

## Opinion No. 34-742

March 27, 1934

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

**TO:** Honorable Byron O. Beall, Chief Tax Commissioner, Santa Fe, New Mexico.

{\*126} Under date of March the 21st, we rendered an opinion upon the question of the Constitutionality of Chapter 85, Laws of 1933, as applied to public officials with a term of office.

Following the citation of authorities in said opinion, we concluded that the imposition of the income tax upon the salaries of all public officers in this state, who have a term of office, amounted to a reduction or diminution of the compensation of such officers and was therefore invalid as being repugnant to our State Constitutional provision, which is Section 27, Article 4 and which reads as follows:

"No law shall be enacted giving any extra compensation to any public officer, servant, agent or contractor after services are rendered or contract made; nor shall the compensation of any officer be increased or diminished during his term of office, except as otherwise provided in this constitution."

It now becomes necessary to determine what class of officers in this state are affected by this provision and for the purpose of this opinion we feel justified in holding that the term "any officer," as specified in the provision quoted, means a "public officer" as the term is generally understood and invoking the rule of ejusdem generis.

What then are "public officers" and what officers have a "term of office"? This question arises by reason of our belief that before the exemption can be made to apply, the taxpayer must be a "public officer" with a "term of office."

As said by Chief Justice Marshall, in *United States v. Maurice*, 2 Brock (U.S.) 96, "Although an officer is an 'employment' it does not follow that every 'employment' is an 'office' and therefore decisions of such questions necessarily depend upon the individual cases.

The question of public officers has been before our own Supreme Court several times and in *State v. Quinn*, 35 N.M. 62, the Court approved the definition set forth in *State, ex rel. Barney v. Hawkins*, 79 Mont. 506, 257 Pac. 411, 53 A.L.R. 583, which is as follows:

"To constitute a position of public employment a public officer of a civil nature, it must be created by the Constitution or through legislative act; must possess a delegation of a portion of the sovereign power of government to be exercised for the benefit of the public; must have some permanency and continuity, and not be only temporary or

occasional; and its powers and duties must be derived from legislative authority and be performed independently and without the control of a superior power, other than the law, except in case of inferior officers specifically placed under the control of a superior officer or body, and be entered upon by taking an oath and giving an official bond, and be held by virtue of a commission or other written authority!" 35 N.M. 64.

Our own Supreme Court has also held in *State ex rel. Gilbert*, 29 N.M. 209, that the constitutional inhibition applies equally to all officers who hold public offices, regardless of whether such officers were created by the Constitution or by statute.

We may safely conclude, therefore, that, in addition to those officers named in Section 1, Article V of the constitution, the inhibition applies with equal force to the county and district officers. These, of course, include sheriffs, treasurers, assessors, county clerks, district attorneys, judges, justices of the peace, county surveyors, county superintendents, and boards of county commissioners. Also, under this doctrine, there must be included members of the State Corporation Commission and Justices of the Supreme Court.

There can be no debatable question that all the foregoing officers are "public officers" within the definition with a fixed "term of office" {*\*127*} either by the Constitution or by Statute.

What then is the status of those officers appointed by the governor by and with the consent of the senate?

Section 5, Article V of our Constitution provides:

"The governor shall nominate, and, by and with the consent of the senate, appoint all officers whose appointment or election is not otherwise provided for, and may remove any officer appointed by him for incompetency, neglect of duty or malfeasance in office. Should a vacancy occur in any state office, except lieutenant-governor and member of the legislature, the governor shall fill such office by appointment, and such appointee shall hold office until the next general election, when his successor shall be chosen for the unexpired term."

It is true that this class of officials may be removed by the governor at his pleasure, (*State v. Sanchez*, 32 N.M. 265, 255 Pac. 1077). Nevertheless, we think that such officers do have a definite tenure of office and, when appointed, such appointment is for the period of two years, unless otherwise prescribed by statute.

As said in the *Quinn* case, *supra.*, in discussing the definition of a public officer, just quoted, "all of these elements need not be present in a particular situation, but all have a bearing, to a degree, in determining whether a position of public employment is an office."

As to the terms of office of these appointive officials, we believe they have "some permanency and continuity," and that they are not "only temporary or occasional." Therefore, these officials fall within the Constitutional provision.

Other statutory officers who are within the Constitutional inhibition are members of the State Labor Commission, created by Chapter 9, Laws of 1931, and the State Labor Commissioner appointed by that board. These appointments, as is the appointment of a State Dairy Commissioner, (Chapter 152, Laws of 1929), are for the definite term of two years and the statutory duties to be performed clearly reveals that they "possess a delegation of a portion of the sovereign powers of the government to be exercised for the benefit of the public."

Where the appointment is merely held at the pleasure of the appointing power, and subject to removal at any time by the appointing power, the exemption may not be invoked as they have no definite "term of office" as is contemplated by the law.

State ex rel. Gilbert v. Board of County Commissioners, 29 N.M. 214.

These appointments include employees such as attaches, deputies, court stenographers and reporters and assistants.

It will, no doubt, be contended that under the ruling in State ex rel. Baca v. Montoya, 20 N.M. 104, that a deputy assessor is a public officer, that all deputies or assistants who are required to take an official oath and receive pay from the public treasury come within the class entitled to the exemption; but such is, in our opinion, not correct, for the reason that under said Section 4, Article 4 of the Constitution the inhibition against increase or decrease of salary applies only to those officers who are public officers and who have a term of office. In other words, it is our interpretation that the two essentials, first, being a public officer and second having a term of office, must be coupled together. And we may add that this interpretation is strengthened by the decisions in State ex rel. Kane v. Johnson, 25 S.W. 855 and Bowers v. City of Albuquerque, 27 N.M. 291, both of which cases involve statutes containing similar language.

Neither does this interpretation entitle such public officials as assistant district attorneys and assistant attorneys general to claim the exemption and we find a very interesting and instructive case supporting our interpretation in 59 N.W. 962 and entitled Somers v. State. There the constitutional inhibition was almost identical with the language of our Constitution, and the opinion of the court justifies our conclusion as to deputies and assistants. Also see Board of Commissioners v. Hart, 119 Pac. 132; <sup>{\*128}</sup> Stone v. State ex rel. Strain, 89 So. 824; State ex rel. Rumford vs. Gordon, 142 S.W. 315.

In all cases not covered by this opinion, if any there be, an individual ruling will be made upon the facts as they exist, and suggest that a very instructive annotation upon this subject may be found in 53 A.L.R. 595 following the reported case of Barney v. Hawkins, supra.

Further, we do not believe that those officials entitled to claim exemption under this opinion are required to make any return of that portion of income which is salary or compensation to the State Tax Commission.

By: FRANK H. PATTON,

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