

Opinion No. 67

**Governor, Interim President Pro Tempore of Senate Shall Receive Per Diem Based Upon \$10,000.00 Per Year When Serving as—
Senate, Interim President Pro Tempore of—**

Held: 1. The Interim President Pro Tempore of the Montana Senate, when serving as acting Governor of the State of Montana, due to the absence of the Governor and Lieutenant-Governor from the State, shall receive per diem based upon the \$10,000.00 per year salary authorized by Chapter 182, Laws of 1949.

November 5th, 1949.

Mr. W. L. Fitzsimmons
Clerk, State Board of Examiners
State Capitol
Helena, Montana

Dear Mr. Fitzsimmons:

You have requested the opinion of this office on the following question:

"At a meeting of the Board of Examiners held Wednesday, September 21, 1949, the question arose as to how much should be paid per diem to the Acting Governor when said Acting Governor was holding that position by reason of his election as President Pro Tem of the Senate, whether he should be paid for time served as Acting Governor on the basis of the present Governor's salary or on the basis of the increase in the salary of the Governor passed by the last Legislative Assembly."

The salary to be paid to the Governor of the State of Montana is now set at \$10,000.00 per year by Chapter 182, Laws of 1949. Chapter 182 was in full force and effect after its passage and approval. The act was approved March 3rd, 1949. Chapter 182 repeals Section 128, Revised Codes of Montana, 1935, which set the Governor's salary at \$7,500.00 per year.

Although the salary of the Governor of Montana is at the present time set by law at \$10,000.00 per year, the incumbent in the office of Governor can only be paid at the rate of \$7,500.00 per year as set by Section 128, *supra*. This situation is the result of the prohibition of Article V, Section 31, of the Montana Constitution. Article V, Section 31, is as follows:

"Except as otherwise provided in this Constitution, no law shall extend the term of any public officer, or increase or diminish his salary or emolument after his election or appointment; provided, that this shall not be construed to forbid the Legislative Assembly from fixing the salaries or emoluments of those officers first elected or appointed under this Constitution, where such salaries or emoluments are not fixed by this Constitution."

Since Chapter 182, Laws of 1949, which raises the salary of the Governor was passed after the election of the present Governor, the above quoted prohibition of the Constitution prevents the present Governor from receiving the increase in salary and therefore the Governor is now being paid at the rate of \$7,500.00 per year. If Article V, Section 31, of the Constitution also relates to the person serving as acting Governor by reason of holding the office of Interim President Pro Tempore of the Senate, then that individual may only receive a per diem recompense based upon the \$7,500.00 annual salary provided for by Section 128, *supra*.

State Senator M. J. Lott was elected Interim President Pro Tempore of the Montana Senate on March 3rd, 1949, the 60th Legislative day of the Thirty-First Legislative Assembly of the State of Montana. By reason of the absence of the Governor and the Lieutenant-Governor from the State, Senator Lott served as Acting Governor of the State of

Montana from the 17th through the 21st day of September, 1949. The authority for such assumption of office is contained in Article VII, Section 16 of the Montana Constitution as follows:

"In case of the failure to qualify in his office, death, resignation, absence from the State, impeachment, conviction of felony or infamous crime, or disqualification from any cause, of both the Governor and the Lieutenant-Governor, the duties of the Governor shall devolve upon the President Pro Tempore of the Senate until such disqualification of either the Governor or Lieutenant-Governor be removed, or the vacancy filled, and if the President Pro Tempore of the Senate, for any of the above-named causes, shall become incapable of performing the duties of Governor, the same shall devolve upon the Speaker of the House."

Article V, Section 31, of the Constitution which prevents the increasing or diminishing of the salary of a public officer after his election or appointment has been interpreted by the Montana Supreme Court in a number of cases. In my Opinion No. 60, Volume 23, Report and Official Opinions of Attorney General, I reviewed the law on this subject at great length. The following portion of Opinion No. 60, *supra*, is relevant to the instant situation:

"The extent of the prohibition and its purposes are well stated in the case of *State ex rel. Jackson v. Porter*, 57 Mont. 343, 188 Pac. 375. In the *Jackson* case the salaries paid to District Judges had been increased by the 1919 Legislature. In October of 1919, the District Judge of the 2nd Judicial District having been elected in 1916 for a four-year term, resigned and the relator in this case, Joseph R. Jackson was duly and regularly appointed to finish the unexpired term. The Relator presented a salary claim based upon the increase granted by the 1919 Legislature. The State Auditor, the defendant in the action, refused to allow the claim to the extent of the increase. In arriving at a decision the court outlined the purpose of the prohibition contained in Article V, Section 31 as follows on Page 347: 'The purpose is to secure, as far as possible, the independence of each co-ordinate branch of government, and to that end relieve the law-making branch from the importunities of office-holders who might seek increased compensation, not for the office, but for themselves, and what was of infinitely greater consequence, remove from the law-makers the temptation to control the other branches of government by promises of reward in the form of increased compensation or threats of punishment by way of reduced salaries: or, stated differently, the sole purpose of the Constitutional limitations is to remove from the sphere of temptation every public officer whose office is created by the Constitution and whose official conduct in the remotest degree might be influenced by the hope of reward or the fear of punishment. So far as there is reason for the rule which underlies the limitations, it must be enforced with the utmost rigor, but whenever the reason for the rule ceases, so does the rule itself.' In holding that the Relator

