

Opinion No. 64-152

December 17, 1964

BY: OPINION OF EARL E. HARTLEY, Attorney General James V. Noble, Assistant Attorney General

TO: Mr. Lowell C. Green, Court Administrator of the State of New Mexico, Supreme Court Building, Santa Fe, New Mexico

QUESTION

QUESTIONS

1. If a district court employee elects to be reimbursed for personal expenses incurred in official travel on a per diem basis, is the 1/4 day allowance, as prescribed by the Department of Finance and Administration applicable?
2. If a district court employee elects to be reimbursed for actual expenses incurred in official travel, rather than on a per diem basis, may such employee be required to submit signed receipts in support of a claim for reimbursement?
3. If a district judge elects to be reimbursed on an actual expense basis for personal expenses incurred in official travel, may he be required to itemize such expenses?
4. May an individual be employed both as a full time district court reporter and as a deputy court clerk over the same period of time and receive salary as both?
5. If the answer to question 4 above is in the negative, may such person be required to reimburse the court to the extent of the salary received as deputy court clerk?
6. May an individual be employed both as a full time juvenile probation officer and as a part time deputy court clerk over the same period of time?
7. If the answer to question 6 above is yes, or if the individual performs no duties as deputy court clerk, may such individual be required to reimburse the court fund to the extent of the salary received as deputy court clerk?
8. If the answers to questions 5 and 7 above are in the affirmative, over how long a period of time may such restitution be required?

CONCLUSIONS

1. Yes.
2. No.

3. Yes.
4. No.
5. Yes.
6. No.
7. Yes.
8. See analysis.

OPINION

ANALYSIS

1. By virtue of the provisions of Section 17, Chapter 2, New Mexico Special Session Laws of 1964 (2nd special session), the authority of the state board of finance to fix per diem and mileage for public officers and employees in lieu of actual expenses was re-enacted by Section 17, Chapter 2, supra, (The Appropriations Act), Opinions No. 63-96, dated August 9, 1963 and 63-111, dated August 26, 1963, all as yet unpublished, are pertinent and fully answers your questions 1 through 3. Opinion No. 64-59 held that the district judge and other court personnel must obtain approval from the Department of Finance and Administration in order to be reimbursed for actual travel and subsistence expense, although such approval was ministerial. The analysis of this proposition cited Section 11-1-9, N.M.S.A., 1953 Compilation to the effect that the examination by the department was of the sworn voucher with any necessary receipts attached.

Opinion 63-111, supra, specifically held that county sheriffs, district attorneys and district judges were governed by the provisions of the law concerning per diem and approval of actual expense accounts.

The authority of the Board of Finance to prescribe rules and regulations concerning the 1/4 day allowance, when per diem is applicable, is found in Section 11-1-1, N.M.S.A., 1953 Compilation (P.S.) which gives the board general supervision over fiscal affairs of the state and the authority to make rules and regulations to carry out the requirements of this act. The 1/4 day per diem provisions is such a rule and regulation.

2. Opinion No. 63-96, supra, held that district judges and district court judges, reporters and interpreters were not restricted to per diem and mileage as set forth in the Appropriations Act but could recover actual expenses incurred **upon submission of itemized expense accounts.**

3. Thus district court employees electing to be reimbursed upon a per diem basis are governed to that extent by the regulations of the Department of Finance and Administration. Court employees and the district judge may be required to submit an

itemization of personal expenses incurred but may not be required to submit paid receipts.

4. Your next question is whether a court reporter may be paid from the court fund as a full time court reporter and also paid from the court fund as a deputy clerk of the court? Two budgetary line items within the court fund are involved -- the item for reporters and that for the clerk of the district court and employees thereof.

Section 16-3-46, N.M.S.A., 1953 Compilation (P.S.), provides in part as follows:

"Each full-time official court reporter of the district courts shall receive a compensation to be paid out of the court fund in an amount not less than six thousand dollars per year, nor more than eight thousand seven hundred dollars per year, **exclusive of transcript fees**, for court reporting, secretarial or other duties performed for the district courts . . ."

It is a basic rule of statutory construction that all parts of a statute are, where possible, construed as a whole so as to give full effect and meaning to each part of the statute.

Clerks of the district courts, their assistants and deputies are appointed by and their duties fixed by the district judge. Sections 16-3-34 and 16-3-35, N.M.S.A., 1953 Compilation. The district judge shall fix their salaries within limitations prescribed by the legislature. Section 16-3-38, N.M.S.A., 1953 Compilation (P.S.) and Section 16-3-34, N.M.S.A., 1953 Compilation, specifically provide that these salaries so fixed shall be paid from the court fund.

Therefore, the salary of the court reporter and that of the same person as deputy court clerk are both paid from the court fund, although from different line items. The salary of the court reporter would be set for full time services, including all duties performed for the district court aside from preparation of transcripts. Preparation of transcripts presumably would have to be done at such time as not to interfere with other duties.

The reporter is paid a salary for full time application to court reporting and such other duties as may be assigned by the judge. Since the clerk is an employee of and under supervision of the judge, he could assign to the reporter duties in that office when not engaged in reporting or performing secretarial duties. Such would be a part of his obligation as a full time court reporter and the reporter would not be entitled to receive any other compensation for doing this.

5. You also ask if restitution can be required of the reporter under the circumstances above set forth. Section 40A-23-1, N.M.S.A., 1953 Compilation, makes it a petty misdemeanor to accept illegal compensation and Section 40A-23-7, N.M.S.A., 1953 Compilation, provides for a civil action for recovery of amounts so received when convicted of receiving illegal compensation as a deputy clerk, then recovery of anything of value received by such reporter from the employer could be recovered.

6. Next you ask whether a person may be employed and paid as a juvenile probation officer and deputy court clerk and paid as both although performing no services as such deputy court clerk. Sections 40A-23-2, N.M.S.A., 1953 Compilation, makes it a misdemeanor to pay or to receive public money for services not rendered and Section 40A-23-3 makes it a fourth degree penalty to make or permit to be made a false public voucher for the expenditure of public money.

7. Upon conviction of either of such offenses, Section 40A-23-7, supra, would again come into play and recovery thereunder could be had.

8. Your last question concerns the length of time for which restitution may be required if, as is the case, this opinion holds that restitution may be required? The statute of limitations is contained in Section 23-1-8, N.M.S.A., 1953 Compilation and provides that an action based upon a judgment or decree of court or against any county or state officer for or on account of any liability incurred in the doing of an act in an official capacity must be brought within three years. A judgment of conviction is the condition precedent to the maintenance of such action for restitution and it must be commenced within three years after such judgment. Recovery would be limited to such period unless grounds for tolling the statute appear. In this connection, it is noted that there is a question as to whether the statute of limitations applies to actions brought or maintained by the state. However, there is no need, at this time, to cover this matter.

There is, however, no doubt but that recovery may be had for a period of three years prior to the judgment of conviction if action is promptly filed.