



TOM UDALL
Attorney General

Attorney General of New Mexico

PO Drawer 1508
Santa Fe, New Mexico 87504-1508

505/827-6000
Fax 505 827-5826

MANUEL TIJERINA
MARIAN MATTHEWS
Deputy Attorneys General

September 1, 1993

OPINION
OF
TOM UDALL
Attorney General

Opinion No. 93-06

By: Elizabeth A. Glenn
Assistant Attorney General

To: The Honorable H. John Underwood
State Representative
State Capitol Building
Santa Fe, New Mexico 87503

QUESTION:

May the state, by statute, authorize legislators to receive reimbursement from state funds for their actual expenses incurred in the performance of their official duties between sessions?

CONCLUSION:

No. Legislators are limited to the amounts specified in Article IV, Section 10 of the New Mexico Constitution to cover their expenses during and between legislative sessions.

FACTS:

The Governmental Ethics Task Force is evaluating the issue of legislator compensation. Article IV, Section 10 limits amounts legislators may receive to per diem and mileage during legislative sessions and for interim committee meetings between sessions. Currently, legislators spend their own money for other expenses related to their official duties, including postage necessary to respond to constituent requests, and telephone and travel expenses incurred in communicating and meeting with constituents. The Task Force asked whether Article IV, Section 10 necessarily precludes

enactment of a statute allowing legislators to be reimbursed for their actual expenses between sessions, up to a specified maximum.

ANALYSIS:

Article IV, Section 10 of the New Mexico Constitution provides:

Each member of the legislature shall receive:

A. as per diem expense the sum of not more than seventy-five dollars (\$75.00) for each day's attendance during each session, as provided by law, and twenty-five cents (\$.25) for each mile traveled in going to and returning from the seat of government by the usual traveled route, once each session as defined by Article 4, Section 5 of this constitution;

B. per diem expense and mileage at the same rates as provided in Subsection A of this section for service at meetings required by legislative committees established by the legislature to meet in the interim between sessions; and

C. no other compensation, perquisite or allowance.

The objective of constitutional provisions like Article IV, Section 10 is to reserve directly to the people of the state (through the constitutional amendment process) the power to set legislator compensation and avoid conflict-of-interest problems inherent when legislators are able to decide upon their own compensation and expenses, in which they have a direct pecuniary interest. See, e.g., In re Advisory Opinion, 41 S.E.2d 749, 750 (N.C. 1947) (holding that the legislature had no power to provide a subsistence and travel allowance for its members in addition to compensation fixed by the constitution); Hall v. Blan, 148 So. 601, 603 (Ala. 1933) (finding unconstitutional a statute granting legislators an expense allowance of up to \$4.00 per day in addition to the \$4.00 per day and ten cents per mile allowed by the constitution); AG Op. No. 87-62 (1987) (concluding that Article IV, Section 10 precluded retirement benefits for legislators).

As will be discussed below, the language and history of this constitutional provision show that the citizens of this state consistently have adopted a strict interpretation of permissible legislator compensation. Although constituents' expectations

regarding legislators' duties has apparently grown over time, the people have rarely granted increases in the amount and extent of compensation.¹ Thus, despite the increase in expenses legislators incur to serve their constituents, those constituents apparently have concluded that, except for times when the legislature meets in a session or at interim committee meetings between sessions, the expenses of holding office are to be borne by each individual legislator. Even though we understand and are sympathetic with the view that meetings with constituents and constituent services are an important part of the official duties of citizen legislators, we are constrained by the New Mexico Constitution's limitation on payments to legislators.

