

Opinion No. 43-4236

February 16, 1943

BY: EDWARD P. CHASE, Attorney General

TO: Mr. M. E. Noble, District Attorney, Las Vegas, New Mexico

We are in receipt of your letter of February 4, 1943, in which you state that the County Clerk of Gaudalupe County was elected to that office, but failed to qualify within the ten days provided by statute; that on January 11, 1943, the Board of County Commissioners declared the office vacant by reason of the failure of the elected official to qualify, and appointed Ernesto Martinez to fill the vacancy, and that the appointed Clerk filed his bond and oath of office on the 22nd day of January.

In light of the above facts, you ask an opinion of this office as to whether or not a County Clerk who qualified ten days after the first day of January would receive his salary from the first day of January, or from the day on which he filed his oath and bond. You further ask whether the same would be true of a County Clerk appointed to fill a vacancy under the circumstances outlined above.

It appears to the writer that the real question involved is as to when a person elected or appointed to a county office becomes an officer, since the salary of an officer is an incident of the office, and is not dependent upon the performance of any services. See 43 Am. J. 161.

At first blush, under Sections 1 and 2 of Article 20 of our Constitution, and the decisions of our Supreme Court, such as *Trust Company vs. Bank*, 18 N.M. 589, construing these provisions, it would appear that a person does not become an officer until he has qualified by filing his oath and bond. However, it does not appear to the writer that either the framers of our Constitution in creating Sections 1 and 2 of Article 20, or the Legislature, in enacting Sections 15-3702 and 15-3703 of the 1941 Compilation, could have contemplated such a result, or they would have used language more appropriate to this result. Section 1 of Article 20 of the Constitution is as follows:

"Every person elected or appointed to any office shall, **before entering upon his duties**, take and subscribe to an oath or affirmation that he will support the Constitution of the United States and the constitution and laws of this state, and that he will faithfully and impartially discharge the duties of his office to the best of his ability."

It will be noted that this provision only prevents an officer from entering upon his duties prior to the time he takes his oath, and does not provide that he shall not be an officer until such time.

Section 15-3703, relating to the bond of County Clerks is as follows:

"If any county clerk shall fail to furnish bond in manner required by the preceding section, the office shall become vacant and be so declared by the board of commissioners of the county."

It will be seen that by this section, the Legislature contemplated that the elected County Clerk should become such officer on January 1, with a defeasible title, since it provided that the office **should become vacant**, on the failure of the County Clerk to post his bond within ten days. If the elected County Clerk never became an officer, the office **would be** vacant, and not **become** vacant.

The writer has been unable to find any New Mexico case directly dealing with this question, and has been able to find but little authority on this question from other states. However, the author in 43 Am. J. 169, relying on *Marbury vs. Madison* 1 Cranch (U.S.) 137, 2 L. ed. 60; and *United States vs. Flanders*, 112 U.S. 88. 5 Supreme Court 67 says:

"In the case of appointive officers, the salary usually commences at the time of appointment, not on the transmission or acceptance of his commission or at the time when he takes the oath of office and files his official bond. And this is true even where there is a statutory provision that such officer must take the oath 'before being entitled to any of the salary or other emoluments' of the office. This requirement is satisfied by court's holding that his title to receive or retain or hold or appropriate the commissions or compensation does not arise until he takes and subscribes the oath or affirmation, but that when he does so, his compensation is to be computed on moneys collected by him from the time when, under his appointment, he began to perform services which the government accepted."

It would follow that an elected County Clerk becomes an officer on the first day of January following his election, since that is the date provided for him to take office, and that an appointed County Clerk becomes an officer on the date of his appointment, so that either is entitled to the salary from the date he becomes such officer, though he does not, and cannot perform any duties until he takes his oath and files his bond.

However, it is not necessary, under the facts outlined, to go this far, since our Supreme Court, in *Baca vs. Parker*, 13 N.M. 466; *Conklin vs. Cunningham*, 7 N.M. 445; *Eldodt vs. Territory*, 10 N.M. 141, has recognized the doctrine set forth in 46 C. J. 1007 that

"A certificate of election, or a commission of appointment to an office is the highest and best evidence of title to the office, and the holder thereof is regarded as prima facie entitled to the office. * * * A certificate, or a commission, however, is merely prima facie evidence of title to the office, and is not conclusive."

It is noted by the writer that the court, in *Trust Company vs. Bank*, supra, questions this doctrine. However, the court, in that case, was not called upon to decide whether the officer involved had prima facie title but was faced with the question of whether or not he was, in fact, the officer. Further, the court could not have had in mind the type of

situation presented here, and so I do not believe that this case should be construed to overrule this doctrine.

It is, therefore, my opinion at least under facts such as stated in your letter, where no third person is asking for payment of the salary, that the elected county official should be paid his salary from the first day of January, even though he does not file his oath and bond for a few days, if he does so within the ten days provided by Section 15-3703 supra.

I see no reason to reach a different conclusion as to a County Clerk appointed to fill a vacancy. While the statute does not provide the length of time within which he must file his bond, he would be required to do so within a reasonable length of time. Without deciding what the effect would be if a holdover had performed the duties of the County Clerk in the interim between the time Ernesto Martinez was appointed and the time when he filed his oath and bond, it is my opinion that under the circumstances outlined above, Ernesto Martinez is entitled to his salary from the 11th day of January, based on his prima facie title to such office.

Trusting that the foregoing sufficiently answers your inquiry, I am

By ROBERT W. WARD,

Asst. Atty. General