

Opinion No. 62-85

July 10, 1962

BY: OPINION OF EARL E. HARTLEY, Attorney General Oliver E Payne, Assistant Attorney General

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

QUESTION

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When a municipality pursuant to Section 14-15-9, 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

No.

OPINION

ANALYSIS

Section 14-15-9, N.M.S.A., 1953 Compilation (P.S.), as amended in 1961, authorizes every municipality to enact an ordinance providing for the mayor and council members to be paid a specified compensation for attending a maximum of four regular or special council meetings per month.

Our understanding of the facts giving rise to this inquiry is that the City of Gallup enacted such an ordinance prior to the last city election. Until that time the mayor and councilmen had received no compensation even though the authority to enact such a compensation ordinance has been on the books since 1939. Two of the councilmen are holdover members; that is, they are still serving the same term as they were when the ordinance was adopted. You ask whether these two council members can legally be paid this compensation. The controlling constitutional provision is Article IV, Section 27, which prohibits an increase or decrease in the compensation of any officer during his term of office.

There is no question but that mayors and councilmen are public officers under the criteria laid down by our Supreme Court in **State v. Board of County Commissioners**,

29 N.M. 209, 222 Pac. 654. They are persons elected to public office for fixed and definite terms whose functions and duties affect the public.

It will be noted that Section 14-15-9, supra, does not deal with an expense reimbursement but rather with "paid compensation in full." See **State ex rel. Peck v. Velarde**, 39 N.M. 179, 43 P. 2d 377.

The crucial question then is whether there is an "increase" in compensation when a salary is provided for an office that formerly carried no compensation at all. The question has been considered by a number of supreme courts in other jurisdictions and the answer has uniformly been that an ordinance providing compensation for a previously non-paying office amounts to an increase within the intendment of the constitutional inhibition. **Gay v. City of Glendale**, 41 Ariz. 207, 16 P. 2d 971; **State ex rel. Wyrick v. City of Ritzville**, 16 Wash. 2d 36, 132 P. 2d 737; **City Council of Newburyport v. Mayor of Newburyport**, 241 Mass. 575, 136 N.E. 70.

After discussing the public policy reasons for such a constitutional limitation, the court in the **Wyrick** case stated as follows:

"It is as much in violation of the spirit and purpose of the constitution to permit payment of compensation to an officer during his term of office, where previously the office carried no compensation, as it is to permit the amount of compensation, previously fixed, to be increased and such increase of compensation paid to one who, at the time of the increase, is holding office under an unexpired term."

Our conclusion must be that the two council members who were on the council at the time the ordinance was adopted and who are still serving the same term of office cannot be paid any compensation for attending council meetings.