

Opinion No. 57-262

October 15, 1957

BY: OPINION OF FRED M. STANDLEY, Attorney General Alfred P. Whittaker,
Assistant Attorney General

TO: Ingram B. Pickett, Commissioner State Corporation Commissioner, Santa Fe, New Mexico

QUESTION

QUESTIONS

1. Can the Governor New Mexico legally refuse to accept the increase in salary provided for his office by Chap. 238, L. 57?
2. Can the Governor decline the salary increase referred to on a periodic basis, drawing the salary provided for his office by Chap. 180, L. 53, and then drawing down the entire increase at the end of a fiscal year?

CONCLUSIONS

1. Yes; see analysis.
2. Yes; see analysis.

OPINION

ANALYSIS

The answers to your questions depend upon the law which governs the right of a state officer or employee, having agreed to accept less than the compensation provided for his office by statute, or having accepted such lesser compensation without previous agreement, thereafter to recover the difference between the agreed and the statutory compensation.

The Constitution of the State of New Mexico, Art. XX, § 9, provides as follows:

"No officer of the state who receives a salary, shall accept or receive to his own use any compensation, fees, allowance, or emoluments for or on account of his office, in any form whatever, except the salary provided by law."

This provision prohibits a state officer from receiving compensation in excess of that provided by law. Ch. 238, L. 57, providing the compensation of state officers, appears as § 4-5-1, NMSA, 1953. § 4-52 then provides as follows:

"The compensation herein fixed shall be paid to the respective officers in equal be full payment for all services rendered by said officers. They shall receive no other fees, emoluments or compensation, other than necessary mileage and travel expenses for services rendered as such officers."

This provision clearly creates a right in the officer to require monthly payment of his statutory compensation, and a duty upon the disbursing officer to honor such demand.

Neither of the provisions cited specifically precludes the acceptance by a public officer of less than the compensation provided by statute. We find no cases involving the questions you ask decided by the Supreme Court of the State of New Mexico. Numerous cases involving similar questions have been decided in other jurisdictions, and these cases are gathered in annotations found in 70 ALR 972, 118 ALR 1458, and 160 ALR 490. The general rule is stated at 67 C.J.S., Officers, § 98, p. 358, as follows:

"It is generally held, at common law and in the absence of statute otherwise providing, that the acceptance of less compensation than that established by law for the office does not preclude an officer, on the ground of waiver, estoppel, or the like, from subsequently claiming the legal compensation."

The rule as stated appears to be the view in the majority of the jurisdictions which have considered these questions. The basis upon which the cases supporting this rule rest is that the public has a vital interest in the performance of public duties, involving the public interest, which are imposed upon public officers. It is thought to be against public policy that the door be opened to the possibility of trade or barter as the compensation of public officers, depriving of their effectiveness the laws designed to attract competent persons to office by providing adequate compensation. (See 160 ALR 492.) Accordingly, under the majority view, an antecedent agreement to accept compensation less than that provided by statute is deemed to be invalid and void.

No such agreement is involved in your inquiry. However, the courts have applied the reasoning upon which they have invalidated an antecedent agreement to accept less than statutory compensation, to a situation in which there has been no such antecedent agreement, but merely the fact of acceptance of a lesser compensation after the compensation has accrued and become payable. It appears that the courts have generally allowed subsequent recovery of the full compensation provided by statute, and refused to find that the officer is estopped to claim the compensation, has waived the difference in compensation, or has made a donation of the difference in compensation.

It should be noted that many of these cases involve situations in which request is made of the state officer or employee that he accept reduced compensation, and the officer or employee agrees to accept, or does accept, such compensation. The question whether a public officer can make a legally effective renunciation of a portion of his compensation which has been earned and is payable, must be distinguished from the question of the validity of an antecedent agreement to accept a lower compensation

than that provided by statute, and also from the question of the effect of acceptance of such lower compensation upon the right subsequently to recover the difference between statutory compensation and that received. The cases do not go so far as to hold that no such renunciation of compensation which has been earned and is payable can legally be effective. In our view, such a legally effective renunciation can be made, and the question whether it has been made is controlled by general rules of law.

The question whether or not there has been such a renunciation is a question of fact: Has the conduct of the public officer unequivocally evidenced a refusal of the increased compensation? This question of fact is also involved in decisions which follow the minority view and bar subsequent recovery of the difference between statutory compensation and that received, on the basis of a finding of waiver, estoppel, donation or laches.

In our opinion, the question whether or not there has been a renunciation in the case which you put does not arise.

The General Appropriations Act, Chap. 235, L. 57 (§ 11-4-4, NMSA, 1953), provides, as to the Governor's contingent fund, that it be disbursed on the basis of one-twelfth each month, but with respect to the Governor's salary and other items related to operation of the office of the chief executive, merely provides that they

"-- shall be paid on vouchers by the governor to the department of finance and administration."

Particularly in view of the express language of this provision, there appears to be no obstacle, under the laws of New Mexico, to the Governor's drawing of the full amount of the increase in his compensation at the end of the fiscal year, in accordance with the usual procedure governing the disbursement of public funds.

It is the view of this office that the considerations of public policy which underly the general rule first stated in this opinion are strongly applicable in the situation to which you refer in your inquiry. In our opinion, the chief executive has the legal power to refuse the increase in compensation provided in the 1957 statute, but such refusal will not bar his subsequent recovery of the increase, at least prior to the end of the fiscal year involved.

Since no person is adversely affected by any refusal by the Governor to accept the increase in his statutory compensation, it is clear that no question such as those you raise can ever arise unless the chief executive himself should later claim the right to additional compensation previously declined.