The framers' intent to strictly limit legislator compensation is found initially in the language of the constitution.² Article IV, Section 10 states that legislators shall receive "per diem expense" and mileage at the specified rates for each day's attendance during a legislative session, travel to and from the seat of government once each session and for service at interim legislative meetings between sessions. The term "per diem" generally refers to "a daily allowance" or "a daily fee." Webster's Third New International Dictionary 1676 (1986). See also

¹Since the constitution was enacted, New Mexico voters have approved amendments increasing legislator per diem and mileage four times: in 1944, 1953, 1971 and 1982. By contrast, voters defeated amendments which would have: permitted legislators to receive compensation as provided by law (1961), provided compensation of \$200 per month (1965), provided compensation of \$3,600 per year (1969), created a legislative compensation committee (1974), provided a monthly salary of \$300 (1978), raised per diem to \$60.00 and mileage to \$.20 (1980), provided annual annuity benefits of up to \$6,000 under a retirement program (1988), increased per diem to \$100 per day and provided a monthly salary of \$500 (1990), and created a citizens' legislative compensation commission to determine legislator salaries and expense allowances (1992).

²In interpreting the provisions of the constitution, we follow the same rules that apply to statutory construction. Postal Finance Co. v. Sisneros, 84 N.M. 724, 725, 507 P.2d 785 (1973); State ex rel. State Highway Comm'n v. City of Aztec, 77 N.M. 524, 526, 424 P.2d 801 (1967). Under those rules, the place to start is the language of the provision. State v. Osborne, 111 N.M. 654, 657, 808 P.2d 624 (1991). See also Flaska v. State, 51 N.M. 13, 18, 177 P.2d 174 (1947) (a constitutional amendment is not open to construction if its language is plain and definite and free from ambiguity).

Black's Law Dictionary 1136 (6th ed. 1990) ("By the day; an allowance or amount of so much per day"). By adding the word "expense," the drafters apparently wanted to emphasize that the per diem allowed was intended to be used for individual expenses during sessions and interim committee meetings. The usual meaning of the word "mileage" is "an allowance for traveling expenses at a certain rate per mile." Webster's Third New International Dictionary at 1433; Black's Law Dictionary at 992. Thus, subsections (A) and (B) of the provision provide for certain expense allowances during and between sessions.

Subsection (C) further declares that legislators shall receive "no other compensation, perquisite or allowance." Thus, subsection (C) prohibits all "other" allowances, including payment and reimbursement for expenses, in excess of the stated amounts. This explicit prohibition of other allowances contrasts markedly with the language in other states' constitutions which have been given a broader interpretation on this issue. See, e.g., Eberle v. Nielson, 306 P.2d 1083, 1087 (Idaho 1957) (holding that the Idaho Constitution's allowance for services and allowance for travel, in "the absence of any restrictive terms limiting the legislators to such allowances," left the legislature free to provide for the payment of other expenses).³

The intent of the framers of Article IV, Section 10 to strictly limit legislators to the specified per diem expense and

³It is our opinion that expenditures for telephone service, postage, stationary, office space and office supplies made available to legislators during sessions are not prohibited by, indeed, are not even the subject of, Article IV, Section 10. The expense of providing these items and services are incurred by the legislature acting as a whole and are necessary to enable that body to function as contemplated by the constitution. In contrast, the allowance for reimbursement discussed in this opinion is distinguishable because it would be incurred by and in the discretion of individual legislators between sessions. See AG Op. No. 5189 (1949) (distinguishing the expenses of individual legislators for which payment is not constitutionally permitted from expenses which are permissible because they are incurred by the House itself). Similarly, transportation expenses for members to attend official interim committee business outside of Santa Fe are allowed by the constitution's explicit inclusion of mileage for attendance at interim legislative committee meetings between sessions.

mileage is further evidenced by the history of the provision.⁴ As adopted by the people of New Mexico in 1911, the provision read:

Each member of the legislature shall receive **as compensation for his services** the sum of five dollars for each day's attendance during each session, and ten cents for each mile traveled in going to and returning from the seat of government by the usual traveled route, once each session, and he shall receive no other compensation, perquisite or allowance.

