

Opinion No. 34-805

September 11, 1934

BY: E. K. NEUMANN, Attorney General

TO: Honorable Juan N. Vigil, State Comptroller, Santa Fe, New Mexico.

{*152} Your office has orally requested an opinion upon the legality of the payments made to Brigadier General Osborne C. Wood, the Adjutant General of New Mexico, and Major Herman G. Baca, the U. S. Property and Disbursing Officer, during the Gallup Emergency in 1933. These payments consisted of the amounts allowed by law for officers of their grade and length of service, which amounts are those allowed to officers of the regular United States Army, and were in addition to their regular salaries for their respective offices allowed by the laws of this state.

The late Governor Arthur Seligman declared Martial Law in McKinley County, New Mexico, on August 29th, 1933, and ordered General Wood to take supreme command of the situation, under orders of the Governor as Commander-in-Chief of the New Mexico National Guard. Pursuant to this order, General Wood took charge, moved troops into the affected area and kept them there, in greater and lesser number until some time in January, 1934. In other words, General Wood placed Martial Law into effect in McKinley County.

The governor of this state is the commander-in-chief of the military forces of the state and has power to call out the militia to preserve the public peace, to execute the laws, to {*153} suppress insurrection and repel invasion. Constitution -- Article 5, Sec. 4. 1929 Code, Sec. 93104; 1929 Code, Sec. 93-105, 1929 Code, Sec. 93-121.

Article XVIII of the State Constitution relates to the Militia and organized militia, the latter to be known as the "National Guard of New Mexico." The following part thereof is very pertinent to the question presented:

"Sec. 2. The legislature shall provide for the organization, discipline and equipment of the militia, which shall conform as nearly as practicable to the organization, discipline and equipment of the regular army of the United States, and shall provide for the maintenance thereof."

Section 1 of Chapter 89, Laws of 1933, provides for the appointment of the Adjutant General and defines his rights, powers, duties and liabilities. It also provides that he shall have the rank of brigadier general. Section 2 of Chapter 39, Laws of 1931, provides that he shall receive a salary of \$ 3,000.00 per annum.

Section 93-118 of the 1929 Code provides for the appointment of a property and disbursing officer, how his salary shall be fixed, and provides that he shall hold such rank as may be authorized by the regulations of the war department.

In New Mexico the Adjutant General holds the rank of Brigadier General of the New Mexico National Guard, and the U. S. Property and Disbursing Officer holds the rank of Major, N.M. N. G.

As far as the National Guard Bureau of the War Department is concerned, both the Adjutant General or U. S. P. & D. Officer are civil officers and not officers of the National Guard. This, however, does not effect their state status, the latter depending upon the state statutes in all cases.

"Whether the adjutant general is a civil or military officer of that state depends upon the law of the state, and the War Department will not give an opinion in the premise in any case. Of course, the person who is the adjutant general of a state may also be an officer of the National Guard of that state."

Opinions of Judge Advocate General, 323.82 April 19, 1926.

Under the statutes of this state, these officers are officers of the National Guard of this state. They hold their civil offices at the pleasure of the governor, and their military status depends upon them holding their civil appointments.

When the officers of the National Guard of this state are called to active or special duty, which active duty is set forth in the various provisions contained in Chapter 93 of the 1929 Code, as amended, they are entitled to the same pay and allowances as officers of like grade and length of service in the Army of the United States. (In some cases only base pay plus allowances.) Sec. 93-137, 1929 Code. Sec. 93-171, 1929 Code. Sec. 93-172, 1929 Code. Sec. 93-176, 1929 Code.

Standing alone, the statutes of this state, herein above cited, permit the payment of that sum allowed for active duty to all officers of the Guard when and while such officer is on active duty. Under the condition of the laws of this state, the Adjutant General and U. S. P. & D. Officer are included and are entitled to draw pay and allowances for active duty.

The difficult proposition is whether or not these officers are entitled to draw both the military and civil allowances at the same time. The general rule is that an officer, where he holds two compatible offices, may have the compensation attached to each office. That holds true under constitutional provisions such as ours and under statutes making the same provisions. Section 9 of Article 20, New Mexico Constitution is as follows:

"No officer of the state who receives a salary shall accept or receive to his own use any compensation, fees, allowance, or emoluments for or on account of his office, in any form whatever, except the salary provided by law."

