

## Opinion No. 31-109

April 1, 1931

**BY:** E. K. Neumann, Attorney General

**TO:** Mr. J. M. Lujan, State Comptroller, Santa Fe, New Mexico.

{\*58} Your letter of March 31st refers to the McKinley County Election contest and we understand from the statements therein, that certain old officials have been replaced in office in their stead; also that the officials who were replaced have received salaries and expenses for the months of January and February, and that the March payments have been withheld.

You desire to know what action your office should take in regard to the paying of the new officials and recovering from the old officials payments which have been made to them.

Section 41-611 New Mexico Statutes Annotated, 1929 Compilation provides in matters of this kind that judgment shall be rendered in favor of the party for whom a majority of the legal votes shall be to the effect that he is entitled to the office in controversy with all the privileges, power and emoluments belonging thereto, and for his costs, and if the contestant prevails he shall have judgment placing him in possession of said office and for the emoluments thereof from the beginning of the term for which he was elected, with his costs.

It needs no argument for the proposition that the State or County cannot be required to pay two different sets of officials. The first officials were in fact de jure officers; payments have been made to these officers and the county under the circumstances cannot be compelled to make payment for these months to a new set of officials.

The statute simply means that by virtue of the judgment placing the successful contestant in possession of the office, he may also recover from the ousted official the salary which has been paid to him.

In other words any action for the recovery of such salary would be in the nature of a civil action between the two officials and in all probability the successful contestant could levy execution upon his judgment.

As we view the proposition there is no reason for the State to be concerned in this matter, other than to instruct the proper county officials to proceed with the payment of the salaries to the newly installed county officers as such salaries become due and payable.

As to the March payments which have been withheld, it is our opinion that the newly installed officials may properly be paid these amounts.

By Frank H. Patton,

Asst. Att'y General