Opinion No. 43-4290

May 19, 1943

BY: EDWARD P. CHASE, Attorney General

TO: Mr. J. D. Hannah, State Auditor, Santa Fe, New Mexico

We have your letter of May 17, 1943, in which you recite that you have heretofore withheld the payment of salary to Chief Justice A. L. Zinn, due to the fact that a question was in your mind as to whether or not Judge Zinn was entitled to receive his salary since he is serving as an officer in the United States Army. You further state that Judge Zinn is submitting his resignation and that you now desire to close this matter with fairness and justice and, therefore, request an official opinion of this office as to whether or not Judge Zinn should be paid any compensation.

The first question presented by your request is whether or not Judge Zinn was at the time of handing in his resignation and is until his successor qualifies Chief Justice of the Supreme Court.

Article 20, Section 2 of the Constitution of the State of New Mexico provides:

"Every officer, unless removed, shall hold his office until his successor has duly qualified."

At this time it is noted that there have been discussions among the press and among legal circles as to whether or not Judge Zinn had by accepting a Commission in the United States Army abandoned his office. This question is not decided in this opinion since, in any event, his resignation has removed this question, subject to the provisions of the above mentioned Article and Section of the New Mexico Constitution.

The Supreme Court of the State of New Mexico stated in the case of Haymaker v. State, 22 N.M. 400, 406:

"Since the adoption of the Constitution no public office becomes vacant, in the sense that there is no incumbent to fill it, except in the case of death, perhaps, because under section 2 of article 20 of the state Constitution, **every officer holds until his successor qualifies, except when he is removed.** That section was construed in Bowman Bank & Trust Co. v. Bank, 18 N.M. 489, 139 Pac. 148, wherein the court declared that all officers held office until their successors qualified."

Further quoting from this opinion, the Court stated:

"* * * Assuming that the resignation of the plaintiff in error of the first office had been accepted, a vacancy, as defined in section 3955, Code 1915, did occur in the office of member of the board of education of the city. But in view of the constitutional provision

cited supra, the vacancy, so-called, was not a corporeal vacancy; a condition simply arose thereby which gave the right to the appointing or electing power to appoint or elect some person to the said office in the place and stead of the plaintiff in error. In other words, the right to fill the first office, by the proper power, was initiated thereby, but such right had **no effect whatever upon the status of the plaintiff in error with respect to that office until the successor qualified for the office.** All that is said in this regard equally applies to the provisions that the acceptance, etc., of an incompatible office vacates the first office * * *." (emphasis ours).

"In no sense, then, can the office be said to be vacant, except for the purpose of supplying another person to fill it, and likewise the argument that the plaintiff in error voluntarily removed herself from the incumbency of the first office by her resignation is equally untenable. There had been no removal of plaintiff in error from the first office, in law or in fact, at the time this cause came on to be heard before the trial court."

This was a unanimous opinion of the Supreme Court and has never been reversed. This case was followed in the New Mexico case of State v. Blancett, 24 N.M. 433, where the question arose concerning a district Judge, who presided at the trial of defendant E. W. Blancett in the District Court. Judge Abbott was at the same time according to this case a Colonel in the New Mexico National Guard actively engaged in the service of the United States Government. It was contended that the two offices, Colonel of the State Troops and Judge of the District Court. are incompatible and that Judge Abbott by his retention of his military office vacated his office as Judge, so that when he attempted to exercise the functions of Judge of the District Court he was an intruder and usurper.

The Court citing the Haymaker case stated:

"* * * though offices are incompatible under the statutory rule providing that an office becomes vacant when an officer accepts and undertakes to discharge the duties of another incompatible office, yet under the provisions of the constitution no public office becomes vacant in the sense that a corporeal vacancy arises, but a condition results conferring a right on the appointing or electing power to appoint or elect some person to the office in the place of the occupant. Our conclusion in the Haymaker case is based upon the constitutional provision that:

"'Every officer unless removed, shall hold his office until his successor has duly qualified.' Section 2, Art. 20, Const. 1."

"It is unnecessary to decide whether the two offices of colonel and district judge are in fact incompatible, as in our view of the matter it **might** be conceded that they are, nevertheless there was no actual vacancy in the office of district judge under our holding in the Haymaker case, and there cannot be any serious contention that the acceptance of the military office created a corporeal vacancy in the civil office." (emphasis ours).

