether or not a non-resident could be employed in a case where a resident could perform the services, I am passing no opinion. At least, I think the services of non-residents should be employed only in such specific cases where our own residents as a matter of legal restriction are not qualified to do the work.

§ 22, Chapter 48 of the Laws of 1923 provides that in the administration of said act (the Comptroller Act) the Comptroller may, by and with the written consent of the Governor, expend annually, in addition to the amounts in said Act specifically appropriated for salaries, traveling expenses and office expenses, a sum not to exceed 5% of the annual collections under the provisions of said Act.