Opinion No. 45-4716

May 16, 1945

BY: C. C. McCULLOH, Attorney General

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

*{*68}* We have your two letters dated May 8, 1945 wherein you request an opinion concerning an interpretation of various phases of Senate Bill No. 64 which will appear as Chapter 71, Laws of 1945. You point out that Senate Bill No. 64 is of vital concern to you and the State Treasurer as well as to other public officials in that it might be construed to impose upon you an impossible task and provides heavy penalties for violation of the act. You point out that the State Auditor cannot possibly know of his own knowledge whether or not all of the people employed by the State are performing their duties.

The question which you raise is of vital importance, not only to yourself, but to many other state, county and municipal officials. The act in question provides in part:

* * * "Any person who receives payment or any person who makes payment or causes payment to be made from public money where such payment purports to be for wages, salary or other return for personal services, and where such personal services have not in fact been rendered, shall be guilty of a felony. * * *"

22 C. J. S., Criminal Law, Section 24, states:

"In creating an offense which was not a crime at common law, a statute must, of course, be sufficiently certain to show what the legislature intended to prohibit and punish. Otherwise it will be void for uncertainty. Reasonable certainty, in view of the conditions, is all that is required, and liberal effect is always to be given to the legislative intent when possible; but where the legislature declares an offense in words of no determinate signification, or its language is so general and indefinite that **it may embrace not only acts commonly recognized as reprehensible but also others which it is unreasonable to presume were intended to be made criminal,** the statute will be declared void for uncertainty; * * *"

In support of this rule of law, the New Mexico case of State v. Diamond, 27 N.M. 477, 202 P. 288, 20 A. L. R. 1527 is cited. Our Supreme Court stated in the above case:

"A further technical legal objection to the statute is its want of certainty. Where the statute uses words of no determinative meaning, or the language is so general and indefinite **as to embrace not only acts commonly recognized as reprehensible, but also others which it is unreasonable to presume were intended to be made criminal, it will be declared void for uncertainty."**

It is further stated in Section 30 of the above referred to text that:

"However, it has been stated that the police power of the State is not without limitations and **that a penal law will not be valid where it makes criminal an act which the utmost care and circumspection could not enable one to avoid.** * * * Whether or not criminal intent or knowledge *{*69}* is an element of statutory crime is a matter of statutory construction to be determined in a given case, by considering the subject matter of the prohibition as well as the language of the statute and thus ascertaining the intention of the legislature. **As a general rule the statute is to be construed in the light of the common law and the existence of a criminal intent is to be regarded as essential even when not in terms required."**

In support of the above rule the text cites the New Mexico case of State v. Blacklock, 23 N.M. 251, 167 P. 714 in addition to numerous other cases. Our Supreme Court has repeatedly held that if a statute is subject to one or more interpretations, an interpretation should be followed that would not invalidate the statute.

You have pointed out that it is impossible for you or the State Treasurer to know whether or not all of the employees of the State are performing their duties; nor is there any practical way in which either you or the State Treasurer could determine this question in relation to every individual employed by the State.

It is, therefore, unreasonable to presume that the legislature intended to make an act criminal which the utmost care and circumspection could not enable one to avoid, and if the statute were so construed it would be unconstitutional under the above cited rule. Therefore, following the rule that a statute must be construed in such a manner that it will be constitutional, it is my opinion that before a person commits a felony by paying or causing payment to be made where services have not in fact been rendered, such payment or act must be made with a criminal intent.

In further connection with your inquiry, the question is raised concerning when a person violates the statute by receiving payment under the prohibition of the statute. It is noted that the statute does not prescribe that definite numbers of hours must be worked by state employees. If an employee is paid on an hourly basis, of course, the number of hours actually worked will be material in determining whether the personal services which the employee is paid for have in fact been rendered. In other instances the amount of hours actually worked during a period are not necessarily conclusive in determining this question if the person has in fact rendered the services which he is paid to perform.

You call my attention to such employees as the Interstate Streams Attorney and various other attorneys of the State. These attorneys are retained to attend to definite legal matters concerning the interests of the State, and as long as such services are actually performed, and the legal matters which such attorneys are retained to perform are in fact performed, there is no violation of the act, regardless of whether such attorneys maintain their offices at the state capitol.

By HARRY L. BIGBEE,

Asst. Atty. General