

Opinion No. 43

**County Commissioners—Change From Per Diem to Salaried Basis—
Chapter 238, Laws of 1957—Chapter 82, Laws of 1955**

Held: Incumbent County Commissioners in first, second, third and fourth class counties cannot be placed on a salaried basis as provided by Chapter 238, Laws of 1957. The compensation of these officers is determined by Chapter 82, Laws of 1955.

January 15, 1958

Mr. Anthony F. Keast
County Attorney
Missoula County
Missoula, Montana

Dear Mr. Keast:

You have requested my opinion whether Chapter 238, Laws of 1957, which altered the mode of compensating county commissioners in first, second, third and fourth class counties from a per diem to a salaried basis, is applicable to incumbent county commissioners.

You contend that Article V, Section 31, of the Montana Constitution, prohibits an increase in a county commissioner's emolument and a commissioner has not had his emolument increased when he is placed on a salaried basis.

Article V, Section 31, of the Montana Constitution provides in part:

". . . no law shall extend the term of any public officer, or increase or diminish his salary or emolument after his election or appointment . . ."

Chapter 82, Laws of 1955, granted a payment of \$12.00 for each day's attendance on sessions of the Board. Volume 25, Opinions of the Attorney General, Number 55, declared the per diem allowance of county commissioners was an emolument within the meaning of Article V, Section 31. Chapter 238, Laws of 1957 grants a salary to county commissioners in first, second, third and fourth class counties. The following table will illustrate the increase in a commissioner's income if he is placed on a salaried basis. The figure of \$4380.00 was determined by assuming a commissioner attended a Board session for 365 consecutive days and received a per diem of \$12.00 for each day's attendance as provided in Chapter 82, Laws of 1955.

Ch. 238, L. '57	Ch. 82, L. '55	Increase Under Ch. 238, L. '57
1st Cl. Cty: \$5000.00	\$4380.00	\$620.00
2nd Cl. Cty: \$4900.00	\$4380.00	\$520.00
3rd Cl. Cty: \$4800.00	\$4380.00	\$420.00
4th Cl. Cty: \$4700.00	\$4380.00	\$320.00

It is seen that Chapter 238, Laws of 1957, provides an increase in a commissioner's compensation from \$620 to \$320 depending on the classification of the county. The purpose of Article V, Section 31, of the Montana Constitution, was enunciated in *State ex rel. Jackson v. Porter*, 57 Mont. 343, 347, 188 Pac. 375, when the court stated:

". . . 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 lawmakers 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."

The Montana Supreme Court has not considered the question of altering the mode of compensating an officer within the prohibition defined by Article V, Section 31. However, the California court has repeatedly construed Article XI, Section 5, formerly Section 9, which provides in part:

"The compensation of any county, city, town or municipal officer, shall not be increased after his election or during his term of office . . ."

In *Galeener v. Honeycutt*, 129 Pac. 595, 596, 173 Cal. 100, this provision was considered and the court stated:

". . . It is thoroughly settled that the legislature may change the mode of compensation of an officer after his election from fees or per diem to a salary provided that in so doing it does not in fact increase his compensation. (Citing cases) . . . If the legislative enactment shows on its face that the change does in fact increase the compensation of an incumbent it is void as to him . . ." See, also, *Regan v. San Mateo County*, 97 Pac. (2d) 231, 14 Cal. 2d 713; *Busch v. Turner*, 161 Pac. (2d) 456, 458, 26 Cal. 2d 817.

The California constitutional provision uses the word "compensation" and this term leaves no doubt that any gain to an officer after his election or appointment by altering his mode of compensation is prohibited. Article V, Section 31, of the Montana Constitution uses the terms "Salary" or "Emolument". In *Scharranbroich v. Lewis and Clark County*, 33 Mont. 250, 257, 83 Pac. 482, the court considered the distinction between a salary and emolument and stated:

". . . that in respect of sheriffs the word 'salary' means what it ordinarily means: a fixed compensation, made by law to be paid periodically for services, whether there be any services actually rendered or not. The word 'emolument' is more comprehensive than 'salary.' But the Constitution says 'salary or emolument.' There are those who receive salaries, and there are other officers who receive certain emoluments which are not salaries . . ."

Salary and emolument distinguish the two modes by which officers are compensated. In *Adami v. Lewis and Clark County*, 114 Mont. 557, 559, 138 Pac. (2d) 969, the salary of incumbent county officers was increased by the legislature. The court ruled the attempted increase for incumbent officers was unconstitutional as in excess of the legislative power in that it violated Article V, Section 31, of the Montana Constitution. A similar prohibition was held for county commissioners compensated on a per diem basis. 25 Opinions of the Attorney General, Opinion Number 55.

The prohibition of Article V, Section 31, is inexorable and affords no opportunity for evasion by legislative action. The legislature may

not defeat this prohibition by indirect action, i.e., altering the mode of compensating county commissioners from a per diem to a salaried basis. The increase is not applicable to incumbent county commissioners.

It is therefore my opinion that incumbent county commissioners in first, second, third and fourth class counties cannot be placed on a salaried basis as provided by Chapter 238, Laws of 1957. The compensation of these officers is determined by Chapter 82, Laws of 1955.

Very truly yours,
FORREST H. ANDERSON
Attorney General