

LAW LIBRARY

ARIZONA ATTORNEY GENERAL

Opinion 63-37
R-410
October 16, 1963

REQUESTED BY: DAN E. GARVEY
Arizona State Examiner

OPINION BY: ROBERT W. PICKRELL
The Attorney General

- QUESTIONS:
1. Does an officer hold a county office as a de facto officer, as opposed to a de jure officer, when the particular officer has filed his bond with the office of the county recorder, without having first obtained approval of the chairman of the county board of supervisors and where the bond was not recorded in the office of the county recorder ?
 2. Are the actions performed by a de facto officer valid insofar as they involve the interests of the public and third persons ?
 3. Does a governmental agency, generally, have to pay a de jure officer for the period when the de facto officer has performed the duties of the position, after the governmental agency has already paid the de facto officer for the period for which he worked ?

- ANSWERS:
1. Yes.
 2. Yes.
 3. No.

This opinion is a companion to our previous Opinion 63-23, which was concerned with the bond of the specific office of a county recorder. However, this present opinion involved the bonds of county offices other than the county recorder.

Because of our Arizona Supreme Court's recent decision abolishing governmental immunity, the significance of a county officer's bond has greatly increased in importance. This is es-

pecially true in the case of those county officers performing ministerial, as opposed to discretionary, duties.

A.R.S. provides specific procedures for approving, filing and recording of bonds upon election to office; nevertheless, our code is silent as to the primary and secondary liability in respect to the handling of these bonds.

If a particular county officer carries out the duties of his elected or appointed office, he will be an officer de jure, provided he has properly complied with all the requirements for holding his or her office. The office de jure has the legal title to the respective office. However, if a person performs the duties of office but has failed to follow certain procedural requirements for occupying the office, the person can be an officer de facto, as explained in Rogers v. Frohmiller, 59 Ariz. 513, 130 P.2d 271 (1942). At pages 520-521 of 59 Arizona, our Supreme Court stated:

"Probably the leading case as to what is necessary to make one an officer de facto is State v. Carroll, 38 Conn. 449, 9 Am. Rep. 409. Therein the Court said:

'Doubtless color of election or appointment from competent authority is necessary for the protection of an officer de facto, when he is assailed directly because of his acts.

. . .

'A definition sufficiently accurate and comprehensive to cover the whole ground must, I think, be substantially as follows: An officer de facto is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised:

. . .

'Second, under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent requirement or condition, as to take an oath, give a bond, or the like . . ."
(Emphasis supplied)

It must be emphasized that a de facto officer is not a usurper of the office but occupies the office under color of right.

A.R.S. §38-252 (C) states:

"The bonds of . . . all county . . . officers except supervisors unless otherwise provided, shall be approved by the Chairman of the Board of Supervisors, who shall report the approval at the next meeting of the Board. No bond shall be filed until approved as prescribed by law. The bonds of supervisors shall be approved by the County Recorder." (Emphasis supplied)

Thus, the approval of the Board must precede the filing of the bond.

The procedure for approving bonds is contained in A.R.S. §§ 38-253, 38-232, and 38-233. A.R.S. §38-253 states:

"The approval of every official bond shall be endorsed thereon, signed by the officer approving the bond, and filed within the time prescribed for filing the oath in the office in which the official oath of the office is filed, except that the bonds of deputies or employees shall be filed with the officer appointing the deputy or employee. No fee shall be charged for the filing or recording thereof."

The import of this latter provision is that the office holder himself has a primary responsibility in seeing that his bond is properly approved and then filed according to the statutory require-

ments. Consequently, if the office holder has filed his bond with the office of the county recorder without having obtained approval of the bond by the chairman of the board of supervisors, the office holder himself is remiss for not having properly complied with A.R.S. §§38-253 and 38-252(C). Because of this responsibility that may not be delegated, the office holder is primarily responsible to see that his bond is properly approved even though the chairman of the board of supervisors may fail to approve the bond.

A.R.S. §38-291 enumerates ten factual situations which require that the office involved in the situation be deemed vacant before the expiration of the term of office. The ninth situation is as follows:

"Failure of the person elected or appointed to such office to file his official oath or bond within the time prescribed by law."
(Emphasis supplied)

This provision has been interpreted to mean that the elected or appointed office holder who fails to file his official oath or bond within the prescribed time fails to legally occupy his or her particular office as a de jure officer, with the predecessor in office retaining the legal title to the office so that no actual vacancy de jure occurs. Such interpretation brings A.R.S. §38-291 (9) into harmony with Constitutional Article 22, §13. which provides that the term shall extend until the successor shall be elected and shall qualify. Sweeney v. State, 23 Ariz. 435, 204 Pac. 1025 (1922).

The Sweeney case held that A.R.S. §38-291(9) was constitutional in total scope except for the interpretation that the office itself would be vacated upon failure of the person elected or appointed to such office to file his official oath or bond within the time prescribed by law.

Because of the phrase "official oath or bond," as used in §38-291(9), the newly elected or appointed office holder must have his bond properly approved as well as filed within the time prescribed by law in order to legally occupy his newly elected or appointed office as an officer de jure.

Opinion 63-37
R-410
October 16, 1963
Page 5

Consequently, if the newly elected or appointed county office holder fails to have his bond approved by the chairman of the board of supervisors prior to filing his bond as prescribed by §38-252 (c) and §38-253, the potential office holder has deprived himself of being legally entitled to hold his appointed or elected office by authority of §38-291(9).

Similarly, if the newly appointed or elected person has properly obtained approval of his bond, but thereafter fails to file correctly the bond with the prescribed officer, the newly elected or appointed person has deprived himself of the legal right to occupy the particular office. Thus, the requirement of proper approval and filing of the office holder's bond are two distinct prerequisites to the person's being legally entitled to occupy his or her office as an officer de jure.

