

**Opinion No. 13**

**COUNTY COMMISSIONERS; Vacations, Commissioners paid per diem not to be paid for time spent on vacation—OFFICES AND OFFICERS; County, Vacations, officers paid per diem not entitled to paid vacations—VACATIONS; Officers, County Commissioners paid per diem not to receive paid vacations—Section 16-912, Revised Codes of Montana, 1947—Chapter 238, Laws of 1957.**

**Held: County Commissioners paid on a per diem basis cannot receive compensation for days spent on annual vacation leave.**

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May 23, 1961

Mr. Albert E. Leuthold  
State Examiner  
Capitol Building  
Helena, Montana

Dear Mr. Leuthold:

You have presented the following question for my official opinion:  
May county commissioners, who are paid on a per diem basis, receive compensation for days spent on annual vacation?

The method of compensating county commissioners has been set by statute, Section 16-912, RCM, 1947. The fixed annual salary provided by this statute is applicable only to those county commissioners who were elected to office subsequent to the enactment of Chapter 238, Laws of 1957, (Reports and Official Opinions of the Attorney General, Volume 27, Opinion No. 43).

Although the statutes do not provide for annual vacations for salaried elected county officers, this office has always held that such vacations are permissible. Opinion No. 398, Volume 15, Reports and Official Opinions of the Attorney General, held:

"County officers and deputies, whose office and salaries are determined and fixed by law, may take reasonable vacations with pay and the county commissioners have no authority to diminish their salaries . . ."

The rationale of this and subsequent opinions is that vacations for health or recreation improve the efficiency of county administration at no additional cost to the taxpayer. Officers entitled to a fixed annual compensation, or salary, receive payment for time in office rather than for service rendered. The Supreme Court of the United States considered this question in the case of Benedict v. U. S., 176 U. S. 357, 360, and its determination was cited in the case of U. S. v. Grant, 237 F. (2d) 511, 514, where the court said:

"The word 'salary' may be defined generally as a fixed annual or periodical payment for services, depending upon the time, and not upon the amount, of services rendered. . . It is compensation which cannot be diminished during continuance of incumbent in office, and of which he cannot be deprived except by death, resignation, or impeachment. . . Benedict v. U. S."

It is evident that county commissioners receiving fixed annual salaries may receive compensation for vacation leave, as such compensation does not create an additional expense to the county. Opinion No. 398, Volume 15, Report and Official Opinions of the Attorney General, at page 280:

"The allowance of vacations with pay ordinarily would not increase the expenditures of the county nor add to the burden of the taxpayer. The work of the office during such absence is usually handled by associates or made up on the return of the deputy or employee without the employment of other persons."

The question for consideration is whether the aforementioned rule is applicable to county commissioners receiving compensation on a per diem basis. The compensation statute, Section 16-912, RCM, 1947, provides:

"Each member of the board of county commissioners in all other counties is entitled to fifteen dollars per day **for each day's attendance on sessions of the board**, . . ." (Emphasis added.)

The statute does not provide for a fixed annual or periodical payment, but rather it provides for compensation for services actually rendered. Thus compensation may only be paid for those meetings which the commissioner actually attended. Absences from such meetings preclude the payment of compensation to commissioners who were not actually present at the meeting.

Therefore, it is my opinion that county commissioners who are paid on a per diem basis cannot receive compensation for days spent on vacation.

Very truly yours,  
FORREST H. ANDERSON  
Attorney General