



# Attorney General

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Robert R. Corbin

April 6, 1987

Mr. Max Hawkins, Director  
Arizona Department of Administration  
State Capitol Building - Room 809  
1700 West Washington  
Phoenix, Arizona 85007

Re: I87-049 (R86-189)

Dear Mr. Hawkins:

Your predecessor asked whether university employees serving on the Governor's Regulatory Review Council ("Council") are eligible to receive compensation for this second state job duty, whether a member attending only a portion of a meeting is entitled to a full day's compensation and whether compensation is available for work performed during days no meeting is scheduled.

First, you asked whether university employees serving on the Council are eligible to receive compensation for performance of their council duties. A.R.S. § 41-1051 sets the compensation for members of the Council at a fixed per diem of \$100.00.

B. Members of the council are eligible to receive compensation in an amount of one hundred dollars a day and reimbursement of expenses pursuant to title 38, chapter 4, article 2.

A.R.S. § 41-1051(B). The university employees, as members of the Council, are entitled by A.R.S. § 41-1051(B) to compensation unless otherwise prohibited by law. Your question raises the issue whether payment of the per diem compensation for performance of council duties to a person employed at a state university is a violation of the prohibition set forth in A.R.S. § 38-601 against excess or additional salary for state employees. A.R.S. § 38-601 prohibits state employees, including

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university employees, from receiving extra or additional compensation in excess of the salary provided by law. A.R.S. § 38-601 provides as follows:

State or county officers, employees, members of boards and commissions, and deputies, stenographers, clerks and employees of any such officer, board or commission, or of any institution, shall receive the salary provided by law, and shall not, under any pretext, receive any salary or emolument in excess of the salary so provided.

A.R.S. § 38-601 prohibits an increased compensation over that fixed by law for performance of the regular duties of a single office. It does not prohibit dual compensation for two separate public positions if the two positions are not incompatible and the compensation for the second position is not payable for performance of the regular duties of the first office. E.g., Ariz. Atty. Gen. Op. 76-41. A.R.S. § 38-601 and its predecessor have consistently been interpreted in previous Attorney General opinions to permit the receipt of compensation for performance of the duties of two separate state public offices providing the two positions are not incompatible and are in fact distinct. Ariz. Atty. Gen. Op. 77-201; Ariz. Atty. Gen. Op. 76-41; Ariz. Atty. Gen. Op. 70-7-L; Ariz. Atty. Gen. Op. 69-24-L; Accord, Coleman v. Lee, 58 Ariz. 506, 121 P.2d 433 (1942) (interpreting the predecessor of A.R.S. § 38-601.)

This office has taken the position on several occasions that the quoted provisions do not necessarily prohibit dual compensation for two separate public positions provided the two positions are not incompatible with each other within the meaning of Coleman v. Lee, 58 Ariz. 506, 121 P. 2d 433, and provided the additional compensation is not payable for the performance of the regular duties of the first office within the meaning of Pima County v. Anklam, 48 Ariz. 248, 61 P. 2d 172. However, where a public officer or employee seeks to collect additional compensation from public funds for performance of the same work or duties, §38-601 prohibits such extra compensation.

Ariz. Atty. Gen. Op. 70-7-L.

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Here there is no suggestion that the two positions occupied by the university employees are not in fact distinct. That is, these persons would not in the ordinary course of their duties as employees of the university be expected also to perform the duties of a member of the Council. The two positions are distinct and are not overlapping. Moreover, the two positions are not incompatible if the duties of both can be fully performed. This office previously set forth guidelines for determining whether two public offices are incompatible.

1. Incompatibility of officers or positions:

A. The employment contract or the applicable statutes with regard to the first position must not contain provisions which prevent employment after normal working hours.

B. The performance of the duties of the second position must not in any way interfere with the performance of the regular duties of the first position.

C. It must not be impossible to perform the duties of both positions. This refers not only to a physical impossibility, but also to an inconsistency in the functions of the two positions such as when one is subordinate to the other or when a contrariety and antagonism would result in an attempt by one person to discharge faithfully and impartially the duties of both. The duties performed in the second position must not be performed during the normal working day of the first position unless the member is on vacation or leave time.

D. Two positions are incompatible when the holder cannot in every instance discharge the duties of both.

Ariz. Atty. Gen. Op. 70-7-L at 4-5. Even if the duties of the second job are performed during the normal working day of the first job, the two positions are not incompatible providing that

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the employee is on approved leave from the first position. Ariz. Atty. Gen. Op. 77-201.<sup>1/</sup> Leave requirements of university employees may depend on university personnel rules and individual contract provisions.

