

Opinion No. 138

County Commissioners—County Surveyor —Expenses, Actual Collection of—Actual Expenses, Collection of—Highways, Inspection of Bridges, Inspection of

Held: "Actual expenses" as used in Section 1632, Revised Codes of Montana, 1935, means that commissioners or county surveyors, when previously ordered or directed by the board of county commissioners, may properly charge for meals and lodging actually provided on highway and bridge contract inspection trips before contemplated work is commenced, during progress of the work, or after completion and before payment therefor, in addition to the per diem and mileage.

September 2, 1948

Mr. Bert W. Kronmiller
County Attorney
Big Horn County
Hardin, Montana

Dear Mr. Kronmiller:

You have requested my opinion on the interpretation of Section 1632, Revised Codes of Montana, 1935, as regards the expenses collectible by the county commissioners and the county surveyor thereunder.

Section 1632, Revised Codes of Montana, provides:

"The board of county commissioners may direct the county surveyor or some member or members of said board, to inspect the condition of any highway or highways or proposed highway or any work, contract or otherwise, under the direction, supervision or control of the county officials, being done or completed on any highway or bridge in the county during the progress of the work or before any work is commenced, or after completion and before payment therefor, and such person or persons making such inspection shall receive for making such inspection when so directed the sum of eight dollars (\$8.00) per day and actual expense, which shall

be audited and allowed in the same manner as other claims against the county; provided, however, that nothing in this act shall be construed to alter or repeal the provisions of sections 1622.1 and 1622.2. (Emphasis supplied).

Your specific question is, "Does the term 'actual expenses' mean that a commissioner or commissioners or county surveyor, when properly ordered or directed by the board of county commissioners, may properly charge for meals and lodging on such inspection trips in addition to per diem and mileage?"

The history of Section 6132, Revised Codes of Montana, 1935, shows that it was originally Section 2741, Political Code, 1895, and it provided:

"The member of said board may receive for the time actually and necessarily employed in such service the sum of five dollars per day and actual traveling expenses, which sum must be in full payment for mileage expenses and per diem for the services aforesaid, and is audited and allowed in the same manner as any other claim against the county:"

The term used in this section, and down to and including the amendment of 1915, Section 13, Chapter III, Chapter 141, Laws of 1915, was "actual traveling expenses. . . ." Section 12, Chapter III, Chapter 172, Laws of 1917, amended the prior law and changed the provision to read "actual expenses," leaving out "traveling" and also leaving out the sentence "which sum must be in full payment for mileage expenses and per diem for the services aforesaid," in which form it has been carried down to the present Section 1632, Revised Codes of Montana, 1935.

In dealing with a similar change in the laws of Pennsylvania, the Superior Court of that state said:

". . . By eliminating the word 'traveling' from the phrase 'traveling expenses' in the earlier acts, (See Com. v. Moore, 49 Pac. Superior Ct. 321) the commissioners are now entitled to be reimbursed for money actually spent on their lodging and meals as well as for transportation, while traveling on

official business from home or office to different parts of the county or state; . . ." Sesquehana Co. Auditors Report, 118 Pa. Superior Ct. 47, 51.)

The Idaho Court dealt with the same question in *Corker v. Pence*, 12 Idaho 152, 85 Pac. 388, 392, as follows:

" . . . In *Stookey v. Board*, 6 Idaho 542, 57 Pac. 312; *Reynolds v. Board*, 6 Idaho 787, 59 Pac. 730; *Clyne v. Bingham County*, 7 Idaho 75, 60 Pac. 76, this court held that an officer was not entitled to compensation for his board. In 1901, after the above cases had been decided by this court, the Legislature, by an act approved March 14, 1901, p. 227, Sect. 3), defines 'actual and necessary expenses,' and includes therein all traveling expenses incurred by any county officer when absent from his residence in the performance of duties of his office. This was clearly intended to allow to the officers their board when absent from their residence in the performance of the duties of their office. . . ."

Thus, the legislative intent was made clear in Idaho by a special act, not changing the statute providing for the expense, but defining the term "actual expense."

The original definition as set out in Laws of Idaho, 1901, page 227, section 3, in effect at the time of the decision in *Corker v. Pence*, supra, provides:

"The term 'actual and necessary expenses' shall be deemed to include all traveling expenses incurred by any county officer when absent from his residence, in performance of the duties of his office."

This has been amended and further clarified to read:

"The term 'actual and necessary expenses' shall be deemed to include all traveling expenses and hotel expenses necessarily incurred by any county commissioner when absent from his residence in the performance of the duties of his office." (Idaho Codes Ann. 30-2604, as amended by Sec. 1, Chap 91, Laws of Idaho, 1937).

In *Eagle Township vs. Phillippi*, 78 Ind. App. 249, 252, 135 N.E. 182, 183, the Indiana Court said:

"Actual expenses incurred while engaged in the discharge of his duties must include such expenses as are personal to himself as traveling expenses or in lieu thereof, telegram and telephone tolls."

There the Court was clearly not limiting the expense to the actual highway traveling done, but was including other reasonable expenses personal to the trustee of the township. This was in construing the statutory provision "for the actual expenses of the trustee incurred while engaged in the discharge of his official duties."

