

Opinion No. 59-91

August 3, 1959

BY: HILTON A. DICKSON, JR., Attorney General

TO: Mr. Abner Schreiber Assistant District Attorney P. O. Box 800 Los Alamos, New Mexico

{*149} This is written in reply to your recent request for an opinion on the following question:

"Are elected "H" class county officials entitled to receive as per diem expense the sum of \$ 15 for each day or fraction thereof spent in commission meetings or in the performance of their official duties for the county?"

It is my opinion that elected "H" class county officials are entitled to receive the \$ 15 per diem expense for each day, or fraction thereof, spent in commission meetings or in the performance of their official duties for the county.

Chapter 47, Laws of 1959, § 1 amends former § 15-43-5.1, N.M. S. A., 1953 Compilation, to read:

"Officers elected or appointed in the counties of the H class shall receive the following **salaries a year:**

A.

(1) county commissioners, one dollar (\$ 1.00); . . .

C. The elected H class county officials listed in Section A, **in addition to the salaries therein prescribed** shall be entitled to receive **as per diem expense** the sum of not more than fifteen dollars (\$ 15.00) while in actual attendance at county commission meetings or while engaged in the performance of their official duties for the county. . . ." (Emphasis added)

The above cited statute must be read with the Constitutional limitations of Article X, Section 1, of the Constitution of New Mexico. This section of the Constitution provides:

"The legislature shall at its first session classify the counties and fix salaries for all county officers, which shall also apply to those elected at the first election under this Constitution. **And no county officer shall receive to his own use any fees or emoluments other than the annual salary provided by law**, and all fees earned by any officer shall be by him collected and paid into the treasury of the county." (Emphasis added)

It is incontrovertible that the legislature has fixed the annual salary of the officers in § 15-43-5.1, as amended, part A (1) through (10) and in part B. Therefore since Section C provides for payment "in addition to the salaries" of the county officers, that payment must be defined to mean something other than "fees or emoluments" or it will fall as unconstitutional.

"Emolument is the profit arising from office or employment; that which is received as compensation for services, or which is annexed to the possession of office, as **salary, fees, and perquisites.**" **Reals v. Smith**, 56 P. 690; **Apple v. Crawford County**, 105 Pa. 300; **Vansant v. State**, 53 A. 711; **Town of Bruce v. Dickey**, 6 N.E. 435. (Emphasis added)

Also:

"'Emolument' is generally defined as the profit arising from office or employment; that which is received as compensation for services, or which is annexed to the possession of office, as **salary, fees, and perquisites**; advantage; gain, public or private. The gain, profit or advantage which is contemplated in the definition or significance of the word 'emolument', as applied {**150*} to public officers, clearly comprehends, we think, a gain, profit, or advantage which is pecuniary in character." **Taxpayers' League of Carbon County v. McPherson**, 54 P. 2d 897, (Wyo.). Again the word was defined in **State ex rel. Todd v. Reeves**, 82 P. 2d 173, (Wash.), as meaning "profit from office, employment or labor, compensation, fees, or salary, . . ." (Emphasis added)

The definition of the word "emoluments" is broad enough to include "salary" and "fees". If the additional payments for expenses per day by the legislature on behalf of the elected county officers fall in the category of either "fees" or "salary", or under any other included meaning of "emoluments", then such provision for additional payment is clearly unconstitutional.

There is a split of authority as to whether or not payments for expenses incurred in the performance of official duties, under constitutional provisions such as ours, are payments barred by the Constitution.

"Generally, statutory compensation for expenses necessarily incurred in performing duties of office is neither 'salary' nor 'emolument' of office, within the constitutional prohibition against increasing or diminishing officer's salary or emolument after his election or appointment, and such compensation can be changed during officer's term." **Words and Phrases**, __permanent__ edition, Vol. 14, p. 487, citing 54 P. 2d 897. Also to the same effect see **McCoy v. Handlin**, 153 N.W. 361 (S. Dak.); **Milwaukee Cty v. Halsey**, 149 Wis. 82; **Smith v. Jackson**, 241 F. 747.

It is my opinion that the better reasoned cases support the theory that expenses incurred in the performance of official duties are not "fees or emoluments" and do not therefore come within the constitutional prohibition of Article X, Section 1.

The expression "per diem" is defined by Webster as meaning "by the day". Without any further explanation attached, it is merely a period of time by which a thing is computed, as in "per annum" or by the year. The Attorney General has recognized a distinction between "compensation per diem" and "expense per diem". See Attorney General's Opinions Nos. 4027 and 4112.

"Compensation per diem" is generally held to be the same as salary whereas reimbursements for expenses is not so considered.

The language accompanying the use of the words "per diem" must be read together to determine just what it is that is to be paid "by the day". The section of Chapter 47, Laws of 1959, (Section C), states that the officials will receive "as per diem **expense**" the sum of not more than \$ 15. Had the legislature used the term "per diem compensation" I would be constrained to hold that this would be an additional salary, which would be paid on the basis of one day periods and which would be clearly unconstitutional. The use of the words "per diem expense" clearly manifests an intention on the part of the drafters that this additional payment will be for reimbursement purposes only and shall not operate as an additional salary.

It is immaterial that the payment may be made without the officials having to submit vouchers, etc., since it is my opinion the legislature may properly anticipate the probable expense that will be incurred in the performance of specific offices, and so long as such anticipated expense is not plainly and palpably excessive, so as to operate as a salary increase, it cannot be declared unconstitutional.

This interpretation of the phrase "per diem expense" holding it not to be synonymous with, or to be included within, the definition of "salary" overrules in part Attorney ^{*151} General's Opinion No. 59-68 as applying from the date of the Constitutional Amendment of Section 10, Article IV, which became effective September 15, 1953, but is in accord with that opinion in holding legislators to be salaried state officials prior to September 15, 1953.

It is my opinion that elected "H" class county officials are entitled to receive the \$ 15 per diem expense for each day, or fraction thereof, spent in commission meetings or in the performance of their official duties. It may be noted that such payments would be limited to a single payment within any 24 hour period.

By B. J. Baggett

Assistant Attorney General