

## Opinion No. 69-02

January 9, 1969

**BY:** OPINION OF JAMES A. MALONEY, Attorney General Gary O'Dowd, Assistant Attorney General

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

### QUESTIONS

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When a municipality pursuant to Section 14-9-3, N.M.S.A., 1953 Compilation, provides for the first time that the mayor and council members are to be paid for attending council meetings, is it legal for the council members who were serving a term in office at the time the ordinance was enacted and who are still serving the same term to draw such compensation?

#### CONCLUSION

Yes.

### OPINION

#### {\*4} ANALYSIS

Section 14-9-3, N.M.S.A., 1953 Compilation provides compensation for the governing body of a municipality under the mayor-council form of government as follows:

"A. When deemed in the public interest the governing body may provide by ordinance that the mayor and the individual members of the governing body be paid compensation for actual attendance at a meeting of the governing body but no compensation shall be paid for attending more than four [4] meetings a month.

B. No mayor of mayor-council municipalities and commission-manager municipalities shall receive more than twenty dollars (\$ 20.00) for each meeting he attends. No member of the governing body or commissioners of a commission-manager municipality shall receive more than ten dollars (\$ 10.00) for each meeting he attends.

Article IV, Section 27 of the New Mexico Constitution provides that no law shall be enacted either increasing or decreasing the compensation of any public officer during his term of office. This constitutional provision has been held to apply to all public officers, whether their offices be created by the Constitution or by the Legislature. **State**

**ex rel., Gilbert v. Board of County Commissioners**, 29 N.M. 209, 222 Pac. 654 (1924).

The purpose of Article IV, Section 27 of the New Mexico Constitution is to secure official independence. **Dorman v. Sargent**, 20 N.M. 413, 150 Pac. 1021 (1915). In **State ex rel. Gilbert v. Board of County Commissioners**, supra, {\*5} the New Mexico Supreme Court stated the purpose of this provision of our Constitution as follows:

"It was designed to protect the individual officer against legislative oppression which might flow from party rancor, personal spleen, enmity, or grudge. These could well harass and cripple the officer by reducing his compensation during his service; while, on the other hand, party feeling, blood, or business relations might be combined in such pernicious activity in the form of strong and powerful lobbying as to sway the members of the Legislature and cause the bestowal of an unmerited increase. To obviate these conditions is the purpose of this wise constitutional provision." *Id.* at 214.

We fail to see how the above stated purpose is in any way fostered by finding that Article IV, Section 27 of the New Mexico Constitution prohibits public officers from exercising an option to receive compensation already established by the legislature.

It is our opinion that Section 14-9-3, supra, provides for the amount of compensation that will be received by members of the governing body of a municipality under a mayor-council form of government. It is up to the members of the governing body to decide how much compensation, if any, they will receive within the salary limitations set by the legislature. Article IV, Section 27 prohibits the legislature from either increasing or decreasing the compensation provided for in Section 14-9-3, supra, during the term of office of those members of the governing body now holding office. It clearly does not prohibit members of the governing body from exercising their option, by adopting an ordinance, of receiving their statutory salary. However, this does not completely answer the question we have been asked as there is also a statutory provision restricting increases and decreases in compensation to municipal officers during their term of office.

Section 14-9-4, N.M.S.A., 1953 Compilation provides as follows:

"Officers -- **Change in compensation** -- Abolition of office -- Restrictions on eligibility. -- The compensation of any municipal officer, elected or appointed to an elective office, shall not be increased or diminished during the term to which he was elected or appointed. If the office is abolished, compensation shall cease at the time the office is abolished. No person who has resigned or vacated an office shall be eligible to fill the unexpired term of the office if the compensation for the office was increased."  
(Emphasis added).

It is our opinion that this section of the New Mexico Statutes prohibits members of the governing body of a municipality from changing their compensation during their term of office. However, this conclusion is not controlling in the present case.

Our research indicates that the majority of courts have held that if no salary was provided prior to a public official taking office, a salary may be provided during his term of office without violating a constitutional prohibition against increasing or decreasing the salary of an officer during the term of his office. See 114 A.L.R., 685, 688. Although we are concerned here with a statutory prohibition against increasing or decreasing municipal officers' salaries, we believe that those cases involving a similar constitutional prohibition are controlling. It is therefore the option of this office that a governing body of a municipality may provide a salary for themselves during their term of office if there was no salary provided when they took office. Anything said to the contrary in Opinion No. 62-85, issued July 10, 1962, is hereby overruled.