I am inclined to the view that the Adjutant General of this State, holds two offices, one a civil office and the other Brigadier General of the New Mexico National Guard, and when, as {*154} in this case, he is ordered to duty by the Governor as a National Guard Officer, he is entitled to pay both as adjutant general and as an officer of the Guard.

That General Wood was ordered to Gallup as an officer of the National Guard is entirely evident from the following excerpt of the Martial Law Proclamation of August 30th, 1933.

"and, I hereby direct Brigadier General Osborne C. Wood, Adjutant General of New Mexico, to assume supreme command of the situation in the territory affected, subject to the orders of the Governor of New Mexico, * * *, **as given through the Adjutant General.**"

That this is an unusually large amount per month is not material, even though it might be a matter for the legislature to correct. We are not concerned with the wisdom of legislative policy. The constitution, in Section 2 of Article XVIII, imposes upon the legislature the duty of providing, among other things, for the maintenance of the militia.

Cases upon this subject are not numerous, except where legislative acts have attempted to give to a particular officer extra compensation for performing the duties of his office in contravention of a similar constitutional provision.

While Ohio has not a constitutional provision similar to Section 9 of Article 20, above set forth, a very interesting case comes from that jurisdiction. It is the case of State ex rel Bryant v. Dohaney, 117 N. E. 318.

Under a similar pay statute, the relator sought to mandamus the state auditor to issue a voucher for the payment of \$ 1,400.00 as the balance of salary due as Colonel of the Ohio National Guard upon active duty from June 18th to November 15th, 1916. The amount which he asked for was the difference between the salary due him as assistant adjutant general and the compensation due him as a colonel of the Ohio National Guard upon active duty. The court allowed the writ of mandamus. The court said:

"In accordance with the command of the President the Governor of the state directed the mobilization of the designated units of the National Guard, which was thereafter effected, and after some weeks in mobilization camps they were ordered to the Mexican border for the required service.

"On June 18, 1916, by order of the Governor of the state, certain named staff officers of the National Guard were placed on duty and directed to immediately report to the adjutant general of Ohio for assignment, Col. Edward S. Bryant, the relator, being one of that number.

"The relator was appointed assistant adjutant general of the state on January 11, 1915, and had continued in such office until the date of filing the petition in this case, which was December 13, 1916; the amount for which he asks a voucher is the difference between the stipulated salary as assistant adjutant general and the compensation to which an officer of his rank and grade is entitled when upon active duty under the provisions of the statute. The relator also claimed that such sum was due by reason of the provision of section 5190, as amended May 27 1915 (106 Ohio Laws, 471). But as that amendment was passed during the incumbency of the relator as assistant adjutant

general he is precluded by the provisions of section 20, article 2, of the Constitution from deriving the benefit of the increase of salary thereby provided. However the authority of the Governor of the state to assign an officer of the National Guard to active duty is unquestioned, and under the provisions of section 5296, General Code, such officer is entitled to the pay of an officer of his rank and grade in the army of the United States. At the time such order was issued the relator was a member of the general staff with the rank of colonel. So long as that order was in force and the relator remained upon duty in obedience thereto, he would be entitled to pay as provided by sections 5292, 5293, {*155} and 5296, General Code.

It appearing that the claim made is merely for the difference between the amount the relator received as assistant adjutant general and the amount which an officer of his rank and grade is entitled to receive when in actual service, a voucher therefor should be issued."

It might be said that neither General Wood nor Major Baca can receive the pay of their respective civil offices, but it seems from all the foregoing that each is entitled to the pay of his rank while on active duty.

From all the foregoing, however, I am forced to the conclusions that:

1. The persons holding the offices of Adjutant General and Property and Disbursing Officer also hold the rank of Brigadier General and Major, respectively, in the New Mexico National Guard.
2. That, as officers of the National Guard, they are each entitled to the pay of their rank while on active duty and that they are also entitled to their pay as Adjutant General and Property and Disbursing Officer, respectively.

This question might well be litigated and, if you determine this the course to take, claim should be made for the full amount of pay allowed for the active service to which these officers were called. If they are entitled to **anything** above their salary as Adjutant General and Property and Disbursing Officer, it is in my opinion, the full amount of active service pay.

It might be interesting to note that after the decision above referred to the Ohio legislature provided that the adjutant general and such other officers upon his staff, having therefore been paid a regular salary, were deprived of all salary allowance and were allowed the pay of their respective ranks during the entire tenure of office.