We lack sufficient information to determine whether the positions of university employee and council member are in every respect compatible. It appears to us, however, that the positions are not inherently inconsistent or antagonistic. Therefore, we conclude that, assuming that the duties of both positions can be fully performed, the three university employees are eligible for statutory compensation for performance of their duties as members of the Council.

Next you ask whether an eligible member who attends only part of a meeting may receive full compensation. The compensation for members of the Council is a fixed per diem of \$100.00 plus statutory expenses. In general a fixed per diem compensation is not divided and allocated to fractions of a day. Where a statute fixes an officer's compensation at a certain sum per day, the officer performing substantial service on a particular day has a right to the per diem of that day. E.g., State v. Hurn, 102 Wash. 328, 172 P. 1147 (Wash. 1918). We found no Arizona case law specifically addressing the question what constitutes a day for purposes of per diem compensation. However, in general, courts of other jurisdictions have interpreted per diem compensation to be not subject to further division. United States v. Erwin, 147 U.S. 685, 686, 12 S.Ct. 443, 37 L.Ed. 331 (1893).

The issue raised by a member attending only a fraction of a meeting is whether the service performed by the member is a substantial service. If the member does not perform substantial service, he is not entitled to any compensation at all. On the

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<sup>1/</sup>If the employee takes annual or compensatory leave to perform the duties of the second position, he receives compensation for both positions. On the other hand, if the employee takes civic duty leave to perform the duties of the second position, the compensation paid for the performance of the second job is paid to his employing agency. In either case, the compensation for the second position is paid. Ariz. Atty. Gen. Op. 77-201.

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other hand, if substantial service is performed, the public officer is entitled to the full per diem compensation. The determination whether a substantial service has been rendered is a determination for the council. E.g., Stetler v. McFarlane, 230 N.Y. 400, 130 N.E. 591 (N.Y. 1921). Although the determination is for the council, we suggest that it would not be unreasonable to require attendance at substantially all of the meeting to constitute substantial service.

You also asked whether work performed on a non-meeting day entitles a member to payment of \$100.00. Nothing in A.R.S. § 41-1051 confines payment of compensation to days on which a meeting is held. Therefore, compensation may be paid for work performed on non-meeting days. The California Court of Appeals considered the question of how many hours of work would entitle a person to a day's per diem in connection with the California statutes that allowed appraisers in the 1930s to receive "not to exceed five dollars per day." The court concluded:

It is apparent to us that the Legislature, when it enacted the statute under construction, did not mean that an appraiser would have to work from midnight to midnight in order to perform a day's service and earn "not to exceed five dollars." It is equally apparent to us that the Legislature did not mean that five minutes' work or an hour of one's time was equivalent to a day. Laws must be construed with reference to their purpose and the object intended to be accomplished, and if susceptible of two interpretations, that one will be adopted which renders it fair and harmonious for the purpose intended. [Citations omitted] . . . We do not believe it was the purpose of the Legislature to permit appraisers to collect a plurality of appraisal fees for the same day's work, and still have abundant time within which to conduct their own businesses. If the statute were given that construction, it would be a prolific source of abuse.

In re Roher's Estate, 14 Cal.App.2d 669, 58 P.2d 948, 949 (1936). We find this observation instructive. Seeking compensation for work performed on multiple non-meeting days

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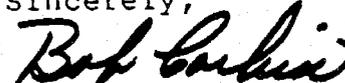
could easily be subject to abuse. In this connection, other courts have held that public officers entitled to a salary per day, though not required to perform services for any particular number of hours, must perform services for a "substantial portion of the day," Harris County v. Hammond, 203 S.W. 451, 453 (Tex.Civ.App. 1918) or "substantial service on a particular day," State v. Hurn, 102 Wash. 328, 172 P. 1147, 1148 (1918). The Washington Court of Appeals recently stated in a similar situation:

Statutes relating to the compensation of public officers must be strictly construed in favor of the government, and such officers are entitled only to what is clearly given by law. [Citations omitted]

Murphy v. State, Department of Licensing, 28 Wash.App. 620, 625 P.2d 732, 735 (1981). We thus conclude that for a day on which work is performed when there is no meeting, a member must perform services for a substantial portion of that day in order to receive the statutory compensation.

Although we conclude that a Council member who performs substantial service on a given day is entitled to the statutory per diem compensation for that day, we note that the member must in fact perform substantial service to be entitled to any compensation at all. On non-meeting days, substantial service means service for a substantial portion of the day. On meeting days, a reasonable definition of substantial service is at least attendance at substantially all of the meeting.

Sincerely,

  
BOB CORBIN  
Attorney General

BC:ABS:DR:pa