An appointed office holder must file his bond within ten (10) days after he or she has notice of his or her appointment. A.R.S. §§38-253 and 38-232. An elected office holder must file his properly approved bond at any time after receiving his or her certificate of election and at least one (1) day before commencement of his or her term of office. A.R.S. §§38-253 and 38-232. For all county office holders, their bonds must be filed in the office of the county recorder except that oath of the recorder which must be filed with the clerk of the board of supervisors.

A.R.S. §38-255 states:

"Every officer with whom bonds are filed shall record them in a book kept by him for that purpose, preserve the bond and give certified copies thereof under seal to any person upon demand and payment of the fee for a copy and certificate."

Thus, the primary responsibility for recording bonds of county officers, other than the recorder, lies with the county recorder. However, if the county recorder fails to record a properly approved bond which has been filed with his office within the prescribed time, no vacancy in office occurs since none of the ten (10) enumerated events contained in §38-291 provide that an office

Opinion 63-37
R-410
October 16, 1963
Page 6

shall be deemed vacant before expiration of its term when the county recorder fails to record a bond filed with his office. Except upon the happening of one (1) of the events enumerated specifically in §38-291, there can be no vacancy in an office prior to the expiration of its term. State ex rel. Sullivan v. Moore, 49 Ariz. 51, 64 P.2d 809 (1937).

Consequently, the answer to question number one is in the affirmative for the reason that the elected county officer failed to obtain the approval of his bond by the chairman of his county board of supervisors and thus cannot be an officer de jure but is an officer de facto. The officer's failure to record the bond, however, has no effect upon his being classified as an officer de jure or an officer de facto because the individual office holder has no responsibility in respect to the recording of his bond. The county recorder has the responsibility to record his bond. A.R.S. §38-255.

The answer to question number two is also in the affirmative because the actions of a de facto officer are valid so far as they involve the interests of the public and third persons. See Rogers v. Frohmiller, supra.

As for your third question concerning compensation to the de facto officer, such officer does not have to return compensation received by him from a governmental agency while he was performing the duties of the office he occupied. See Shaw v. County of Pima, 2 Ariz. 399, 18 Pac. 273 (1888). Extensive annotations appear in 64 A.L.R. 2d. 1375 - 1397 and 55 A.R.S. 997 through 1014.

If the de jure office should sue the governmental agency for the compensation paid to the de facto officer performing the duties incident to the job of the de jure officer, the general rule is that the governmental agency does not have to pay the de jure officer after the agency has already paid the de facto officer. One of the basic reasons for Courts so holding is that the state auditor and county treasurers must assume that claims for salaries presented to them within the proper procedural requirements are valid claims. The officer authorizing payment cannot be required to make an independent verification of each claim submitted for their approval. Secondly, if the rule were otherwise, the agency would

Opinion 63-37
R-410
October 16, 1963
Page 7

have to pay twice for a single set of services.

On the other hand, some Courts have held that the governmental agency must pay twice for a single set of services when it has first paid the de facto officer and subsequently is demanded to pay the de jure officer. Yet, these particular cases are limited to specific situations. Thus, our own Supreme Court in City of Phoenix v. Sittenfiled, 53 Ariz. 240, 88 P.2d 83 (1939) held that a Phoenix civil service employee who had been wrongfully discharged was entitled to recover from the city the salary he would have received during the period of his removal notwithstanding that a de facto officer had already drawn an equivalent salary. In writing the Courts' opinion Justice Lockwood acknowledged that the Courts' decision followed a minority view, but the Justice emphasized that in order to uphold the policy of the merit system, a wrongfully discharged civil service employee would have to receive the salary he would have received had he not been improperly removed from office.

The Oklahoma Supreme Court similarly followed the minority view in Board of County Commissioners v. Litton, Okla. _____, 315 P.2d 239 (1957), when the Court held that the county had to pay a de jure officer the salary he would have received had he not been discharged upon his being convicted in the lower court of a crime. The ousted officer had appealed his conviction which was reversed on appeal. Thus, he was thereafter reinstated in his job and paid the job's salary during his absence despite the County's having previously paid an equivalent amount to his replacement.

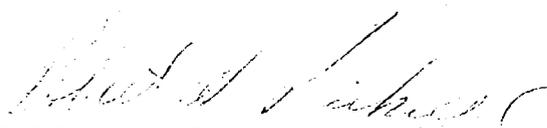
Certainly, in the factual situation presented in your inquiry, the county should not have to pay the predecessor in office for the period when the de facto officer holder had the job.

Consequently, the answer to the third question is in the negative.

As a post script, we bring to your attention two Arizona cases, both of which held that a de facto officer could sue and recover for services performed because there in fact existed no de jure officer, Behan v. Davis, 3 Ariz. 399, 31 Pac. 521 (1892) and Adams v. Directors, 4 Ariz. 329, 40 Pac. 185 (1895).

Opinion 63-37
R-410
October 16, 1963
Page 8

These cases involved the first appointment of particular offices with the procedure having been improper. Thus, these two cases are exceptions to the general rule that a de facto officer cannot sue and recover compensation for his services, because a prerequisite to his or her recovery is the proving of the legal right to occupy the office. Therefore, whereas the status of being a de facto officer can be used as a shield or defense when sued by a governmental agency, being a de facto officer cannot be used as a sword or a weapon to attack to secure the fruits of office. See 62 C.J.S., page 675.



ROBERT W. PICKRELL
The Attorney General

RWP:DML:nja:db