

Opinion No. 65-240

December 15, 1965

BY: OPINION OF BOSTON E. WITT, Attorney General James V. Noble, Assistant Attorney General

TO: Mrs. Molly O. Rivera, City Clerk of Taos, Bedford Avenue Taos, New Mexico

QUESTION

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Under the New Mexico Municipal Code, if a municipality retains an attorney on a monthly fee basis may it pay an additional fee for representation in unanticipated litigation or for extraordinary services rendered for it by such attorney?

CONCLUSION

Yes.

OPINION

{*392} ANALYSIS

Under Section 14-9-1, N.M.S.A., 1953 Compilation (P.S.) elective officers of a municipality having a mayor-council form of government are the mayor, the members of the council and the municipal judge. If the municipality has a commission-manager form of government, the elective officers are the five commissioners and a municipal judge. Under the provisions of Section 14-11-4, N.M.S.A., 1953 Compilation, it is provided that the governing body of each municipality shall provide for the **office** of clerk, treasurer and police officer and may also provide for the **office** of an attorney. Section C provides:

"The governing body may provide for deputy **appointed officials** who may exercise the powers granted the **appointed officials.**" (Emphasis added)

In connection with your question, it is assumed that no merit system has been adopted which would affect the question now presented. Such being the case, the contract of employment would govern the situation and in the absence of specific agreement the retaining fee being paid to the appointed city attorney, as an official of the city, would cover the normal duties pertaining to the city attorney's office and contemplated by the parties, i.e., the governing body, the mayor and the city attorney.

Under the facts presented to us the appointed city attorney receives a monthly retainer fee of \$ 100.00. The amount must be looked to in determining the contemplated duties

and the normal duties expected of a city attorney. Such duties based upon the retainer fees here being paid would normally consist, in the absence of specific agreement, of attendance at all meetings of the city council and a reasonable amount of advice to the various city officials affecting the ordinary and every day administration of the city government. Additionally, the city attorney would be committed to refuse to handle any case or matter against the city. In the absence of express agreement, suits against or for the city or for or against officials **in their official capacity** would not be contemplated as a portion of the retainer agreement unless expressly agreed upon. Similarly, other extraordinary situations involving the expenditure of time or effort over and above that which would normally be expected for the amount of the retainer fee would be the subject of negotiation between the governing body of the city and the municipal attorney. An agreement should be reached before expecting the municipal attorney to proceed upon such efforts. However, the city attorney should not permit the municipality to be prejudiced by his failure to enter into prompt negotiations with the city governing body and to advise the city governing body of the fact that the matter should be negotiated. {393} Once agreement has been reached between the city governing body concerning the value of the extraordinary services and the manner in which they are to be computed, if other than a flat fee basis, the city would have authority under Section 14-17-1, N.M.S.A., 1953 Compilation (P.S.), to pay the city attorney the agreed upon amount. The same Section likewise contains the authority for a municipality to enter into contracts.

Inasmuch as the extraordinary duties the municipal attorney is called upon to perform are outside the normal duties for which he is being compensated and which he agreed to perform, the provisions of 14-9-4, N.M.S.A., 1953 Compilation (P.S.) concerning increase or decrease of compensation of municipal officers do not prevent an agreement as to compensation for such extraordinary services.

Nothing in the foregoing opinion should be taken to hold that a municipality may not, at the time a retainer fee or other fee is agreed upon, agree with the municipal attorney that he is to perform all or any part of the legal services for the municipality without compensation for such extraordinary services agreed upon to be so rendered.