

## Opinion No. [30-74]

June 30, 1930

**TO:** Office of the Attorney General of New Mexico

SCHOOLS -- Employment of rural school supervisor and extra clerical help not permissible.

### OPINION

I have your letter of the 27th inst. in which you state that "a number of counties" have included in their budgets provision for the payment of salary and expenses of a so-called "Rural School Supervisor", and, that some of them have also included in their budgets for rural schools an item, under administrative expenses, which has been termed "Extra Clerical Help," this latter amount to be included in addition to the amount allowed for a clerk. You desire my opinion as to whether the allowance of these items in the budget is legal.

In looking into the question let us first consider just what the laws of this state specify as the duties of a county school superintendent. Under the provisions of Section 120-403 of the Code of 1929, which is the general statute on the subject, we find that these duties are,

- (a) to exercise a careful supervision over all of the rural schools of the county;
- (b) to visit each rural school within each county at least once each year and at such other times as the State Board of Education or the Superintendent of Public Instruction shall direct;
- (c) to consult with school directors concerning the conduct of their schools and to hold teacher's meetings for the advancement of school interests;
- (d) to supervise the methods of instruction in rural schools.

While it is true that in your letter you do not state just what the duties of the proposed "Rural School Supervisor" are supposed to be, nevertheless, common sense would seem to say that this position contemplates the supervision of rural schools. It is therefore apparent that these duties would overlap those imposed upon the County School Superintendent by law, as set forth above. Such being the situation we are immediately confronted with a holding by our Supreme Court in the case of Fancher et al., v. County Com., 28 N.M. 179, which opinion, by the way, was cited by Mr. Chapman, special attorney of your office, in his letter to you of the 27th inst., advising you against approval. In this decision, which quotes many cases in point, we find the law well summarized in paragraph five of the syllabus, which reads:

"Where, by law, the duty of performing certain work is cast upon a designated county official, it is not competent for the board of county commissioners to employ other persons to do the work required of such county official and pay for such services."

and in paragraph seven of the syllabus the law is still further set forth to be that,

"The test is not whether the duty is primary or secondary but whether provision has been made by law for the accomplishment of the end or the doing of the work or the performance of the services for the benefit of the people in its organized capacity."

In going into the opinion of Judge Roberts in that case it is seen, on page 189, that he quotes from the case of Chase v. Board, 37 Colorado 268, as follows:

"If the power to do the very thing which this contract attempts to give to plaintiffs has been by statute conferred upon other public officers, as it is altogether plain has been done, certainly this negatives the existence of an implied power in the board of commissioners to do that thing."

According to the rule laid down by our Supreme Court in Fancher et al. v. County Com., supra, it seems clear to me that a salary paid to another for performing the duties imposed upon the County School Superintendent could not properly come under the heading of "administrative expenses," of the County School Board. To hold otherwise, in the very face of the opinion of our own Supreme Court would indeed be "stretching the law," and, since the adoption of the construction urged by private counsel for a proponent of this "Rural School Supervisor" and "extra clerical help" idea would simply result in the virtual creation of a lot of new jobs and the consequent expenditure of public monies, -- for you say that "a number of counties" are interested, -- I feel that the doubt, if indeed it can conscientiously be said that there is a doubt about a matter so perfectly plain and simple, must be decided in favor of economy and consequently against the expenditure of the money.

As to the "extra clerical help" the legislature has granted authority, section 120-405, for the county school superintendent, when budget allowance therefor shall be made and with the consent of the county board of education, to employ a clerk, which clerk shall also be clerk of the county board of education and may be allowed a salary from the school funds, which salary is based on the number of rural school rooms, etc. The principle of law applicable to the employment of a rural school supervisor, as set forth above, applies equally to the employment of a clerk. The statute contemplates but one clerk and fixes the amount of salary, or the basis from which the amount is to be computed.

No matter how desirable it might be, in the opinion of "a number of counties," to employ additional clerks, or to pay a higher salary than the statute provides, neither the county superintendent, or the county board has legal authority to do either one at the expense of the county or school funds, and hence the questions which you have propounded to me must be answered in the negative.