

Opinion No. 68-60

June 13, 1968

BY: OPINION OF BOSTON E. WITT, Attorney General

TO: Mr. Luis L. Fernandez, Chief Local Government Division Department of Finance and Administration Legislative Executive Building Santa Fe, New Mexico

QUESTION

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1. Should the primary filing fee set forth in Section 3-11-8.1, N.M.S.A., 1953 Compilation, be based on the salary allowed by law, or on the salary budgeted?
2. If the county finds after the primary filing date that a higher salary can be paid due to an increase of valuation of property in the county, may the salary of the official be increased?

CONCLUSIONS

1. On the salary allowed by law.
2. Yes.

OPINION

{*98} ANALYSIS

Since a different result may be reached when answering the same questions if the questions were related to state officials, this opinion is specifically limited to county officials. Because of our answers we have taken the liberty to make some immaterial changes in the questions asked.

Section 3-11-8.1, N.M.S.A., 1953 Compilation, provides that the filing fee of all officers receiving a salary shall be 6% of the first year's salary. The legislature fixes the salary of all county officers. Article X, Section 1, New Mexico Constitution.

{*99} The legislature has fixed the salaries of elected county officials by enacting Sections 15-43-1 through 15-43-5.1, N.M.S.A., 1953 Compilation. If the county salary fund is insufficient to pay the salaries provided by law, the deficiency must be paid from the current expense fund. Section 15-43-25, N.M.S.A., 1953 Compilation; **Taylor v. Board of Commissioners of Union County**, 44 N.M. 605, 107 P. 2d 121 (1940). If the current expense fund is insufficient to pay the salaries of elected county officials all fees, salaries and prerequisites of all county officers must be reduced on a pro rata basis.

See Sections 11-6-7 and 11-6-8, N.M.S.A., 1953 Compilation and **Taylor v. Board of Commissioners of Union County**, supra. Evidently some counties are unable to pay the salaries fixed by law for their officers and the salaries fixed by law for their officers and the salaries of all officers are reduced in advance on a pro rata basis.

The word "salary" in a statute respecting county officers means the remuneration or recompense fixed by statute for services of every character and kind performed by the official while he remains in office. **McNally v. Grauman**, 255 Ky, 201, 73 S.W. 2d 28, 30. It is our opinion that the filing fee is to be based on 6% of the statutory salary of the county officer and not on the budgeted salary of such an officer. The budgeted salary is not the salary he is entitled to but rather is a reduction in salary because of insufficient funds.

Next we are asked if the salary of a county officer may be raised to the statutory salary after the primary filing date. The budget of a county may be increased with written approval of the Director of the Department of Finance and Administration and the Attorney General if there are surplus funds on hand not necessary to meet the expenditures provided for in the budget with which to cover the increase in the budget. See Section 11-2-57 (H) N.M.S.A., 1953 Compilation. Article VI, Section 27 of the New Mexico Constitution should be considered when making such an increase.

Article VI, Section 27 provides that the compensation of public officers cannot be increased or diminished during their term of office, except as otherwise provided in the Constitution. This provision of the New Mexico Constitution applies to elected county officials. **State ex rel Gilbert v. Board of Commissioners of Sierra County**, 29 N.M. 209, 222 Pac. 624 (1924).

In **State ex rel Gilbert**, supra, the New Mexico Supreme Court held that the salaries of county officials can neither be increased nor decreased because of a change in valuation of property in the county during their terms of office.

We do not believe that **State ex rel Gilbert**, supra, is controlling in the present case as the statutory salaries of the officers would not be increased during their term of office. The county officers would only be receiving what they were entitled to in the way of salary if their salaries had not been reduced in the budget because of insufficient funds.

By: Gary O'Dowd

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