

COUNTIES: County Judges of third and fourth class counties
COUNTY JUDGES: are not entitled to the increased per diem compensation
COUNTY OFFICERS: provided by House Bill 255, 71st General Assembly,
MILEAGE: but are entitled to the increased mileage allowance
therein provided.

October 24, 1961



Honorable J. R. Fritz
Prosecuting Attorney
Pettis County
Sedalia, Missouri

Dear Mr. Fritz:

We are in receipt of your recent request for an official opinion of this office which reads as follows:

"At the request of the County Court, Pettis County, Missouri, I submit to you for your opinion the question as to whether or not House Bill No. 255 enacted by the recent legislative session and signed by Governor Dalton permits the County Judges now in office to be paid at the increased rate during their present term, and also if County Judges presently holding office may receive the .10¢ per mile mileage allowance for travel both to and from work and otherwise during their present term of office."

House Bill No. 255, 71st General Assembly reads as follows:

"Section 1. Sections 49.110 and 49.120, RSMo 1959, are repealed and two new sections enacted in lieu thereof to be known as sections 49.110 and 49.120, to read as follows:

49.110. In all counties of the third class the judges of the county court shall receive for their services fifteen dollars per day for each of the first ten days in any month that they are necessarily engaged in

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holding court and shall receive ten dollars per day for each additional day in any month that they are necessarily engaged in holding court, and shall receive ten cents per mile for each mile necessarily traveled in going to and returning from the place of holding county court and for all other necessary travel on official business in the personal automobile of the judge presenting the claim. The per diem compensation herein fixed shall be paid at the end of each month and the mileage compensation shall be paid at the end of each month on presentation of a bill, by the respective county judge, setting forth the number of miles necessarily traveled.

49.120. In all counties of the fourth class in this state, the judges of the county court shall receive for their services fifteen dollars per day for the first ten days they are necessarily engaged in holding court in each month and ten dollars per day for each day they are necessarily engaged in holding court thereafter in each month; and shall receive ten cents per mile for each mile necessarily traveled in going to and returning from the place of holding county court and for all other necessary travel on official business in the personal automobile of the judge presenting the claim. The per diem herein fixed shall be paid at the end of each month and the mileage shall be paid at the end of each month upon the presentation of a bill, by each county judge, setting forth the number of miles necessarily traveled.

Sections 49.110 and 49.120 RSMo 1959 which were repealed and replaced by House Bill 255 read as follows:

Section 49.110-

"In all counties of the third class the judges of the county court shall receive for their services fifteen dollars per day for each of the first ten days in any month that they are necessarily engaged in holding court and shall receive five dollars per day for each additional day in any month that they are necessarily engaged in holding court, and shall receive seven cents per mile for each mile necessarily traveled in going to and returning from the place of holding county court.

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The per diem compensation herein fixed shall be paid at the end of each month and the mileage compensation shall be paid at the end of each month on presentation of a bill, by the respective county judge, setting forth the number of miles necessarily traveled."

Section 49.120 -

"In all counties of the fourth class in this state, the judges of the county court shall receive for their services ten dollars per day for the first ten days they are necessarily engaged in holding court in each month and five dollars per day for each day they are necessarily engaged in holding court thereafter in each month; and shall receive seven cents per mile for each mile necessarily traveled in going to and returning from the place of holding county court but mileage shall be charged only once for each regular term and shall not be charged over eight times per year for special or adjourned terms. The per diem herein fixed shall be paid at the end of each month and the mileage shall be paid at the end of each month upon presentation of a bill, by each county judge, setting forth the number of miles necessarily traveled."

We first direct your attention to the question of whether county judges of third and fourth class counties can receive the increased per diem compensation provided in the above bill.

Section 13 Article VII of the Missouri Constitution of 1945 reads as follows:

"The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

It is clear that this constitutional provision prohibits county judges of third and fourth class counties from receiving the increased per diem compensation provided by House Bill 255 during their present term of office.

Does this constitutional provision also prohibit county judges of third and fourth class counties from receiving the increased mileage provided by House Bill 255? The answer to this question depends on whether the mileage allowance provided for is to be considered "compensation". Volume 67 CJS Officers, Section 91, page 330 reads in part as follows:

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"In a limited sense, mileage may become a part of the compensation of an officer; if the mileage allowance is limited to the amount actually expended in traveling, it cannot add anything to the income of the recipient of the salary; but, if the mileage is not so limited, as where a certain amount is allowed for each mile traveled and this amount exceeds the actual mileage charged, the balance above such charge becomes a part of the official income or compensation."

The cases of *Reed v. Gallet* (1931) 50 Idaho 638, 299 P. 337 and *Marioneaux v. Cutler* (1907) 32 Utah 475, 91 P. 355 also expressed this principle.

The question then becomes whether the legislature intended the ten cent per mile allowance to be an allowance limited to the amount actually expended by the county judges in traveling or an allowance exceeding in amount the actual expenditure. We must look to the wording of the bill to determine the legislative intent. The bill speaks of the mileage allowance as "mileage compensation". We believe that this description does not indicate an intention that the allowance is to be in excess of what is actually expended, but rather approximates and is equivalent to reimbursement.

This view is further indicated because mileage is allowed under House Bill 255 only when the county judge involved has traveled in his own personal automobile. The repealed sections (Sections 49.110 and 49.120, RSMo 1959) had no such restriction. Under them it was possible for a county judge to receive a mileage allowance if he rode in the automobile of someone else. This likewise indicates an intention on the part of the legislature to provide for reimbursement of the judges for the traveling expenses actually incurred by them.

While it is conceivable that the amount allowed to a particular judge may sometimes be greater than his actual expenses in running his automobile, yet this does not mean that the mileage allowance is compensation. In the case of *Macon County v. Williams* (1920) 284 Mo. 447, 224 S.W. 835 the Missouri Supreme Court held that a flat allowance of \$1200.00 per year, given to circuit judges to cover their expenses in holding court, was not "compensation" within the meaning of the constitutional prohibition against increases in compensation.

Under the foregoing authorities and because of the above reasoning, it is the opinion of this office that the legislature intended the mileage allowance for county judges included in

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House Bill 255 to be a reimbursement for expenses actually incurred by them. Such allowance is not, therefore, compensation within the meaning of Section 13, Article VII of the Missouri Constitution.

CONCLUSION

County Judges of third and fourth class counties are not entitled to the increased per diem compensation provided by House Bill 255, 71st General Assembly, but are entitled to the increased mileage allowance therein provided.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Ben Ely, Jr.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

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