

Opinion No. 59-68

June 25, 1959

BY: FRANK B. ZINN, Attorney General

TO: Mrs. Inez B. Gill Acting Director New Mexico Legislative Council P. O. Box 1651
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The legislators are employees of the State of New Mexico within the meaning of the Public Employees Retirement Act and per diem expense, as authorized in Article IV, Section 10 of the New Mexico Constitution, constitutes "compensation" as defined in the Public Employees Retirement Act.

OPINION

{*109} Receipt is acknowledged of your recent request for an opinion of this office on the following questions:

Are legislators employees of the State of New Mexico within the meaning of the Public Employees Retirement Act?

Does per diem expense, as authorized in Article IV, Section 10, New Mexico Constitution, constitute compensation as defined in the Public Employees Retirement Act?

It is my opinion that legislators are employees of the State of New Mexico within the meaning of the Public Employees Retirement Act.

It is further my opinion that "per diem" expenses, as authorized in Article IV, Section 10 of the New Mexico Constitution, constitute "compensation" as defined in the Public Employees Retirement Act.

Subsections C and E of Section 1, Chapter 370, New Mexico Session Laws of 1959, under "Definitions", reads as follows:

"C. 'state' means the state of New Mexico, and includes {*110} its boards, departments, bureaus and agencies.

E. 'public employer' means the state of New Mexico or any municipality in the state of New Mexico."

Subsection G of Section 1, Chapter 370, New Mexico Session Laws of 1959, reads as follows:

"G. 'employee' means any person, including any elected official, who is in the employ of any public employer and whose salary is paid by warrant or any other medium from any income of said public employer. The term shall include full time civilian employees employed through direct appointment or designation by the governor as commander-in-chief of the national guard or by the adjutant general, and whose salaries are paid by the United States from funds allocated to the national guard of this state. 'Employee' does not include any person who is a beneficiary of any other retirement, pension or annuity plan created and established by the state or any of its political subdivisions."

It is plain from the wording of these three subsections of Chapter 370, New Mexico Session Laws of 1959, that legislators, as elected state officers, are employees of the State of New Mexico to the same extent as other elected officials of the State.

It is further plain that the Legislature intended that legislators, who are elected officials and whose salaries are paid by warrant of the State of New Mexico, a public employer, are state employees under definition of the word "employee" defined in the above quoted subsection of Chapter 370, New Mexico Session Laws of 1959. On the proposition of legislators being state officers, see cases of **Ward v. Romero**, 17 N.M. 88, 97; **State ex rel. Gilbert et al. v. Board of County Commissioners, Sierra County**, 29 N.M. 209; **Pollack v. Montoya**, 55 N.M. 390, 234 P. 2d 336; and **Patrick Hanagan and Kermit Nash, Plaintiffs-Appellees v. Board of County Commissioners of the County of Lea, State of New Mexico, Defendants-Appellants**, 64 N.M. 103, 325 P. 2d 282. Also see Annotation at 139 A.L.R. 738. In 42 Am. Jur., under heading "Public Officers", Section 20, listing the officers which have been adjudged to be state officers, is included a representative in the state legislature. And in 24 L.R.A. in the case of **Re Marilla M. Ricker**, the New Hampshire Supreme Court said at page 751:

"A representative in the legislature is a state officer, within the meaning of the Act of June 23, 1813. *Morril v. Haines*, 2 N. H. 246."

On your second question, Section 10 of Article IV, New Mexico Constitution, reads as follows:

"Each member of the legislature shall receive as per diem expense the sum of not more than twenty dollars for each days' attendance during each session, and ten cents for each mile traveled in going to and returning from the seat of the government by the usual traveled route, once each session as defined by section 5, article IV of this Constitution, and he shall receive no other compensation, perquisite or allowance."

Subsection 22 of Section 5-5-1, N.M.S.A., 1953 Compilation, defines "compensation" as follows:

"'Compensation' or 'salary' or 'regular salary' means all compensation for service, except overtime service, and shall include, after June 30, 1953, the reasonable cash value of all maintenance regularly allowed any employee in any medium other than

cash, such reasonable cash value to be determined in accordance with rules prescribed by the retirement board."

{*111} The phrase "per diem" is defined in Volume 32 of Words and Phrases at page 18 as follows:

"Term 'per diem,' as used in Const. art. 2, sec. 23, fixing compensation of members of Legislature, is synonymous with salary, and term 'salary' imports idea of compensation for personal service, and not repayment of money expended in discharge of duties of office. Peay v. Nolan, 7 S.W.2d 815, 817, 157 Tenn. 222, 60 A.L.R. 408."

See also annotation in 5 A.L.R. 2d 1214 to 1221.

Question has been raised that legislators actually work only 60 days every two years, but a legislator is subject to call at any time during the said two years, a large number serve on committees who meet often during the two years, and if successful under a proposed constitutional amendment, next year they will have to meet 30 days the second year after the regular session. It is also true that even though at the present time the legislature is only in regular session 60 days, legislators continuously advise with their constituents as to legislation to be considered during the time the legislature is in session. Though they are not paid for this time, they continue to serve as legislators and as public officers in many cases spend many hours a week in service of the state.

Hilario Rubio