

Opinion No. 71-18

February 9, 1971

BY: OPINION OF DAVID L. NORVELL, Attorney General

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

QUESTIONS

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Is a proposed statute providing that "each member of the Legislature shall receive as compensation for legislative services rendered the State three hundred dollars [\$ 300] for each month during no part of which the Legislature is in session" constitutional?

CONCLUSION

No.

OPINION

{*28} 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."

Opinion of the Attorney General No. 71-11, dated January 28, 1971, held that based on **State v. Fetting**, Santa Fe District Court Cause No. 41719, the Legislature may lawfully enact statutes providing for reimbursement of legislators for expenses incurred on public {*29} business at times when the Legislature is not in session.

A determination of whether, based upon the foregoing, a proposed statute providing that "each member of the legislature shall receive as compensation for legislative services rendered the State three hundred dollars [\$ 300] for each month during no part of which the legislature is in session is constitutional", is dependent on further interpretation of the opinion in **State v. Fetting, supra**. Because the issues in that opinion went only to payments for "per diem" and "travel expenses", there was no attempt by Judge Wood to define the phrase "compensation, perquisite or allowance." Instead, he proceeded on the assumption that the phrase reads: "no other per diem or travel expense."

However, other courts have undertaken to define the terms "compensation, perquisite or allowance." By the great weight of authority there is a distinction between legislative or governmental and personal expenses. Those expenses incurred in the performance of official duties are allowable, while purely personal expenses are considered **perquisites** of office, and, being such, are forbidden by constitutional provision. **Ferris v. Aten**, 318 Mich. 522, 28 N.W. 2d 897 (1947). **State ex rel. Griffith v. Turner**, 117 Kan. 755, 233 P. 510 (1925), in discussing the distinction between personal and legislative expenses, stated that legislative expenses are those that are necessary to enable the legislature to properly perform its functions, while those that are personal are those that must be incurred by a member of the legislature in order to be present at the place of meeting -- expenses for his personal comfort and convenience which have nothing to do with the performance of his duty as a member of the legislature.

We are aware of the ever-increasing burden of time and expenses falling on members of the Legislature over the years. Unfortunately, the question for us is not whether the proposed expense may be needed or justified, but solely whether the Legislature may constitutionally provide therefor by the Act before us.

The proposed legislation in issue here is phrased "compensation for legislative services rendered the State;" however, even the title of the Act recognizes the true nature of the "compensation" when it states that the Act provides for a "salary" for each member of the Legislature. Clearly, a salary of three hundred dollars for each month the Legislature is not in session will in no way meet the definition of "reimbursement of Legislators for expenses incurred on public business."

Opinion of the Justices, 159 Me. 77, 190 A. 2d 910 (1963), held in an advisory opinion that legislation proposed by the state senate providing for reimbursement of each member of the Legislature in an amount not to exceed ten dollars for expenses, other than travel, for each day in attendance would be unconstitutional. This decision was based on a provision similar to Article IV, Section 27, New Mexico Constitution:

"No law shall be enacted giving any extra compensation to any public officer, servant, agent or contractor after services are rendered or contract made; **nor shall the compensation of any officer be increased or diminished during his term of office**, except as otherwise provided in this Constitution." (Emphasis added.)

With a determination that the salary in question here is compensation, the mandate of the Constitution becomes applicable. Thus, this further impediment leads us to conclude that the proposed legislation providing for a three hundred dollar [\$ 300] a month salary for each legislator would probably be held unconstitutional by the courts. Compare, **Spearman v. Williams**, 415 P. 2d 597 (Okla. 1966).

By: Leila Andrews

Assistant Attorney General