

Opinion No. 75-33

May 22, 1975

BY: Jill Z. Cooper, Assistant Attorney General

TO: Harry Wugalter, Chief Public School Finance Division Department of Finance and Administration State Capitol Building, Rm. 433 Santa Fe, New Mexico 87503

QUESTIONS

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1. How should a board of education manage the pay for an employee of the school district who receives compensation for jury duty during the time said employee is obligated to provide a service to the school district?
2. Is it legal for the local board of education to deduct the amount received for jury duty from the employee's daily rate of compensation by the school district?

CONCLUSIONS

1. See analysis.
2. Yes.

OPINION

{*97} ANALYSIS

1. Apparently there are no statutes or board of education regulations specifically covering the questions presented. Generally, however, Section 40A-23-2, NMSA, 1953 Comp. makes it illegal to pay public moneys in compensation for "services which have not in fact been rendered." This statute further provides, however, that the prohibition does not prevent payment for "vacation periods or absences from employment because of sickness, or for **other lawfully authorized purposes.**" (emphasis added). Thus, if school employees are to be paid at all by a board of education, we must initially determine that jury duty is such a lawfully authorized purpose.

First, there is no doubt that jury duty is lawfully authorized. The statutes provide:

Any person who is a qualified elector is eligible and may be summoned for service as a juror by the district courts, unless such person is incapable because of physical or mental illness or infirmity to render jury service. Section 19-1-1, NMSA, 1953 Comp.

Second, there is precedent for considering jury duty such a lawfully authorized purpose so as not to withhold compensation from public employees serving on jury {*98} duty. The State Personnel Board, for example, evidently recognizes court and jury leave as a proper exception to Section 40A-23-2, **supra**, in that court or jury leave with pay is granted state employees covered by the Personnel Act. Specifically the regulations of the State Personnel Board provide:

402.8 Court and Jury Leave a. When, in obedience to a subpoena or following the direction of his appointing authority, an incumbent appears as a juror or is a witness for the federal government, the State of New Mexico or a political subdivision thereof, in his official capacity, he shall be entitled to a court or jury leave with pay for the period required. Fees received as a witness or compensation for jury, not including reimbursement for transportation, shall be paid to the state. Attendance in court or at an official hearing in connection with an incumbent's official duties, and the time required in going and returning, shall not be considered as absence from duty.

Thus, we conclude initially that jury duty constitutes a lawfully authorized purpose within the meaning of Section 40A-23-2, **supra**.

Having determined that jury duty is an absence from work that need not result in a loss of compensation, the question becomes one of determining a means of accounting for the additional compensation jurors receive for serving as jurors. Section 19-1-15, NMSA, 1953 Comp. provides for a mileage allowance of \$.10 a mile and compensation for time and travel, attendance and jury service in the sum of \$ 1.60 an hour.

Jury duty is, however, a civic duty and there is ordinarily no right to compensation for such service in the absence of statute. 47 Am. Jur. 2d, **Jury**, § 94. The reason for the enactment of statutes awarding compensation to jurors is not to provide extra income but to attempt to prevent undue hardship because of possible loss of income during the period of jury service. ABA Standards for Criminal Justice Relating to Trial by Jury, 3.2, Approved Draft, 1968. Moreover, it is necessary to recognize the existence of an underlying state policy against double compensation for public employees. See, for example, Article IV, Section 27, New Mexico Constitution; Section 2-1-4, NMSA, 1953 Comp.

Therefore, considering the fact that school employees need not lose regular compensation while serving on jury duty together with the rationale behind the compensation of jurors and the policy against double compensation, we conclude in response to your first question that the management of compensation must be such that employees receive no more than their ordinary rate of compensation during the period of jury duty. In any event, however, school employees serving on juries would be entitled to accept the allowance for mileage.

2. In response to your second question, we find no illegality in a plan which required a deduction from the employee's ordinary compensation in the amount of the compensation received for jury duty.

Article IV, Section 27 of the New Mexico Constitution, for example, prohibits the diminishing of compensation for public officers. Even if that prohibition were applicable to school employees, such a plan would not violate the prohibition, {*99} essentially on the ground that there is no diminishment. The persons affected would continue to receive in salary an amount equal to their regular compensation. Compare **State v. Velarde**, 39 N.M. 179, 182, 43 P.2d 377 (1935).

We would strongly suggest, however, that a plan such as the one established by the State Personnel Board, and cited above, be adopted. That is, local school employees would receive their ordinary compensation for the period of jury service plus the mileage allowance specified in Section 19-1-15, **supra**, while the statutory compensation for jury duty would be paid to the local school board. We would further urge that in the interests of consistency and fairness among the various school districts the state board of education adopt a regulation to that effect. By: Jill Z. Cooper Assistant Attorney General