

Dear Senator Simmons:

You have requested the opinion of this office whether a senator absent and in military service, and not attending the session, is entitled to his per diem as set forth in Section 74, Revised Codes of Montana, 1935. Said Section 74 reads as follows:

"Per diem and mileage of members. Members of the legislative assembly hereafter elected shall receive ten dollars per day, payable weekly, during the session of the legislative assembly, and seven cents per mile for each mile of travel to and from their residences and the place of holding the session, by the nearest traveled route."

You will note in this section it is not specified the pay shall be for days in attendance.

Section 61, Revised Codes of Montana, 1935, provides if a quorum is not present, or if a member or members are not found to be present upon any call, the members present may direct the Sergeant at Arms to compel the attendance of any of the absentees, and then specifically provides in part as follows:

"If the House refuses to excuse such absentee, he is not entitled to any per diem during such absence, and is liable for the expense incurred in procuring his attendance."

Further, Section 11 of Article V of the Montana Constitution provides in part:

"Each House shall have power to determine the rules of its proceedings . . . and shall have other powers necessary for the legislative assembly of a free state."

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

"Except as otherwise provided in this constitution, no law shall extend the term of any public officer or increase or diminish his salary or emoluments after his election or appointment."

In the case of *State v. Eaton*, Lieutenant Governor, 114 Mont. 199, 133 Pac. (2d) 588, our Supreme Court cited the last mentioned constitutional

Opinion No. 2.

**Senators—Military Service—Per Diem
—Mileage—Legislative Assembly—
Quorum—Attendance to Provide Quorum—
Representatives—Constitution—
Public Offices.**

Held: The legislative bodies have jurisdiction over their memberships and they have the right to excuse absentees. If the senate in its rules covers such contingencies and in its discretion and deliberations formally excuses an absent senator, such senator is entitled to his per diem.

January 5, 1945.

Mr. H. A. Simmons
President of the Senate
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Helena, Montana

provision in relation to its query whether Senator Mahoney might have a right to draw his wages during his absence in military service; but as the question was not before the court, it did not specifically rule upon the matter, but intimated at least that there might be some question involved.

Section 7 of Article V of the Montana Constitution in referring to the fact senators and representatives may not hold other public offices makes exceptions of notary publics and persons in the militia.

In view of the foregoing statutory and constitutional provisions, it seems the legislative bodies have jurisdiction over their memberships and they have the right to excuse absentees. There is a precedent for excusing absentees under Section 61, Revised Codes of Montana, 1935, to be found in the 1937 session, reference to which is made at page 4 of the Senate Journal of that year. Therefore, it is my opinion that, if the senate in its rules covers such contingencies and in its discretion and deliberations formally excuses an absent senator, such senator would be entitled to his per diem.

Sincerely yours,
R. V. BOTTOMLY,
Attorney General