

Opinion No. 49-5189

January 21, 1949

BY: JOE L. MARTINEZ, Attorney General

TO: John F. Simms, Jr. Speaker, House of Representatives Nineteenth Legislature
Santa Fe, New Mexico

{*8} At the request of your house committee, consisting of Representatives McCollum and Hoover, this office has made an investigation and check into the law for the purpose of ascertaining whether or not the Legislature can legally, in view of the provisions of Article 4, Section 10 of the New Mexico Constitution as amended November 7, 1944, provide by Act of the Legislature for payment to members of the Legislature of an allowance to cover their expenses while attending the Legislature, in addition to the compensation provided for in the Constitution.

Article 4, Section 10 of the New Mexico Constitution, as amended November 7, 1944, reads as follows:

"Sec. 10, (Compensation of legislators.) -- Each member of the legislature shall receive as compensation for his services the sum of ten dollars (\$ 10.00) for each days attendance during each session, and ten cents (10c) for each mile traveled in going to and returning from the seat of the government by the usual traveled route, once each term of the session as defined by section 5, article IV of this constitution, **and he shall receive no other compensation, perquisite or allowance.**

Your attention is specifically called to the underscored (boldface) language, "and he shall receive no other compensation, perquisite or allowance." The language of the provision is clear and the meaning is plain, and in our opinion it admits of but one construction.

However, we have made a search of constitutional provisions of other states for similar provisions and of the decisions arising thereunder in order to ascertain what the courts have said in construing similar situations.

Article 5 of Session 26 of the Oklahoma Constitution is very similar to the above quoted language of the New Mexico Constitution, and reads as follows:

"Members of the Legislature shall receive \$ 6.00 per diem for their services during the session of the Legislature and {*9} 10c per mile for every mile of necessary travel in going to and returning from the place of meeting of the Legislature, on the most usual routes, and **shall receive no other compensation.**"

You will note that the language of the prohibition against other compensation is identical with that contained in our Constitution except that the words "perquisite or allowance" are omitted and only the word "compensation" is used.

In the case of *Dixon v. Shaw*, 122 Okla. 211, 255 Pac. 500, the Supreme Court of Oklahoma had before it the identical question you have presented. In that case it appeared that members of the Legislature presented claims to the State Auditor supported by receipted bills for expenses incurred in the payment of hotel room rent and for meals incurred by them at the seat of government while plaintiffs were serving as members of the Legislature, and sought a writ of mandamus against the State Auditor to compel him to pay the claims. The Legislature had, by Senate Bill No. 8, made available by appropriation a sufficient sum of money to pay the claims. The Auditor by way of defense asserted that the Constitution of the state fixed the compensation of the members of the Legislature and that any attempted payment of the living expenses of the members, while serving at the capitol, was violative thereof. In disposing of the question, the Supreme Court of Oklahoma, said:

"The court does not concede that it needs go further than the provisions of the constitution of this state measured by well recognized rules of interpretation of constitutional and statutory provisions, to reach what it concludes the law is in the instant case. Thereby the whole compensation, personal to the members, is fixed, and we cannot sanction an addition thereto. We not only approve, but adopt, the reasoning of the supreme court of the state of Kansas, in the said case of *State ex rel. Griffith v. Turner*, as to the distinction between expenses that are legislative and amply within the authority of that body to provide and use, and those which are purely personal in their nature, and by reason thereof are, under the said section 21 of the Oklahoma Constitution, an allowance of a compensation other than that provided in the said section."

In the case of *State ex rel. Griffith v. Turner*, 117 Kans. 755, 233 Pac. 510, referred to in the opinion of the Oklahoma Supreme Court, it was held that the Legislature could not by statute appropriate \$ 5.00 per day additional expense allowance for each member of the Legislature where the constitution provided that their compensation should be not more than \$ 3.00 per day for actual service and 15c per mile for necessary travel. The Kansas Supreme Court, in discussing the difference between legitimate legislative expense which could be paid and purely personal expenses of the legislators in attending the session, said:

"All legislative expense may be properly paid. The expenses that may be paid are not those that are incurred by a member of the legislature because he is at the capitol city; they are those that are incurred by him in the performance of his duties. They are legislative expenses, not personal expenses. The distinction between expenses that are legislative and those that are personal is that legislative expenses are those that are necessary to enable the legislature to properly perform its functions, while those that are personal are those that must be incurred by a member of the legislature in order {*10} to be present at the place of meeting, -- expenses for his personal comfort and

convenience, which have nothing to do with the performance of his duty as a member of the legislature. Personal expenses are those incurred for rooms, meals, laundry, communications with their homes, and other things of like character . . . The Constitution fixes the compensation of members of the legislature at \$ 3 per day, and provides that such compensation shall not be more than \$ 150 each for each regular session, nor more than \$ 90 each for each special session. This compensation, fixed by the Constitution, cannot be increased. Any law which in any way, either directly or indirectly, increases the compensation of any member of the legislature, must be held invalid."

In Illinois, by Section 21 of Article 4 of the Constitution, members of the General Assembly are prohibited from receiving, in addition to such salaries as may be fixed by law, "any other allowance or emolument, directly or indirectly for any purpose whatever, except the sum of \$ 50.00 per session to each member, which shall be in full for postage, stationery, newspapers, and all other incidental expenses and perquisites.

The Supreme Court of Illinois, in the case of *Fergus v. Russell*, 270 Ill. 626, 110 N.E. 887, in construing this Section of the Constitution, held that an act appropriating additional sums for the railroad mileage of the legislators was contrary to the above constitutional provisions and was invalid.

To the same effect is the decision of the Supreme Court of Arkansas in the case of *Ashton v. Ferguson*, 164 Ark. 254, 261 S.W. 624. In that case, the Constitution, after fixing the per diem of the legislators and mileage allowance, contained the words "They shall receive no compensation, perquisite, or allowance whatever, except as herein provided." You will note the similarity of this language with the prohibitive words as used in the New Mexico Constitution. The Supreme Court of Arkansas said:

"These words mean more than mileage and per diem and the use of them excludes the payment of anything else to members. * * * The provision for the payment of \$ 100.00 to each member is nothing more nor less than an allowance. It is an allowance for the use of each member for the purposes mentioned, but it is to be used at the will of the member to whom it is paid, and is, after all, a mere allowance, and not the payment of expenses incurred by the house itself. Each house may provide conveniences, such as stationery, pencils, ink, telephone and telegraph, and other things for the use of the members, and pay same out of contingent expenses, but it is quite another thing to attempt to make an allowance of funds to a member to be used at will. One is the payment of a legitimate expense, and the other is an allowance placed at the disposal of the member to be used at his own discretion and will. One is a payment of necessary expenses of the house itself, and the other is an allowance to the member in spite of the provision of the Constitution to the contrary

. . . Our conclusion is that these allowances are in plain violation of the Constitution, and the officers of the state should be restrained from making disbursements thereunder."

To the same effect is the decision of the Supreme Court of Washington in the case of State ex rel. Banker v. Clausen, 253 Pac. 805, which held that a resolution { *11 } allowing each member of the Legislature \$ 5.00 per day for expenses incurred in attending the session of the Legislature was invalid.

The Supreme Court of South Dakota, and the Supreme Court of Tennessee arrived at conclusions contrary to the foregoing, but in each of these states the constitutional provision under consideration did not have any prohibiting or limiting words at the end thereof such as is embodied in our constitutional provision.

In view of the foregoing, it is our conclusion that the allowances under consideration are in plain violation of the constitutional provision and would be invalid, if passed.