

**OPINION
71-57**

April 8, 1971 (OPINION)

Mr. Frank A. Wenstrom

President

North Dakota Constitutional Convention

RE: Constitution - Convention Compensation of Delegates

This is in response to your letter in which you state that some of the delegates to the Constitutional Convention are also officials in one form or another of district, county, or other governmental bodies from which they are receiving compensation. You then ask:

"May these individuals receive the allowances provided for by law and at the same time continue to receive their regular salaries as officers or employees?"

You also state that some delegates to the Constitutional Convention are also legislators who, pursuant to laws adopted by the Legislature, are entitled to receive compensation for expenses at a given rate per month. You then ask:

"Are these legislators entitled to receive full compensation as a delegate to the Constitutional Convention and at the same time receive full compensation as a legislator or is it necessary to make an adjustment?"

In answering your questions, it is necessary to review Chapter 462 of the 1969 Session Laws as amended by House Bill 1484 of the Forty-second Legislative Assembly, and the appropriations and provisions contained in House Bill 1033 of the Forty-second Legislative Assembly.

Initially, we must note that Section 2 of Chapter 462 among other things sets forth the legal qualifications of a delegate. The pertinent language is as follows:

"* * *Candidates for election to the office of delegate to the convention shall possess the qualifications required by law for a member of the house of representatives of the legislative assembly, and shall be qualified electors of the district from which they are elected.* * *"

The qualifications of a house member are set forth in Section 34 which provides as follows:

"No person shall be a representative who is not a qualified elector in the district from which he may be chosen, and who shall not have attained the age of twenty-one years, and have been a resident of the state or territory for two years next preceding his election."

Section 10 of Chapter 462 as initially enacted and as amended by House Bill 1484 of the Forty-second Legislative Assembly provides among other things:

"* * *The convention shall elect its own officers, and shall be sole judges of the qualifications and election of its own membership.* * *"

Section 11 of Chapter 462 among other things provides that:

"* * *Delegates to the convention shall be paid at the rate of twenty-five dollars for each day of attendance at meetings of the convention, plus their necessary expense and mileage for not more than four trips to and from the convention at rates prescribed by law for state officials."

The rates prescribed by law can be found in Section 54-06-09 and Section 44-08-04 which were amended by Senate Bill 2304 of the Forty-second Legislative Assembly.

In addition to the aforementioned provision, we also find that Section 2 of House Bill 1033 of the Forty-second Legislative Assembly authorizes committee meetings, as approved by the convention president, at such times and places during the interim between the organizational and plenary meeting of the convention, as is deemed advisable. The section also provides that:

"* * *Committee members will receive per diem compensation and expenses for each additional day spent in interim committee meetings.* * *"

No specific reference is made such as provided for by law for state officials, but we assume for the moment that this is what is intended. Subsection 2 continues by providing that:

"* * *Convention delegates will receive mileage payments, at the rates provided by law for other state officials, for trips to and from the convention site and for travel to and from convention interim committee meetings."

Subsection 2 also provides that the president of the convention and other persons as the convention may authorize shall receive reimbursement, at the rates provided by law for state officials, for meals, lodging, and mileage expenses incurred while traveling on official business.

House Bill 1033 was an emergency measure and was approved March 30, 1971.

The aforementioned provisions set forth the compensation and reimbursement allowances for delegates to the Constitutional Convention. We find no language in either Chapter 462 of the 1969 Session Laws or in House Bills 1033 and 1484 which provides for other compensation. It is significantly noted that no provision is made for adjusting per diem allowances or reimbursement for expenses in the event a delegate is an officer or an employee of the state or its political subdivision. From this follows the conclusion that every

delegate as authorized in Chapter 462 of the 1969 Session Laws and House Bills 1033 and 1484 is entitled to receive compensation, expenses, and mileage allowances as set forth in the above-mentioned provisions of law.

In an earlier opinion we pointed out that certain office holders (legislators) are not disqualified from holding the office of delegate to the Constitutional Convention. (See opinion to Richard Bloedau dated August 31, 1970.)

In our opinion delegates to the Constitutional Convention are entitled to the compensation, reimbursement for expenses and mileage as provided for by law (Section 54-06-09 and 44-08-04 for expenses and mileage and after July 1, 1971, at the rates prescribed by Senate Bill 2304 which amended these sections.) It is the responsibility and duty of the Convention to determine if the delegates meet the qualifications, but it is not the duty of the Convention to inquire whether any official or employee of the state or its political subdivision while serving as a delegate is receiving any compensation from the state or its political subdivision. By this we do not mean to imply that these factors need not be taken into account by the state or its political subdivisions, but simply that the convention does not have this responsibility. The responsibility to make an adjustment if any lies basically with the state (its bureaus, agencies or political subdivision) of which the delegate is either an employee or officer.

The governing body of the state agency, department or bureau or of the political subdivision is basically responsible and accountable for the salaries or compensations paid to the employees and officers. Such governing body could take into account accumulated annual or earned leave and related items. This, to a great degree, involves administrative judgment in which we have no justification to impose our judgment over that of the responsible officers. The judgment of the officers responsible for determining the wage and salary of the employees or officers who are now delegates should be exercised by keeping in mind the basic concepts of payment for services rendered. It is also conceivable that the employees or officers who are now delegates may work out an arrangement with the state department, agency or bureau, political subdivision to make up or to compensate for any time lost. Again, fiscal responsibility would be the key factor.

As to legislators who are now delegates, we must take into account that the office of a state legislator is not a full-time position as compared to other state officials or positions. While it is recognized that it is not a full-time position, we do finally realize that the office of state legislator does not cease upon the adjournment of the Legislature. The Legislature is expected and does devote considerable time to affairs of the state for purposes of determining whether or not legislation is needed in certain areas. In comparing the duties of a legislator and that of a delegate, we find nothing incompatible between them.

The compensation and allowances allowed for individual legislators are set forth in Section 54-03-20 as amended by House Bill 1144 of the Forty-second Legislative Assembly. It is an emergency measure

and has been signed by the Governor and is now in full force and effect. Paragraph 3 of this section provides as follows:

"In addition, each such member shall receive during the term for which he was elected, for uncompensated expenses incurred in the execution of his public duties during the biennium, the sum of fifty dollars a month, which sum shall be payable every six months. Provided, however, should a member die or resign from office during his term, he shall be paid only the allowances provided for in this section for the period for which he was actually a member."

The same act also provides that attendance at organizational, special or regular session shall be conclusive presumption of the expenditure of such expense allowances. The act also provides that it is to be retroactive to January 1, 1971. This act clearly indicates that the allowance is uncompensated expenses. In this respect we would make no distinction between being a delegate and being employed in private employment. In either event, the legislator is entitled to the fifty dollars per month.

HELGI JOHANNESON

Attorney General