

## **Opinion No. 69-134**

November 21, 1969

**BY:** OPINION OF JAMES A. MALONEY, Attorney General Ray Shollenbarger,  
Assistant Attorney General

**TO:** Mr. Abner Schreiber, County Attorney, County of Los Alamos Post Office Box 800,  
Los Alamos, N.M. 87544

### **QUESTION**

#### **QUESTIONS**

1. May the County Council of the Incorporated County of Los Alamos adopt a resolution which will provide for the payment of a per diem fee to the Clerk, Assessor, and Sheriff while these officials are attending County Council meetings and while in the performance of their official duties in addition to the amounts such officers are entitled to under Section 304 of the Charter of the Incorporated County of Los Alamos?
2. Since the Clerk, Assessor, and Sheriff of Los Alamos County were elected to their respective offices in November of 1968 and the Charter for the County setting the salary for these offices did not become effective until January 1, 1969, is Section 304 of that Charter a violation of Article IV, Section 27 of the New Mexico Constitution in that it increases or diminishes the compensation of these officers during their term of office?

#### **CONCLUSIONS**

1. No.
2. No.

### **OPINION**

#### **{\*217} ANALYSIS**

Section 304 of the Charter for the Incorporated County of Los Alamos provides:

The offices of Clerk, Assessor, and Sheriff of the County shall be elective. The annual compensation for each of these offices shall be \$ 1.00. The officers shall be reimbursed for their actual and necessary expenses incurred in the performance of their official duties.

This section became effective on January 1, 1969, the same date the Clerk ,Assessor, and Sheriff took office. The County Commission now seeks to provide an additional per

diem fee to these officers while in attendance at County Council meetings and while in the performance of their official duties.

We feel that Article IV, Section 27 of the New Mexico Constitution prohibits such action. This Section provides:

No law shall be enacted giving 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.

There is no question that the Clerk, Assessor, and Sheriff are public officers within the meaning of this section. They are persons elected to public office for {218} a fixed and definite term and whose functions and duties affect the public. **State ex rel. Gilbert v. Bd. of County Comm'r of Sierra County**, 29 N.M. 209, 222 Pac. 654 (1924).

Since Section 304 of the Charter for the county already provides that these officers will be reimbursed for their actual and necessary expenses incurred in the performance of their official duties, it would be an increase in the compensation of these officers if they were paid an additional per diem fee for the same act.

Although the payment of per diem is not in every case an increase in the compensation paid to a public officer, it would be in this case. This office has stated in the past that the question of whether the payment of per diem is additional compensation or merely reimbursed must be determined from the language accompanying the words "per diem" and the surrounding circumstances. Attorney General Opinion No. 59-91, issued August 3, 1959. There is no conceivable way the payment of the per diem under these circumstances could be anything but an addition to the compensation of the officers and as such is clearly unconstitutional.

Before going into your second question it is necessary to set forth some facts. The Clerk, Assessor and Sheriff of Los Alamos County for the 1969 and 1970 term were determined at an election held in November of 1968 and the Charter which provided the compensation for these offices did not go into effect until January 1, 1969, the same date that these officers took office. Thus the question is really one of when did the term of office of these officials commence, in November of 1968? or January 1, 1969? This is true since the Constitution of New Mexico only prohibits increases or decreases in the salary of public officers "during his term of office."

Article XX, Section 3 of the New Mexico Constitution provides:

The term of office of every state, county or district officer, except those elected at the first election held under this Constitution, and those elected to fill vacancies, shall commence on the first day of January next after his election.

Since this was not the first election under this Constitution and these officers were not elected to fill vacancies their term of office did not commence until January 1, 1969, the same date the Charter for the County became effective. Therefore, there was no increase or decrease in the salary of these officers during their term of office.