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**ARIZONA ATTORNEY GENERAL**

November 21, 1951  
Op. No. 51-306

Mr. E. A. Thomas  
Chairman, Arizona Power Authority  
Heard Building  
Phoenix, Arizona

Dear Mr. Thomas:

This is in answer to your inquiry requesting the opinion of this office on the following question:

"May an individual who is employed as a University of Arizona professor receive in addition to his regular salary the per diem provided by law for performing additional duties in the capacity of an Arizona Power Authority Commissioner?"

We have carefully examined the statutes and cases, in addition to the opinions of this office, which might have some bearing on this question, and it is our opinion that if any prohibition exists against the per diem payment it must be found in Section 12-709, ACA 1939, which reads in part as follows:

" \* \* \* All state or county officers, employees, members of boards and commissions not mentioned in this chapter, and all deputies, stenographers, clerks and employees of any officer, board or commission, or of any institution, shall receive the salary provided by the laws creating or authorizing their respective positions, and shall not under any pretext, receive any salary or emolument in excess of the salary so provided by law."

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The prohibition contained in this statute, we believe, is a prohibition against the payment of salary claims when an official or employee draws or attempts to draw compensation for his regular employment in addition to that fixed by law for his duties, either by (a) an increase for those duties alone, or (b) by an increase for some addition to those duties. The adjudicated cases amply support this conclusion. Pima County vs. Anklem, 48 Ariz. 248, 61 P. 2d 172, is a case illustrating under (a) above the proper denial of a salary claim. In that case a county physician, who was hired at a fixed salary of \$225 per month, collected indirectly in addition thereto an additional fee of \$10 per operation for the services of anesthetists. When the payments were questioned, the Supreme Court of Arizona stated:

"Whatever surgical and medical attendance reasonably necessary for patients, Doctor Purcell bound himself to give for \$225 per month. He could not take or receive the anesthetist fees for to do so would increase his salary and violate section 2799, Revised Code of 1928." (Now Section 12-709, supra.)

An example under (b) above, is an opinion from this office dated November 2 of this year wherein the office of the State Auditor was advised that deputy sheriffs and highway patrolmen could not serve as police officers for any public agency during their "off hours" and receive extra compensation therefor. The basis of this recent opinion was that deputy sheriffs and highway patrolmen are employed on a twenty-four hour basis and that serving as police officers at any hour of the day or night is simply the job they are hired to do. Thus, Section 12-709, supra, prohibited such payments.

Under these decisions it is manifest that Section 12-709 does not prohibit the payment of per diem to the individual involved. His position as a Power Authority Commissioner is not related in any way to his regular employment as a University professor. The two positions are completely separate and distinct and call for the performance of independent and unrelated duties. Thus, the payment of per diem to the individual involved does not fall within the prohibition of the statute.

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However, under the cases of Coleman vs. Lee, 58 Ariz. 506, 121 P. 2d 433, and Perkins vs. Manning, 59 Ariz. 60, 122 P. 2d 857, another test apparently must be applied in determining the legality of salary claims when two public positions are held by the same person. This is the test of incompatibility which at common law was applied only when two public offices were involved, L.R.A. 1917 A, 216. (In Arizona the test can now only be applied when two public positions, or when one public office and one public position, are held by the same person. A 1949 amendment to Article 1, Chapter 12, Section 12-110, Cum. Pocket Supp., ACA 1939, prohibits one person from holding more than one public office.)

Coleman vs. Lee, supra, is a case somewhat analogous to the present situation and illustrates the improper denial of salary claims. In that case the secretary to the county board of social security and public welfare was also hired to investigate applicants for indigent sick relief by the county board of supervisors. The Supreme Court held that the defendant was entitled to compensation for both positions, basing its opinion in part upon the fact that the duties of the two positions were not incompatible.

The test of incompatibility as subsequently developed and laid down in the case of Perkins vs. Manning, supra, involves not only incompatibility of the prescribed duties but also physical incompatibility, or the impossibility of proper performance of the two positions. Applying this test to the individual about whom you inquire, it is readily apparent that the duties of a University professor are not incompatible with those of a Power Authority Commissioner nor does there exist any physical incompatibility, as in the case of Perkins vs. Manning, supra. Since the positions are not incompatible and it is obvious that the positions do not involve the prohibition contained in Section 12-709, supra, it is our opinion that there is no prohibition against the payment of the per diem prescribed by law to the individual involved.

Unfortunately in bygone years two opinions emanating from this office have expressed the view that Section 12-709 was a prohibition against anyone receiving "double compensation" from public funds. This conclusion, we believe, was erroneous and cannot be supported under the adjudicated cases; nor does

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this office now follow the views expressed in those earlier opinions. The cases make it manifestly clear that there is no prohibition against receiving compensation from two separate and distinct public positions provided that the two are not incompatible with each other, Coleman vs. Lee, supra; and cf. Pima County vs. Anklam, supra, or do not fall within the prohibition of Section 12-110, supra.

No trust that this sufficiently answers your question and will be of aid to you.

Yours very truly,

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