(Emphasis added.) In 1953, voters approved an amendment to Article IV, Section 10 which substituted "shall receive as per diem expense" for "shall receive as compensation for his services." Attorney General opinions issued during the period indicate that before the 1953 amendment, there were conflicting views about whether the constitutional provision allowing "compensation for services" precluded legislators from receiving payment for their expenses. Compare, e.g., AG Op. No. 5189 (1949) (concluding that legislators could not receive an allowance to cover their expenses while attending legislative sessions in addition to the compensation provided for in the constitution) with AG Op. No. 3687 (1941) (concluding that Article 4, Section 10 did not preclude legislators from receiving payment for their actual expenses incurred in attending committee meetings between sessions, and arguing that the term "allowance" in the last part of the provision referred to an allowance of compensation and not to an allowance for expenses).⁵ The change in the wording from "compensation" to

⁴See Flaska v. State, 51 N.M. at 18 (history of constitutional amendment and conditions that prompted its framing may be considered to ascertain the will of the people); State ex rel. Hannah v. Armijo, 38 N.M. 73, 80-81, 28 P.2d 511 (1934) (court should discover spirit of constitution from contemplation of its historic background).

⁵The use of the word "expense" in Article IV, Section 10 differs from similar constitutional restrictions in other states where the amounts specified as per diem or otherwise are interpreted as compensation for services and are distinguished from expenses found not covered by the pertinent restriction. See, e.g., Chamber of Commerce v. Leone, 357 A.2d 311 (N.J. Super. Ct. 1976) (constitutional provision limiting legislators to compensation fixed by law "and no other allowance or emolument" did not preclude an act appropriating an allowance to each legislator, not to exceed \$5,000, for expenses related to the legislator's home district office), aff'd without opinion, 382 A.2d 381 (N.J. 1978); Spearman v. Williams, 415 P.2d 597 (Okla. 1966) (expense allowance

"per diem expense" appears to have been intended to put that issue to rest (and to have ruled out any "compensation," other than specified expenses, for services as a legislator).

The scope of the reimbursement of legislator expenses remained at issue, however, and in December, 1970, the Santa Fe County District Court ruled that because Article IV, Section 10 expressly limited payment of legislators' expenses only during legislative sessions, it did not prohibit the reimbursement of per diem and travel expenses to legislators when the legislature was not in session. State ex rel. Thompson v. Fettinger, No. 41,719 (December 1970). Based on this decision, an Attorney General's opinion issued in early 1971 concluded that the legislature could enact a law reimbursing expenses incurred by legislators while performing legislative duties between legislative sessions. AG Op. No. 71-11 (1971).⁶

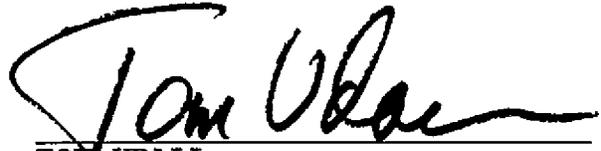
Against this background, during the 1971 legislative session an amendment to the constitution, titled "An Amendment to Article 4, Section 10 of the Constitution of New Mexico to Provide **Limitations** on the Compensation of Members of the Legislature" (emphasis added), was proposed, H.R.J. Res. 2, 1971 N.M. Laws 1377, and adopted by voters in November, 1971. The amendment added the present provision limiting per diem expense and mileage between sessions to attendance at interim legislative committee meetings. This effectively closed the inter-session gap in the constitutional provision left open by the district court in State ex rel. Thompson v. Fettinger and subsequent Attorney General opinions.

In sum, the language of Article IV, Section 10 and its history show that its limitations apply to reimbursement for expenses as well as other forms of compensation, and to periods between as well as during legislative sessions. We believe that the intent of Article IV, Section 10 is to reserve to the voters and remove completely from legislators any power to authorize for themselves

for district office and travel within district was not precluded by a constitutional provision limiting legislators to \$100 monthly salary except during sessions when legislators receive \$15 per diem and ten cents per mile and "no other compensation").

⁶That same year another AG opinion concluded that a proposed statute paying legislators \$300 per month between sessions as **compensation** for legislative services would be unconstitutional. AG Op. No. 71-18 (1971).

payment--whether compensation, allowance or reimbursement--for performing legislative duties between sessions beyond that expressly mentioned in the constitution.



TOM UDALL
Attorney General



ELIZABETH A. GLENN
Assistant Attorney General

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