

Opinion No. 53-5851

December 1, 1953

BY: RICHARD H. ROBINSON, Attorney General

TO: Arthur T. Noble, Jr. District Attorney Eighth Judicial District Taos, New Mexico

{*269} Receipt is acknowledged of your letter dated September 2, 1953, in which you request an opinion from this office as to whether you, as District Attorney, are entitled to convention expenses, as well as other local government officials, for your trip to Denver, Colorado, for a meeting which four other District Attorneys attended. It appears from your letter that this convention was held recently by the National Association of County and Prosecuting Attorneys.

In 43 Am. Jur. § 368, under heading "Public Officers", sub-heading "E. Expenses and Allowances", I find the following:

"Public officers are very often allowed statutory compensation {*270} for expenses incurred by them in the performance of their official duties. Such allowances for expenses are something different from salary, emoluments, or perquisites, and prohibitions against changing these do not ordinarily apply to an allowance for expenses. Where, by constitutional provision, the compensation of a designated officer or class of officer for the performance of official duties is fixed, official expenses may be allowed the officer, but not personal expenses, or expenses unnecessarily incurred. Thus, expenses incurred in attending conventions or meetings not for a public purpose may not be allowed. These rules are applicable to members of a state legislature. * * *"

I also find in Chapter 89 of the 1953 Session Laws, on pages 160 and 161, which is a law regulating the salaries of district attorneys and their assistants and providing for the expenses of the district attorneys and assistants in the State of New Mexico, the following:

"Provided, that the actual traveling expenses, by common carrier or personal automobile, shall be paid for on the basis of transportation costs by common carrier and at the rate of nine cents (9 [cents]) per mile for travel by personally owned vehicle, and subsistence in lieu of actual expenses shall be paid to the district attorneys and other personnel at the rate of six dollars (\$ 6.00) per diem, or actual expenses, while in the discharge of their duties; provided that per diem in lieu of subsistence shall not be allowed while such district attorneys and their assistants and other personnel are performing duties within a radius of twenty (20) miles of their respective official duty stations. Such expenses incurred while in the discharge of their duties shall be paid by the counties in behalf of which the same are incurred, out of the court fund of each county when supported by sworn statements of such expenses, and approved by order of the court."

The statute hereinabove cited specifically provides for the payment of actual traveling expenses for district attorneys and their assistants.

There is no question that the National Convention of District Attorneys has programs which are instructive and which are of extreme importance to prosecuting attorneys in successfully acquainting themselves with modern methods of apprehending and prosecuting criminals.

In Sec. 27 of Art. 4, Constitution of New Mexico, I find the following provision which is pertinent to your question:

"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."

In the case of **Collins v. Riley**, 24 Calif. 2d 912, 152 P 169, the State of California, which was a Constitutional provision similar to ours, held that the payment of traveling expenses to each state legislator does not constitute an improper increase in the compensation provided for by Const., Art. IV, § 23, of the State of California, since the state's repayment of such expenses is not the {**271*} giving of additional compensation, but merely a reimbursement to the legislator for actual cash outlays necessarily incurred for maintenance while away from his home in the performance of his duty. In this case, it was also held that when a state officer is required to travel in order to perform his duty, the payment of his actual necessary living expenses while away from home is a proper item of state expense and, unless expressly forbidden by the Constitution, it is a proper exercise of legislative authority to provide for the officer's reimbursement. The mere fact that such an officer is given a stated amount as compensation for his services cannot transform into additional compensation the allowance of his actual necessary living expenses while traveling on state business.

In the case of **Taxpayers' League of Carbon County, Wyoming v. McPherson**, et al, 49 Wyo. 251, 54 P. 2d 897, the question involved was whether the Sheriff of Carbon County, Wyoming, was entitled to a certain amount as traveling expenses under itemized and verified claims. The court held that the amount fixed by the statute to be paid the sheriff for the use of his personal automobile was not part of his salary within constitutional provision that salary of officer cannot be increased or diminished after his election or appointment, under the Wyoming Constitution, § 32, Art. 3. The Wyoming Supreme Court also held that the statutory compensation for expenses necessarily incurred in performing duties of office is neither salary nor emolument of office within constitutional prohibition against increasing or diminishing officer's salary or emolument after his election or appointment, and such compensation can be changed during officer's term.

Again the Wyoming Supreme Court in the case of **State ex rel. Murane v. Jack**, 70 P. 2d 888, followed the reasoning and decision in the case of **Taxpayers' League of**

Carbon County, Wyoming v. McPherson, et al, 49 Wyo. 251. The facts, briefly, in this case were that the defendant, Wm. "Scotty" Jack, as State Auditor of the State of Wyoming, and the plaintiff, C. D. Muran, one of the District Judges, were in disagreement as to the interpretation of Chapter 66, Laws of Wyoming, 1933, which prescribed the mileage expense to be paid state, county, or precinct officers in Wyoming. In this case, the Supreme Court further held that the Governor was without authority to fix mileage rates for state officers who used their own automobiles while transacting official business, since the statute allowed only actual expenses, not to exceed eight cents a mile, and only the Legislature could change the statutory mandate.

In Arizona, which has a statute like ours wherein claims of state employees have to be approved by the head of the department, in the case of **Ward v. Frohmiller**, 55 Ariz. 202, 100 P. 2d 167, Ward applied for a writ of mandamus against Ana Frohmiller, as Auditor of the State of Arizona, requiring her to approve certain claims for the travel expenses of himself and J. R. McDougall in attending a conference of what is known as the Council of State Governments held in San Francisco to discuss various governmental problems and the court held that such expenses and claims were for a public purpose and the Auditor was bound to approve claims where they had been duly approved by proper head of state department, unless it appeared that appropriation for such purpose had been exhausted.

{*272} The doctrine that the travel and convention expenses are for a public purpose and as such is compensable by the State is supported by the cases of **Louisville & Jefferson Co. Board of Health v. Steinfeld**, 308 Ky. 824, 215 SW 2d 1011; **Lindquist v. Abbett et al**, 196 Minn. 233, 265 NW 54; **Town of Farmington v. Miner**, 133 Me. 162, 175 A. 219; **People ex rel. Schlaeger v. Bunge Bros. Coal Co.**, 392 Ill. 153, 64 NE 2d 365; **Collins v. Riley**, 24 Cal. 2d 912, 152 P. 2d 169. The majority of the jurisdictions follow this rule and we believe that they express the better view.

In view of the above and foregoing authorities and majority of other cases from other jurisdictions, it is the opinion of this office that you are entitled to be reimbursed for your actual traveling and convention expenses while attending the meeting of the National Association of County and Prosecuting Attorneys, as provided in the foregoing statute.

Trusting that this fully answers your inquiry, I remain

By: Fred M. Standley

Assist. Attorney General