

## **Opinion No. 73-63**

September 4, 1973

**BY:** OPINION OF DAVID L. NORVELL, Attorney General

**TO:** Henry G. Rodriguez, Member State Board of Education State Department of Education Santa Fe, New Mexico 87501

### **QUESTIONS**

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1. Is it legally permissible for the State Board of Education, as a body, to refuse to approve either in-state or out-of-state travel requests of individual Board members, which travel involves reimbursement for per diem and mileage and/or fares, when such travel is at least arguably related to public education?
2. Currently, the policy of the State Board of Education is that a member who wishes to travel outside his district but within the State and be reimbursed must have prior approval of the President of the State Board. Is such a policy a usurpation of the statutory rights of a member of the State Board of Education?

#### **CONCLUSIONS**

1. Yes.
2. No, but see analysis.

### **OPINION**

#### **{\*124} ANALYSIS**

1. The members of the State Board of Education are elected officials of the State. N.M. Const. Art. XII, § 6(B); Section 77-2A-1 et seq., N.M.S.A., 1953 Comp. As such, the only compensation they may receive is reimbursement for expenses. Section 77-2-3, N.M.S.A., 1953 Comp., states:

"A. Each member of the state board shall be entitled to receive per diem and mileage as provided in the Per Diem and Mileage Act, and shall receive no other compensation, perquisite or allowance.

B. Per diem and mileage shall be paid to members of the state board by the department of education out of funds appropriated and budgeted for that purpose."

Since the statute covering compensation allowed to State Board of Education members refers to the Per Diem and Mileage Act, Sections 5-10-1 to 5-10-4, N.M.S.A., 1953 Comp., we must turn to that legislation for the answers to your questions.

The purpose of the Per Diem and Mileage Act was "to establish standard rates for reimbursement for travel for public officers and employees coming under the Per Diem and Mileage Act." Section 5-10-2, **supra**. Elected State Board of Education members are certainly covered by the act which applies to "public officers." Section 5-10-2.1(D), (E), **supra**.

The provisions crucial to the answer of your question are Sections 5-10-3(A), **supra**, 5-10-3(C), **supra**, and 5-10-3(D), **supra**, which read:

"A. Every non-salaried public officer shall receive twenty dollars as per diem expense for each day spent **in the discharge of official duties within the state**, notwithstanding any specific law to the contrary, and shall receive no other compensation, prerequisite or allowance.

C. Every public officer or employee shall receive not to exceed twenty-five dollars a day for each day of travel outside the state **on official business**.

D. Every public officer or employee shall receive ten cents a mile for each mile traveled in a privately owned vehicle, or fifteen cents 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 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 added.)

The emphasized language contains the standard against which we must measure any travel in order to determine whether per diem expense is allowed. For in-state {<sup>\*125</sup>} travel, per diem expense may be paid for time spent "in the discharge of official duties," whereas out-of-state per diem expenses are allowable for travel "on official business." For mileage reimbursement, the standard is also "discharge of official duties." This office perceives no difference in these standards. The question which must be answered in every case is whether the travel was "on official business."

Who is to make the determination that the travel in question is "on official business"? In answering this question, we assume that the Board has not made any permissible delegation of authority for the decision on this matter. Such permissible delegation is discussed in conjunction with Question 2. Since no delegation has been made, such determination must be made by the Board, acting officially. No individual member can bind the Board, absent a permissible delegation of authority to that member. Therefore, the decision as to whether a particular trip by a Board member is "on official business"

must now be made by a majority vote of a quorum of the Board, meeting in official session. If it decides that certain travel, even if arguably related to public education, is not necessary for the adequate discharge of the Board's function, then such a determination must be controlling as to each individual member of the Board. Any travel by a Board member not approved by the Board cannot be on official business and therefore cannot entitle the member to per diem allowance.

Thus, the answer to your first question must be in the affirmative, since the State Board of Education, and not its individual members, must be the judge of what travel is on official Board business and thus reimbursable.

Our analysis has not involved the prior approval of the Department of Finance and Administration that is required for out-of-state travel by Section 5-10-3.1(A), N.M.S.A., 1953 Comp. It is assumed that this approval is sought and obtained after the State Board of Education has given its prior approval for an out-of-state travel request of a member.

2. In answering your second question, we must reiterate the above discussion and also make the assumption that no permissible delegation of authority has been made for the approval of travel. If such is the case, the prior approval must be made by the Board as a whole. Since the prior approval is meaningless, and the member must have the travel reviewed and approved by the Board as a whole, regardless of the President's decision, we see no usurpation of the member's "statutory rights" to reimbursement for travel expenses.

But if our assumption is incorrect concerning a permissible delegation, our analysis would be quite different, even though our conclusion would be the same. Section 77-2-2(L), N.M.S.A., 1953 Comp., gives the State Board of Education the authority to "adopt . . . bylaws for its own administration." In our opinion, approval of travel requests by Board members is an internal administrative matter which can be handled pursuant to "bylaws" adopted by the Board, and not thereafter require Board action. Presently, it appears that Board "bylaws" require Board approval, but in our opinion, it would be proper for the Board to delegate this administrative function so long as the delegation was by official Board action and "bylaws" were concurrently adopted providing the standard for determining what travel is "on official business."

We think that a delegation of this authority to the President of the Board would be proper, as would a delegation to the Superintendent of Public Instruction, who, under the provisions of Section 77-2-5(B), N.M.S.A., 1953 Comp., is the "chief administrative officer of the state board." Section 77-2-5(A), *supra*, also provides that the "state board may delegate administrative functions to the department of education." Approval of travel requests is surely an administrative function.

We do not mean to limit permissible delegations to the President of the Board or to the Superintendent. In our opinion, other members of the Board or members of the staff of

the State Department could also legally perform this administrative duty, provided that an adequate standard is provided to guide their decisions.