In view of the above authorities and since it is clear that Judge Zinn has not been removed and that his successor is not qualified, even though (as has been reported) he has handed in his resignation and it has been accepted by the Governor. In any event, he continues to hold his office as Justice of the New Mexico Supreme Court and is, therefore, entitled to the salary which under our Constitution and Laws is an incident of such office.

43 Am. Jur. 136, Public Officers, Section 342 states:

"Compensation does not constitute any part of the public office to which it is annexed. It is a mere incident to the lawful title or right to the office, and belongs to the officer **so long as he holds the office.** When an office with a fixed salary has been created, and a person duly elected or appointed to it has qualified and enters upon the discharge of his duties, he is entitled, during his incumbency, to be paid the salary, fees, or emoluments prescribed by law. The public body cannot by any direct or indirect course of action deprive such incumbent of the right to receive the emoluments and perquisites which the law attaches to the office, and effect will not be given to any attempt to **deprive him of the right thereto, whether it is by unauthorized agreement,** by condition, or otherwise, or by a wrongful removal or suspension * * *." (emphasis ours).

Also see numerous cases cited in the footnotes in support of this rule of law.

An identical question was passed unanimously by the Supreme Court of the United States in the case of SMITH, Auditor, v. JACKSON, 246 U.S. 388, 38 Sup. Ct. 353. Due to the fact that this salary was withheld by the Auditor without availing himself of a ruling by the Attorney General and refusing to request one at the time of such action, we, therefore, quote at length from this decision, which should in the future prevent injustices in the withholding of salaries by the Anditor.

"* * * In 1915 the Secretary of War submitted to the Attorney General two questions: First, whether the district judge was entitled to the same privilege as to quarters in the Canal Zone there enjoyed by other employees of the government; and second, if not, whether the Auditor had authority to deduct from the salary of the judge before paying it the sum which he considered due for rent of such quarters. Reversing the order in which the questions were asked, the Attorney General came first to reply to the second question and said:

"'* * * Without specific authority no portion of the salary of an officer of the United States may be withheld. See 20 Ops. 626 (1893); Benedict v. United States, 176 U.S. 357, 20 Sup. Ct. 458, 44 L. Ed. 503 (1900). * * *'"

"While it is apparent that this ruling should have put the subject at rest, obviously the misconception of the Auditor as to the nature of his powers prevented that result from being accomplished and the Auditor refused to carry out the act of Congress and deducted from the salary of the judge, fixed by Congress, not only a charge for rent of quarters, **but a sum which he considered due because of the**

absence of the judge from the Canal Zone during a certain period. The judge thereupon commenced the proceeding which is before us to compel the Auditor to perform his **plain duty under the law** and pay the salary without the deductions. As the result of the action of the Auditor and the necessity for bringing the suit, **the expense was occasioned the United States of calling a judge from the United States to hear the cause** and Judge Clayton of the Middle and Northern Districts of Alabama proceeded to the Canal Zone to discharge that duty. He did so, stating the reasons which controlled him in an elaborate and careful opinion making perfectly manifest **the error of the action of the Auditor and his wrong in refusing to observe the ruling of the Attorney General in the premises.** 241 Fed. 747, 154 C. C. A. 449. From the consequent judgment directing the payment of salary to be made without the deductions the Auditor prosecuted error to the Circuit Court of Appeals for the Fifth Circuit, in which court the judgment below was affirmed, and it is a further writ of error prosecuted by the Auditor from this court to that ruling which brings the subject-matter before us now.

"The expense of printing a voluminous record has been occasioned and the views of the Auditor have been pressed before us in a printed argument of more than one hundred pages. We think, however, that we need **not follow or discuss that argument,** as we are of the opinion that it is obvious on the face of the statement of the case that the Auditor **had no power to refuse to carry out the law** and that any doubt which he might have had **should have been sub-ordinated, first, to the ruling of the Attorney General** and, second, beyond all possible question to the judgments of the courts below. It follows, therefore, that the prosecution of the writ of error from this court constituted **a plain abuse by the Auditor of his administrative** discretion. * * *" (emphasis ours).

The above opinion of the Supreme Court of the United States seems to dispose of all questions raised by this request for an opinion not disposed of by our specific constitutional provisions and cases.

In view of the foregoing, it is my opinion, that Chief Justice Zinn is entitled to all salary and emoluments of his office up until the time his successor qualifies.