

Opinion No. 73-27

March 6, 1973

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Mr Sam E. Romero Accountant Financial Control Division Department of Finance & Administration Legislative-Executive Building Santa Fe, New Mexico 87501

QUESTIONS

FACTS

The sole district judge in a multi-county judicial district resides in the county seat of one of the counties of the district. Approximately 60 to 80 percent of his time as a district judge must be spent at the county seat of the other county.

QUESTIONS

Is this judge to be paid per diem and mileage for his trips from his home city to the other county seat where he must preside over court 60 to 80 percent of the time?

CONCLUSION

Yes.

OPINION

{*48} ANALYSIS

Section 16-3-10, N.M.S.A., 1953 Comp. provides as follows:

"Personnel -- Travel expenses. -- District judges and district court employees shall be allowed per diem and shall be reimbursed for their necessary travel **expenses incurred while absent from their principal offices upon official business**, at the same rates and under the same conditions as prescribed by law or regulation of the state board of finance for other employees of the state. These expenses shall be paid from the funds of the district court of the judicial district for which the business is transacted."
(Emphasis supplied.)

Section 5-10-3, N.M.S.A., 1953 Comp. (1971 P.S.), of the Per Diem and Mileage Act, provides in part:

"B. Every salaried public officer or employee who is traveling within the state **but away from his home and away from his designated post of duty on official business**

shall receive not to exceed twenty dollars [\$ 20.00] a day for each day spent in the discharge of his official duties.

* * *

"D. Every public officer or employee shall receive ten cents (\$.10) a mile for each mile traveled in a privately owned vehicle, or fifteen cents (\$.15) a mile for each mile traveled in a privately owned airplane if the travel is **necessary to the discharge of his official duties**, and if the private conveyance is not a common carrier. Provided, however, that only one [1] person shall receive mileage for each mile traveled in a single privately owned vehicle or airplane, except in the case of common carriers, in which case the person shall receive the cost of the ticket, in lieu of the mileage allowance. No privately-owned conveyance except a common carrier, shall be used on state business when a government-owned conveyance is available for use . . ."
(Emphasis supplied.)

Thus, it can be seen that the tests for eligibility for per diem and for mileage are different. Under the statute, per diem may be collected by an employee only where he is "away from his home and away from his designated post of duty on official business." With respect to mileage it is only required that the travel be "necessary to the discharge of his official duties," before he may be reimbursed.

The per diem question will be considered first since it is, obviously, the more difficult. Applying the "away from home and away from designated post of duty" test to the facts you have related, it is stated in the facts that the judge in traveling to the county seat where the most business is found is away from his home. The real question is: What is his "designated post of duty," and who designates it?

We reach the conclusion that district judges may declare as their principal post of duty any courthouse where their duties require that they preside over a substantial number of court matters. In truth, a district judge in a multi-county district has a station of duty at each courthouse where he must conduct court. This fact was recognized by the Legislature in Section 16-3-10 when it used the term "principal offices." The designation by DFA or anyone else that the city where the most business is located is the duty station no matter where the district judge resides would have at least two undesirable consequences. It would not only discourage participation in elections by candidates from other than the duty station city, but might also conflict with {**49*} the negative implication from Article VI, Section 14 of the New Mexico Constitution that a judge may reside anywhere in his judicial district.

We conclude that the judge must designate one city as his duty station. As previously stated he must choose a courthouse where he performs a substantial portion of his duties as his duty station. A majority of his duties is not required at a courthouse before he may choose it to be his duty station. We feel that the intent of the Legislature in such a situation is to allow the judge a decision as to the principal or "designated" duty station.

As to the mileage payments, if the judge is traveling to and from the city which is away from his home, and the travel is necessary to the discharge of his official duties, then he should be paid the mileage rate provided in the Per Diem and Mileage Act.

By: Prentis Reid Griffith, Jr.

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