

## Opinion No. 31-220

July 27, 1931

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

**TO:** Mr. Arsenio Velarde, State Auditor, Santa Fe, New Mexico.

{\*91} Reference is made to your letter of even date, in which you desire an opinion as to whether you should pay the salary of Mrs. Louise Coe as High School Supervisor, inasmuch as Mrs. Coe is now a member of the Legislature.

You, of course, have in mind Section 28 of Article 4, of the Constitution of New Mexico, which provides as follows:

"No member of the legislature shall, during the term for which he was elected, be appointed to any civil office in the state, nor shall he within one year thereafter be appointed to any civil office created, or the emoluments of which were increased during such term; nor shall any member of the legislature during the term for which he was elected nor within one year thereafter, be interested directly in any contract with the state or any municipality thereof, which was authorized by any law passed during such term."

In our opinion the matter presented by you must be decided in line with the holding of our Supreme Court in the case of State ex rel Baca vs. Otero, State Auditor, 33 N.M. 310, as we believe the facts to be parallel.

In that case the Relator had received an appointment as Rural School Supervisor while he was a member of the legislature. It was stipulated that there was no such office as rural school supervisor and the court said therefore the position was merely an employment.

In the Baca case, Supra, it was urged by Respondent that "an employment is based on contract, and that the only authority to employ any person to perform such duties rests in the general appropriation bill passed by the Legislature in 1927, and that inasmuch as relator was a member of that Legislature he was precluded from entering into such contract by the constitutional provision above quoted. The contract of employment was not authorized by the appropriation bill of the 1927 Legislature, of which relator was a member, but was authorized by Laws 1923, c. 148, Sec. 201, sub-sec. (a), which gives to the superintendent of public instruction the power to supervise all municipal and rural schools and authorities thereof. Relator was therefore entitled to enter into this contract of employment, and is entitled to receive his compensation and expenses incurred in the administration of the same.

It follows from all of the foregoing that the judgment of the district court is erroneous and should be reversed, and the cause remanded, with directions to issue a peremptory writ

of mandamus as prayed for in the petition, and it is so ordered. BICKLEY and WATSON, J. J. concur."

In the instant case there is no such office as High School Supervisor and the employment is not authorized by the appropriation bill passed when Mrs. Coe was a member of the legislature. The authority for the employment was granted by the legislature in 1923 by par. (a) of Sec. 201, Ch. 148, and which is now cited as Sec. 120-201 New Mexico Statutes, Annotated, 1929 Compilation, and which reveals one of the powers of the Superintendent of Public Instruction, which section reads as follows: "(a) To supervise all municipal and rural schools and authorities thereof."

We are informed by the Superintendent of Public Instruction that Mrs. Coe's duties pertain largely to the rural high schools and, if therefore {<sup>92</sup>} she was not a member of the legislature when the power to employ in this capacity was granted, she is entitled to be paid for rendering such service and such employment is not illegal.

By Frank H. Patton,

Asst. Attorney General