

**OPINION
60-73**

March 31, 1960 (OPINION)

COUNTIES

RE: Salaries of County Officers - County Commissioners

This is in reply to your request for an interpretation and construction of section 11-1010 of the 1957 Supplement.

The complexity of the question apparently resulted from the fact that the expenditures, compensation, reimbursement, and so forth, are on a fiscal year basis, whereas the county commissioners' terms are four years, beginning with the first Monday of January succeeding their election. In other words, normally a commissioner leaves office on the first Monday of January, and the new commissioner takes over on the same date. The fiscal year begins July first and ends July first the following year.

The expenditures or payments in question were made to a county commissioner who was serving his last year in office. The commissioner in question left such office on January 7, 1957, (presumably the end of his term) and his successor took over thereafter. During the fiscal year beginning July 1, 1956 to January 7, 1957, the date that the commissioner left the office, he was paid a total of \$2,046.38 (\$2,028.20 as per itemized form from County Auditor). We are not concerned with the exact figure, merely the principle of law involved.

Section 11-1010 as amended by chapter 111 of the 1955 Session Laws was in effect at the time and provided in part as follows:

"Total compensation and expenses, including per diem, board and lodging, and transportation expense, received by any member of a board of county commissioners shall be charged to and paid from the general fund of the county only and shall not exceed for each fiscal year the following amounts: In counties having a population of eight thousand or less, one thousand eight hundred dollars; in counties having a population of over eight thousand and less than fifteen thousand, two thousand five hundred dollars; and in counties having a population of over fifteen thousand, three thousand dollars, and for the purpose of fixing the maximums herein provided, population figures shall be those established by the most recent federal census."

This Act also provided that the provisions relating to compensation be retroactive, beginning with January 1, 1955. According to population, the maximum payment to any commissioner was \$2,700.00 at the time.

It is noted that subsection 3 of chapter 111 of the 1955 Session Laws which amended section 11-1010 states that:

"Each county commissioner shall be allowed the sum of ten dollars per day while performing his duties in attending meetings of the board of county commissioners of which he is a member or when engaged in other official duties. * * *."

Thereafter it sets out in rather minute detail under what conditions and at what times the county commissioners may charge per diem. The same act also sets out in detail under what conditions county commissioners may collect mileage.

The facts presented to us for consideration do not challenge the validity of the claim filed by a certain commissioner, nor do they indicate that the payments were made to the commissioner for anything else but services rendered. We are therefore assuming that all payments made to the commissioner in question were proper as to amount and for service rendered.

The main portion of the 1955 amendment is still in effect. The maximum payment based on population had been modified by subsequent legislation. It is noted that the payments provided for under the statute in question are per diem and reimbursement for mileage. The payment is not on an outright salary basis. Reference has been made to the case of *Bradley v. Esmeralda County* reported in 104 Pac. 1058. The conclusion reached by the court in said case cannot be applied to the instant facts. In the case cited the county sheriff received a given salary per annum. In the cited case the statute provided:

"The sheriff shall receive four thousand (\$4,000) dollars per annum, and such fees, in civil actions, as are now allowed by law, and as ex officio assessor, the sheriff shall receive twelve hundred (\$1,200) dollars per annum."

The Act also provided that the salaries and fees be in full compensation for their services. In the instant case we do not have a given salary but rather a per diem and reimbursement for mileage.

The case of *State ex rel Matson v. O'Hern*, 65 Pac. 2d 619, among other things said that statutes relating to fees or compensation of public officers must be strictly construed in favor of government and such officers are only entitled to what is clearly given by law. This case among other things discharged the question whether moneys erroneously collected for per diem, and so forth, could be recovered by stating that there is no provision by law for such recovery.

The principle of law announced in this case has some application here. We are, however, not concerned with any erroneous payments for mileage or per diem. In strictly construing the payment of per diem and mileage, it is found that we have in addition to the circumstances under which per diem and mileage can be collected the limitation that it

shall not exceed for each fiscal year. " * * *the sum of \$2,700." We do not have any statutory provision that this amount shall be prorated monthly, quarterly or semiannually. The total per diem and mileage received by the commissioner in question did not exceed the maximum of \$2,700.00. The new commissioner, by reason of previous expenditure, is, however, still limited to the \$2,700.00 up to July 1, 1957.

The statute does not require prorating and neither did the commissioners on their own prorate such maximum allowances. In this connection it is also observed that there is no provision in the above cited statute which states when the \$2,700.00 will be available. As pertaining to appropriations to state departments, it is specifically provided that only seventy-five percent of such appropriation will be available on the first day of July next succeeding the enactment, and that twenty-five percent will be available beginning with the fourth quarter of the biennium. Here the legislature specifically took into consideration that state officers take office on the first Monday in January, whereas the financial matters are handled on a fiscal year or a biennium basis, July 1 to July 1. In the absence of such limitation on the availability of the funds appropriated, the department in charge could expend the entire appropriation as soon as it is available. Whether such practice is good or bad is of no concern as to the legal principle of law involved. Similarly, the county commissioners may at the beginning of the fiscal year expend the maximum amount allowed by law without violating any statute. If the legislature had intended that the county commissioners should receive a certain portion or not make the entire amount available until after a certain date, it could have adopted similar legislation as that found relating to state departments. It is conceivable that a county commissioner at different times is required to perform more services than at other times. The statutes relating to county commissioners require that regular meetings be held at certain times, but such statutes are not a limitation. The commissioner still is required to perform his duties aside from attending the regular statutory meetings.

As stated before we are assuming that the payments made to the commissioner in question were for services rendered. It is therefore our opinion that the payments to the commissioner in question as stated above do not violate the statutory provision relating to per diem and mileage allowances permitted to county commissioners. It necessarily follows that the commissioner in question is not required to reimburse the county for the money he received over and above the money he would have received if such maximum would have been prorated on a monthly, quarterly or semiannual basis. If the limitation or maximum of \$2,700.00 were an outright salary, the conclusion might be different. Apparently the letter by Mr. J. A. Hyland, dated March 25, 1957, was on the assumption that the payments made to the county commissioners were on a salary basis rather than per diem and mileage for services rendered and miles actually and necessarily traveled.

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