In South Carolina, the Public Service Commission's compensation is provided as follows when conducting an investigation:

" . . . and shall each receive the sum of ten dollars a day while actually employed and necessary expenses. . . ."

In interpreting this section, the Court said:

"Giving to the language used its natural and ordinary meaning, it provides only for the payment of per diem of the members of the commission and the necessary expenses of each."

Similarly, the Montana law provides for the payment of per diem of the member or members of the county commissioners or the county surveyor, **only when directed**, to make road or work inspections, **by the board**, and also provides for the payment of "actual expenses." This is not limited or modified. It does not indicate that it is to be any one kind of expense such as traveling, or mileage, but is an authorization for payment of all of the expenses necessary to the proper carrying out of the official county business of the board. If the person directed to do such inspection work has more than one day's work to do away from his residence, he will, of course, incur expenses for food and lodging. These expenses are incident to the official work being done and would not be incurred except in doing the official business and when such inspection has

previously been directed and ordered by the board while in regular session.

It should be kept in mind that Section 1632, Revised Codes of Montana, 1935, was re-enacted and amended by Chapter 176, Laws of 1929, after several decisions of the Supreme Court construing this and other statutes. The title of Chapter 176, Laws of 1929, is significant also, and is as follows:

"An Act to Amend Section 1632 of the Revised Codes of Montana, 1921, **Relating to Inspection of Highways and Construction Work by Board of County Commissioners and Compensation Therefor.**" (Emphasis supplied).

The Act then specifically provides that the Board of County Commissioners **may direct** the county surveyor or some **member or members** of the board, to inspect the condition of any highway or highways or proposed highway or any work, contract or otherwise, which is under the direction, supervision or contract of the county officials, being under construction or completed, or any highway or bridge in the county during the progress of the work or before any work is commenced, or after completion and before payment therefor; the Act then provides that such person or persons (meaning, of course, the commissioner or commissioners, or county surveyor, whom the board of county commissioners have directed by order of the board) making such inspection or inspections, shall receive therefor the sum of \$8.00 per day and actual expenses.

There are good sound reasons for the enactment of this kind of legislation. The purpose of authorizing inspection of such work by a member or members of the board of county commissioners is so the board may have direct knowledge of the work being done for the county and the members of the board may be in a position to intelligently pass on claims presented against the county for that character of work; in other words, the board may have first hand information that the work is being carried forward expeditiously and is being or has been completed in accordance with the plans.

There has been some question raised as to conflict between Section 1632, Revised Codes of Montana, 1935, and Section 4464, Revised Codes of Montana, 1935, owing to the decision of our Supreme Court in,

State v. Story, 53 Mont. 573, 583, 165Pac. 748. Fisher v. Stillwater County, 81 Mont. 31, 261 Pac. 607.

However, it should be noted that Section 1632, Revised Codes of Montana, 1935, was re-enacted after the foregoing decisions, and evidently the legislature restated the law in no uncertain terms by Chapter 176, Laws of 1929, now Section 1632, supra, so that any question of conflict would be set at rest.

Another reason why now there should be, and is, no conflict between the two sections is, that Section 4464, Revised Codes of Montana, 1935, is in Chapter 344 of the Revised Codes dealing with county commissioners-organization-meetings and compensation, this chapter deals with the compensation of the board at its regular and special sessions, and duties of the clerk. Section 1632, Revised Codes of Montana, 1935, however, is found in Chapter 142, of the Revised Codes of Montana, 1935, which is an entirely separate and distinct provision and subject, which deals entirely with the supervoin of public highways, and the duties and powers of the board of county commissioners in connection therewith.

There is a wealth of authority holding that the last legislative act upon a special subject or concerning a special provision of the law, and where the legislature has, as it did by the enactment of Chapter 176, Laws of 1929, fully and clearly expressed its intent on the subject, be given preference over an older statute on the same subject in the event of a conflict.

The definition of "expense" as given in Black's Law Dictionary page 724, is:

"EXPENSE. That which is expended, laid out or consumed; an outlay; charge; cost; price. Rowley v. Clarke, 162 Iowa 732, 144 N.W. 908, 911."

The definition of "actual" as given in Black's Law Dictionary, page 46, is:

"ACTUAL. Real; substantial; existing presently in act, having a valid objective existence as opposed to that which is merely theoretical or possible."

The limitation on the expense that it be "actual" means that it is to be for only such sums as the person has in fact, and from necessity, laid out or disbursed. If the person buys his dinner when he is out on an official county inspection which has been ordered, that is an "actual expense" as intended by Section 1632. If he goes without his dinner, he cannot include the price of a dinner in his expenses as he has not expended that amount of money. There was "actual" expenditure.

Therefore, it is my opinion "actual expenses" as used in Section 1632, Revised Codes of Montana, 1935, means that commissioners or county surveyors, when previously ordered or directed by the board of county commissioners, may properly charge for meals and lodging actually provided on highway and bridge contract inspection trips before contemplated work is commenced, during progress of the work, or after completion and before payment therefor, in addition to the per diem and mileage.

Sincerely yours,
R. V. BOTTOMLY,
Attorney General