

Opinion No. 71-11

January 28, 1971

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: The Honorable Anthony Lucero New Mexico State Senator Legislative-Executive Building Santa Fe, N.M. 87501

QUESTIONS

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May the Legislature enact a law reimbursing expenses incurred by legislators while performing legislative duties between legislative sessions?

CONCLUSION

Yes, based on **State v. Fettinger**, Santa Fe District Court Cause No. 41719

OPINION

{*14} ANALYSIS

Article IV, Section 10 of the New Mexico State Constitution provides that:

"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."

The issue to be determined in this opinion is whether the phrase "no other compensation, perquisite or allowance" prohibits the reimbursement of any per diem or mileage expense to legislators except that specifically authorized for attendance during legislative sessions.

In an opinion filed December 9, 1970, the Honorable Joe. W. Wood, Judge of the Court of Appeals of New Mexico, sitting in Santa Fe County Cause No. 41719, **State of New Mexico, ex rel. Harold G. Thompson, State Auditor v. George E. Fettinger and William A. Segó**, concluded that the New Mexico Constitution, Article IV, Section 10 "does not prohibit the reimbursement of per diem and travel expenses to legislators when that expense is incurred under appropriate authorizing statutes and at a time when the Legislature is not in session." Thus the logical conclusion followed that the Legislature may lawfully enact statutes providing for reimbursement of legislators for expenses incurred on public business at times when the Legislature is not in session.

First, Judge Wood stated that he would proceed on the assumption that the phrase "no other compensation, perquisite or allowance" reads: "no other per diem or travel expense." The opinion then offered the following analysis in support of the above conclusions:

"What does 'no other' mean? Is this an absolute limitation or is it a limitation on reimbursement for {*15} attendance at legislative sessions?"

The usual principles governing construction of statutes apply to the interpretation of the constitution. *State ex rel Highway Com'n v. City of Aztec*, 77 N.M. 524, 424 P. 2d 801 (1967). The purpose of construing a statute or constitutional provision is to determine the intent involved in the provision under consideration. In determining that intent (1) the entire act (or here the constitutional article) is to be read together and (2) the intent is to be determined primarily by the language used. *Winston v. New Mexico State Police Board*, 80 N.M. 310, 454 P. 2d 967 (1969). I apply these rules.

Considering the entire legislative article (Art. IV), Sections 5, 6, 7, 8, 8, 11, 12, 13 and 14 all speak in reference to legislative sessions. Other sections in Article IV give no indication to the contrary. Considering Art. IV, Section 10, the wording used refers to legislative 'sessions' twice, and the 'no other' limitation is a part of the sentence which refers to legislative sessions. The context of Art. IV, Section 10 within the legislative article and the context of the words used within Section 10 disclose the intent of that section.

The intent of Art. IV, Section 10 was to place a limit on the per diem and travel expense legislators could receive for attending legislative sessions.

The foregoing view is fortified by other rules of construction. They are: (1) a legislative act (here, the statutes authorizing reimbursement of per diem and travel expense) is not to be held unconstitutional unless no other conclusion can reasonably be reached and (2) doubts are to be resolved in favor of constitutionality. *Peyton v. Nord*, 78 N.M. 717, 437 P.2d 716 (1968). Under these rules, the meaning of 'no other' in Art. IV, Section 10 being uncertain, the result is a holding that Art. IV, Section 10 does not prohibit legislators from being reimbursed for per diem and travel expense pursuant to authorizing legislation if the expense is incurred when the Legislature is not in session.

Although Art. IV, Section 10 does not prohibit the reimbursements involved in this case, neither does it authorize them. Constitutional authorization is not required. The constitution is not a grant of power to the Legislature, but a limitation on legislative powers. The Legislature may enact any law (including the laws authorizing the reimbursement of expenses) which is not expressly or inferentially prohibited by the state or federal constitution. *State ex rel Harvey v. Medler*, 19 N.M. 252, 142 P. 376 (1914). See also *State ex rel Hovey Concrete Products Co. v. Mechem*, 63 N.M. 250, 316 P.2d 1069 (1957)."

As stated above, the decision in **State ex rel. Thompson v. Fettinger, et al., supra**, was filed December 9, 1970. Under appeal procedure in this state [§ 21-2-1(5), N.M. S. A., 1953 Comp. (1969 P. S.)], the time for appeal has run. Therefore, the judgment entered pursuant to Section 21-1-1(58), N.M. S. A., 1953 Comp., constitutes the most current law on this matter.

The Legislature, relying on the above decision, may enact a law reimbursing expenses incurred by legislators while performing legislative duties between legislative sessions.

By: Lelia Andrews

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