

## Opinion No. 79-27

July 3, 1979

**OPINION OF:** Jeff Bingaman, Attorney General

**BY:** Jill Z. Cooper, Deputy Attorney General

**TO:** The Honorable Archie A. Valdez, Municipal Judge, Post Office Box 910, Raton, New Mexico 87740

### JUDGES

The salary of a municipal judge of a nonhome rule municipality may not be increased during the term for which he was elected, unless additional duties are added by the governing body.

### QUESTIONS

May the salary of a municipal judge of a non-home rule municipality be increased during the term for which he was elected?

### CONCLUSIONS

No, unless additional duties are added by the governing body.

### ANALYSIS

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, "except as otherwise provided in this constitution." For purposes of this provision, a public officer has been defined as one who is elected to public office for a fixed and definite term and whose functions and duties affect the public. **State ex rel. Gilbert et al. v. Board of Com'rs. of Sierra County**, 29 N.M. 209, 222 P. 654 (1924). A municipal judge is such a public officer. See Sections 35-14-2 and 35-14-4 NMSA 1978.

### OPINION

The New Mexico Supreme Court, Court of Appeals, district courts, magistrate courts and probate courts are established by Article VI, Section 1 of the New Mexico Constitution, which also provides that "other courts inferior to the district courts as may be established by law from time to time in any district, county or municipality of the state." Municipal courts may thus be distinguished from the courts enumerated in Article VI, Section 1 in that they are created by legislation and not established by the constitution.

Article VI, Sections 11, 17, 23, 26 and 28 of the New Mexico Constitution provide that the salaries of the judges of the several courts established by the constitution shall be fixed by law. In Opinion of the Attorney General No. 73-8, dated January 29, 1973, this office concluded that where the constitution itself provides that the salary for a particular office shall be fixed by law, "without any limiting phrase, such a provision must be construed as bringing the office within the 'except as otherwise provided in this Constitution' proviso of Article IV, Section 27." The salaries of the judges of constitutionally established courts are, therefore, not subject to the prohibition against an increase in compensation during the term for which they were elected.

No such legal basis exists, however, which would exclude the judges of the municipal courts from the prohibition of Article IV, Section 27. Nor is it likely that this {\*66} distinction between the judges of constitutionally created courts and municipal judges would be deemed invalid as a denial of equal protection of the law. The constitutional provisions resulting in a classification excluding certain judges from the prohibitions of Article IV, Section 27 are presumably valid and will not be struck down unless they are so devoid of reason "as to amount to mere caprice." **Board of Trustees of Town of Las Vegas v. Montano**, 82 N.M. 340, 343, 481 P.2d 702 (1971).

It does not appear unreasonable that different classes of judges receive different salaries. Compare, e.g., Section 34-2-2 NMSA 1978 and Section 34-6-3 NMSA 1978. Similarly, it is not unreasonable that the salaries of one class of judges are fixed for a term while others are not. Indeed, it has been held that distinctions made within the class of municipal judges are valid. In **Tsiosdia v. Rainaldi**, 89 N.M. 70, 547 P.2d 553 (1976), the court found that the statute authorizing each municipality to establish the qualifications of its municipal judges and resulting in different qualifications being imposed between municipalities was not discriminatory on its face and did not present an equal protection problem.

In summary, the office of municipal judge has not been exempted from the prohibition against increasing the salary of a public officer during the term for which he was elected and therefore the salary of a municipal judge may not ordinarily be increased during the term for which he was elected.

Nevertheless, this office has previously concluded that the initial awarding of a salary during an incumbent's term of office where no salary had been established did not violate Article IV, Section 27. See Opinion of the Attorney General No. 69-2, dated January 9, 1969. Moreover, we recognize that the legislature has prescribed increased compensation for an officer whose salary during his term was otherwise fixed by Article IV, Section 27, when the duties of the office were enlarged or expanded during the term of the incumbent. In such cases, the increase in compensation is paid in exchange for the performance of additional duties not contemplated when the office was created and the salary was specified. It does not serve as an increase in the salary for the performance of the original duties of the office.

When the legislature defined additional duties for the office of Lieutenant Governor, it also provided for a salary for the performance of these duties. See Laws 1971, Chapter 138. Similarly, the salaries of the several District Attorneys were increased when they were delegated the additional duties of juvenile court attorneys. See Laws 1968, Chapter 65, Section 1; repealed Laws 1972, Chapter 97, Section 71.

Accordingly, the governing body of a municipality may increase the compensation paid to a municipal judge during his term of office only if it also defines additional duties of the office. An increase in salary during the term for which the judge was elected would not be justified because of increased costs of living or an anticipated increase in the amount of work to be done by the judge pursuant to his ordinary duties.

### **ATTORNEY GENERAL**

Jeff Bingaman, Attorney General