

**OPINION
60-151**

February 10, 1960 (OPINION)

STATE GOVERNMENT

RE: Legislative Assembly - Members Constitutional Ineligibility for Other Civil Office,
When

This is in reply to your letter in which you ask for an interpretation of the N. D. laws and constitutional provision. You set forth Section 39, Article 2 of the North Dakota Constitution which reads as follows:

"No member of the legislative assembly shall, during the term for which he was elected, be appointed or elected to any civil office in this state, which shall have been created, or the emoluments of which shall have been increased, during the term for which he was elected; nor shall any member receive any civil appointment from the governor, or governor and senate, during the term for which he shall have been elected."

You then state that the salary of the Governor was raised in 1957 by Chapter 335 from six thousand dollars to ten thousand dollars and the salary of the Lieutenant Governor from one thousand to sixteen hundred dollars. The Legislature in 1959 by Chapter 325 amended Section 54-0609 and set the mileage allowance from seven and half cents to eight and half cents per mile. The same Legislature by Chapter 324 amended 44-0804 increasing the sustenance allowance from eight dollars to ten dollars per day and out-of-state six dollars per day for meals plus actual lodging cost.

You then call to our attention that the senators in North Dakota are elected for a four-year term as provided for in Section 27, Article 2 of the Constitution and that the representatives are elected for a two-year term, according to Section 33 of said Article.

You also call to our attention that the term of service begins the first Tuesday of January after their election. You then ask for an opinion whether or not the increase in mileage and sustenance as provided for in Chapters 324 and 325 would be an increase in emolument under Section 39 of the Constitution.

The North Dakota Supreme Court apparently has had no occasion to speak out on this question. Neither were we able to find any case on the precise question from other jurisdictions.

The case of State v. Reeves, 184 N.W. 993 (44 S.D. 568), cited in your letter dealt with a somewhat related problem. In the cited case the State Constitution did not require judges to reside at the capital. The Constitution of South Dakota provided that the judges are to

receive any compensation, perquisites or emoluments for or on account of his office in any form whatever, except such salary. The Legislature amended a law allowing one hundred fifty dollars a month instead of fifty dollars a month as living expenses for living at the capital city. This Act was challenged as being contrary to the Constitution. The court held that under its Constitution and laws this Act was not unconstitutional. In essence the court said it was not an emolument under the South Dakota Constitution and laws. This case was in a sense a sequel to the case of McCoy v. Handlin, 153 N.W. 361 (35 S.D. 47) which related to an enactment allowing fifty dollars per month expense to Supreme Court judges for living expenses to reside at the state capital.

The court in the case of State v. Reeves held that the Act was:

". . . . not violative of Constitution, fixing the judge's compensation and making it unlawful for him to receive any 'compensation, perquisite, or emoluments' except such salary, since a lump sum allowance for actual expenses is not additional 'compensation,' or a 'perquisite,' or 'emolument,' and since one hundred fifty dollars per month is not so plainly and palpably in excess of any amount of expenses which could be incurred as to show that the Legislature intended to increase the salary and not to provide for the payment of expenses incident to discharge of their duties, in view of fact that the judges are not required to reside at the capital."

Because of the constitutional provisions which are not identical or similar to those of North Dakota, this case cannot be said to be controlling. The case is controlling as far as South Dakota is concerned and as pertaining to the judges. This case does, however, serve as an aid to our problem.

Chapter 324 provides that:

"No officer, employee, representative, or agent of this state, or of any of its subdivisions, agencies, shall make claim upon any public fund for any sum in excess of ten dollars for any one day for actual expenses of meals and lodging while engaged in the discharge of a public duty and while upon a public expense account within the state," (Underscoring ours)

It is noted that this provides for a reimbursement of expenses incurred and it is also observed that it is in the nature of a claim against the public fund. In this connection we must take into consideration what constitutes a claim under the North Dakota law and the essential elements of such claim. Section 54-1404 of the 1957 Supplement sets forth what must be contained in such claim. The certificate is an essential part of the claim, required by statute, which requires amongst other things that the claimant:

". . . . certify that the within bill, claim, account or demand, is just and true; that the money therein charged was actually paid for the purpose therein stated; that the services therein charged were actually rendered and are of

the value therein charged; . . . and that the goods therein charged were actually delivered and were of the value charged."

Under another section a penalty is imposed for certifying a false claim.

An emolument has been defined to mean the profit arising from office or employment; that which is received as compensation for services, or which is annexed to the possession of office, as salary, fees, and perquisites. An emolument is something positively and directly conferred, as compensation, or gain, that the holder of an office receives, and not something necessarily, inseparably, and incidentally used by him in the discharge of his duty, a duty for which he is paid a fixed salary, as stated in 241 Fed. 747, page 769, Smith v. Jackson.

The claim for sustenance or per diem does not fall within this definition. It is a claim that any person may file. It is not limited to a certain office but pertains to all officers and employees performing duties for the state or any of its political subdivisions on an expense account.

Section 54-0609, as amended by Chapter 325 of the 1959 Session Laws, relating to mileage allowance provides:

"State officials, whether elective or appointive, and their deputies, assistants, and clerks or other state employees, entitled by law to be reimbursed for mileage or travel expense, shall be allowed and paid for mileage and travel expense the following amounts:

1. The sum of eight and one-half cents per mile for each mile actually and necessarily traveled within this state. . . ."

(Underscoring ours)

Here again it is observed that it is a reimbursement for expenses had and not additional compensation. Where the Legislature has set a definite allowance for mileage, it is deemed to correspond directly to the actual cost of travel. Legislative history will tell us that the mileage allowance has been modified from time to time to correspond to the actual cost of travel and has not been considered as part of the compensation or salary for those in office, either appointive or elective.

It is recognized that there is quite a distinction between reimbursement for expenses and additional allowances to an office. The turning point is not the terminology of the item itself, but rather what the item actually is.

For the foregoing reasons it is our opinion that the increase in sustenance or mileage as provided for in Chapters 324 and 325 does not constitute an increase in emolument as contemplated in section 39 of the North Dakota Constitution and such increase in itself

would not act as a bar against members of the Legislature who served in the 1959 session to seek election to any state office.

It is our further opinion that members of the Legislature who served in the 1957 session and who are still holding such office to which they were elected (holdover senators) would not be eligible to be elected to the position of Lieutenant Governor or any state office of which the salary had been increased.

In this opinion we have confined ourselves to the question whether sustenance under Section 44-0804 and mileage under Section 54-0609 as increased by the 1959 Legislature constitute a bar under Section 39 of the North Dakota Constitution. We have expressed no thought whether Chapter 33 of the 1959 Legislature would constitute such bar as to the office of Governor or other state office. While having refrained from expressing any comments thereon we deem it advisable to call to your attention Chapter 33 of the 1959 Session Laws allowing expenses in the amount of fifteen hundred dollars per annum to certain state offices. The allowance referred to in this Chapter was not made to the office of Lieutenant Governor. Therefore such chapter would not have any effect on such office.

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