was entitled to the salary increase and that the Constitutional prohibition did not apply in such case the Court on pages 347-8 held as follows: 'At the time the bill for the amended Act was before the Legislature in March, 1919, it was impossible that any member could have known that Judge Dwyer would resign in October following and that Joseph R. Jackson would become his successor. No possible importunity on the part of Mr. Jackson in March, 1919, could have influenced the enactment of the amended statute for his own benefit, and no Legislative promises then made to Mr. Jackson could have tended to sway his judicial mind seven months later when for the first time he became clothed with judicial power and authority. The circumstances remove Relator's case from the operation of the rule.'

The rule of the Jackson case has been uniformly followed in Montana down to the present date. The most recent decision affirming the Jackson decision was in the case of *Adami v. County of Lewis and Clark*, 114 Mont. 557, 138 Pac. (2nd) 969. See also *State ex rel. Jaumotte v. Zimmerman*, 105 Mont. 464, 73 Pac. (2nd) 548; *Broadwater v. Kendig*, 80 Mont. 515, 261 Pac. 264; *Drolte v. Board of Commissioners of Ellis County*, 56 Pac. (2nd) (Oklahoma) 800."

In Opinion No. 60, *supra*, I held that the salary to be paid to the appointee to the office of State Treasurer shall not be limited by Article V, Section 31, of the Constitution where the vacancy and appointment occurred after the passage, approval, and effective date of a law increasing the salary to be paid to the State Treasurer, since the vacancy and appointment were both subsequent to the passage and approval of the law authorizing the salary increase.

The decision in the instant case as to whether Senator Lott shall receive per diem on the basis of the \$10,000.00 per year salary as set forth in Chapter 182, Laws of 1949, thus depends upon the date of his election to the office which qualified him to serve as acting Governor and also upon the date of passage of the act authorizing the salary increase.

Chapter 182, Laws of 1949, was originally Substitute House Bill No. 141. It was passed in the House on February 11th, 1949, and transmitted to the Senate for its concurrence. On February 28th, 1949, the Senate concurred in the bill but amended it in several particulars and returned the bill to the House for concurrence in the Senate amendments. The House rejected the Senate Amendments on February 28th and a House-Senate Joint Conference Committee was appointed to arrive at an agreement. The Joint Conference Committee having agreed upon a suitable compromise, the House and Senate both adopted the Committee Report on March 2nd, 1949. On March 3rd, the Governor signed the bill and it became effective at once.

As stated above, Senator Lott was elected Interim President Pro Tempore of the Senate on March 3rd, 1949. At the time the last action

on Substitute House Bill No. 141 was taken in the House and Senate, Senator Lott did not know that he would be the Interim President Pro Tempore of the Senate and at the same time, the Senate, along with the House, did not know that Senator Lott would be elected to such office. Applying the tests laid down in the Jackson Case, supra, to the case at hand, I find no reason why Article V, Section 31, should apply so as to prohibit Senator Lott from receiving compensation based upon the salary of \$10,000.00 per year allowed by Chapter 182, Supra. Since Senator Lott did not know he would be the President Pro Tempore of the Senate until March 3rd, the day after Substitute House Bill No. 141 was concurred in by both the House and the Senate, he could not possibly have importuned the Legislature to raise the salary of the Governor for his own benefit and conversely the Legislature could not have attempted to influence his future conduct as Acting Governor by promises of reward in the form of increased compensation or threats of punishment by way of reduced salary. Article V, Section 31, was designed to guard against certain evils, and as stated in the Jackson Case, supra, when such evils are not present, the prohibition does not apply.

It is my opinion that Senator M. J. Lott, the Interim President Pro Tempore of the Montana Senate, shall receive per diem based upon the \$10,000.00 per annum salary authorized by Chapter 182, Laws of 1949, when serving as Acting Governor of the State of Montana due to the absence of the Governor and Lieutenant-Governor from the State.

Very truly yours,
ARNOLD H. OLSEN,
Attorney General.