

Opinion No. 47**Officers — Constitution — Legislative
Assembly — Delegation of Power—
Hail Insurance Board—Increased
Emoluments — Per Diem
Allowance**

HELD: 1. The per diem allowance of the appointive members of the Board of Hail Insurance is an emolument within the meaning of Section 31, Article V of the Montana Constitution.

2. The appointed members of the Board of Hail Insurance may not have their per diem allowance increased during their appointive term of office as such increase would constitute an increase in the emolument of the office and be in violation of Section 31, Article V of the Montana Constitution.

December 22, 1955.

Mr. G. L. Bryant
Executive Clerk
State Board of Examiners
State Capitol Building
Helena, Montana

Dear Mr. Bryant:

You have requested my opinion on the following question:

May appointive officers of the Board of Hail Insurance have their per diem allowance increased during their appointive term of office?

Section 82-1519, R.C.M., 1947, as amended by Chapter 53, Session Laws of 1951, provides in part as follows:

“ . . . and all appointed officers under this act shall be paid their actual traveling expenses and shall be allowed such per diem as the State Board of Hail Insurance may determine for each day of eight hours while actually engaged in service under this act, out of the Hail Insurance Administrative Fund.”

In your letter of request you stated that the Board of Hail Insurance determined, with the approval of the Board of Examiners, the per diem

allowance to be Ten Dollars (\$10.00). Also, that this rate has been in existence prior to and following the appointments of the present board members. That further, the Board of Hail Insurance has approved an increase of the per diem allowance to Fifteen Dollars (\$15.00) for future meetings.

By the terms of Section 82-1519, R.C.M., 1947, as amended by Chapter 53, Session Laws of 1951, it can be clearly ascertained that the Board of Hail Insurance has the delegated and discretionary power to set the per diem allowance of the appointed officers.

Thus, your question necessarily involves an interpretation of Section 31, Article V of the Montana Constitution, and a determination of whether the exercise of the discretionary powers granted by statute to the Board, as to per diem allowance, would be in violation of said constitutional provision.

Section 31, Article V of the Montana Constitution, declares:

“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 . . .” (Emphasis supplied.)

In *Reals v. Smith*, 8 Wyo. 159, 56 Pac. 690, 692, the Supreme Court of Wyoming, interpreting an identical constitutional provision as Montana's Article V, Section 31, defined the word “emolument” as:

“ . . . the profit arising from office or employment; that which is received as compensation for services, or which is annexed to the possession of office, as salary, fees, and perquisites; advantage; gain, public or private.”

Clearly, a per diem allowance under the definition given in the *Reals v. Smith* case, supra, is an emolument as distinguished from expenses; however, in determining whether such an increase in emolument is violative of Article V, Section 31 of the Montana Constitution, recourse must be had to that constitutional provision. Article V, Section 31, supra, specifically states that, “ . . .

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

In the instant case the per diem allowance or emolument of the appointed members of the Board of Hail Insurance was set prior to their appointment. The law (Section 82-1519, R.C.M., 1947, as amended by Chapter 53, Session Laws of 1951) governing the emoluments of the appointed members of the Board does not directly allow or does not directly provide for the increase of an emolument during the term for which the members were appointed.

If the Legislative Assembly had itself prescribed and attempted to increase the emoluments of the Board members, it cannot be doubted that this constitutional inhibition (Article V, Section 31) would have been applicable. However, here the Hail Insurance Board seeks to exercise a delegated power and increase the emoluments of the office; and, though its exercise in this particular way would be discretionary, I can discover no sound reason why an emolument, once prescribed, should not be controlled by the constitutional mandate.

It would certainly be an indefensible inconsistency to say that although the Legislative Assembly is inhibited in such cases, yet its mere creature and agent, the Board of Hail Insurance, is within its delegated sphere of action subject to no such restraint. (See *Purcell v. Parks*, 82 Ill. 346; *Morgan County v. Fidelity & Deposit Co.*, 77 Southern 233, 200 Ala. 690.)

In *State v. Ayer*, 23 Wash. (2d) 578, 161 Pac. (2d) 429, wherein a similar factual situation existed, and wherein a constitutional prohibition such as Montana's Article V, Section 31, was present, the Washington Court stated:

“Many cases have been before this court involving attempts to raise the salary of public officers during the term for which they were elected or appointed. While in our opinion none of the cases presents a factual situation such as is presented in the instant case, they all bear evidence of the

fact that this court has zealously guarded against any attempted violation . . . of our constitution by whatever method employed to accomplish that end. This court has recognized that, based upon expediency, evasive methods might be used to accomplish indirectly what could not be done directly.”

* * *

“So that it will be seen that it was a positive policy of the constitution, expressed in every possible way, that the salaries of officers should not be increased during their term of office. This wise provision was no doubt intended to prevent pernicious activity on the part of the office holders of the state being brought to bear upon the members of the legislature—a wise provision, which must not be construed out of existence or evaded by legislative enactment.”

Thus, again it may be stated that if the salary or emolument fixing body can do indirectly what it has attempted to do under Section 82-1519, R.C.M., 1947, as amended by Chapter 53, Session Laws of 1951, namely, increase the emoluments of the appointed members of the Board of Hail Insurance during the terms for which they were appointed, then, in my opinion, Article V, Section 31 of the Montana Constitution would become a nullity.

For authorities indicating the attitude of the Washington Court on such evasive and indirect methods to circumvent the clear mandates of the constitutional prohibition preventing the increase or diminution of an officer's salary or emolument during the term for which he was elected or appointed, see, *State ex rel. Cornell v. Smith*, 155 Wash. 422, 284 Pac. 796; *State ex rel. Jaspers v. West*, 13 Wash. (2d) 514, 125 Pac. (2d) 694; *State ex rel. Wyrick v. City of Ritzville*, 16 Wash. (2d) 36, 132 Pac. (2d) 737, 144 A.L.R. 681.

In *Sarter v. Siskiyou County*, 42 Cal. App. 530, 183 Pac. 852, 853, the court held that a law increasing the per diem allowance of an officer during his term of office was in violation of the California Constitution. Therein the court stated:

“ . . . No one would seriously contend that the payment by the day of a person for services rendered is any less a compensation for the services than a salary or a definite sum per month or year would be.”

It is therefore my opinion that the per diem allowance of the appointive members of the Board of Hail Insurance is an emolument within the meaning of Section 31, Article V of the Montana Constitution.

It is further my opinion that the appointed members of the Board of Hail Insurance may not have their per diem allowance increased during their appointive term of office as such increase would constitute an increase in the emolument of the office and be in violation of Section 31, Article V of the Montana Constitution.

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