

Opinion No. 77-20

June 28, 1977

OPINION OF: Toney Anaya, Attorney General

BY: P. J. Turner, Assistant Attorney General

TO: James A. Bird, State Highway Engineer, State Highway Department Santa Fe, New Mexico 87501

PER DIEM AND MILEAGE ACT-STATE HIGHWAY COMMISSIONERS-STATE OFFICERS-PUBLIC EMPLOYEES-COMPENSATION-Nonsalaried public officers may receive the statutory per diem allowance for each day on which public business involving travel away from the place of residence and personal business premises is performed without regard to the number of hours actually expended in the performance of public duties; state agencies may reduce rates for per diem and mileage for that agency with prior approval of DFA director.

QUESTIONS

1. May State Highway Commissioners, as unsalaried state officers, draw the statutory per diem allowance while engaged in official state business at their place of residence or at their personal business premises?
2. May State Highway Commissioners, as unsalaried state officers, draw the statutory per diem allowance while engaged in official state business for only a portion of the day?
3. May a state agency reduce the statutory per diem and mileage allowance for its officers and employees to an amount less than that specified in the Per Diem and Mileage Act?

CONCLUSIONS

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

ANALYSIS

1. Section 55-2-1 N.M.S.A. 1953 Comp. provides that:

The members of the state highway commission shall receive per diem and mileage as provided in the Per Diem and Mileage Act and shall receive no other compensation, prerequisite or allowance.

OPINION

Accordingly, we must consider the provisions of the Per Diem and Mileage Act, Sections 5-10-1 to 5-10-4 N.M.S.A. 1953 Comp., in order to respond to the questions presented.

Section 5-10-3 states in part:

A. Every nonsalaried public officer shall receive twenty-four dollars (\$24.00) 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.

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-four dollars (\$24.00) a day for each day spent in the discharge of his official duties.

C. Every public officer or employee shall receive not to exceed thirty-six dollars (\$36.00) a day for each day of travel outside the state on official business.

While Section 5-10-3(A) does not specify that travel away from place of residence or business while engaged in the discharge of public business is a prerequisite to entitlement to the statutory per diem allowance, as do Sections 5-10-3(B) and 5-10-3(C), the purpose of the Per Diem and Mileage Act as specified in Section 5-10-2 would clearly seem to so limit such entitlement. Section 5-10-2 provides:

{*133} The purpose of the Per Diem and Mileage Act is to establish standard rates for reimbursement for travel for public officers and employees coming under the Per Diem and Mileage Act. The act is designed to be referred to where applicable in statutes setting compensation of public officers and employees. (Emphasis added.)

Clearly, money received pursuant to the Per Diem and Mileage Act is intended as reimbursement for the various travel expenses which are frequently occasioned in the discharge of public business and may not be regarded as merely another form of compensation for services rendered. Indeed, the statutory per diem allowance is in lieu of any other form of compensation for the services of non-salaried public officials.

With respect to State Highway Commissioners in particular, this conclusion is supported by the legislative history of Section 55-22-1 which formerly authorized State Highway Commissioners to receive a fixed sum as "compensation for their services," but which now specifies, by reference to the Per Diem and Mileage Act, that these Commissioners

may only receive reimbursement for expenses incurred. See Opinion of the Attorney General No. 65-29, dated February 17, 1965. Any monies received by public officials for work performed at home or at their personal business premises would obviously not constitute reimbursement for travel expenses, but would necessarily be in the nature of compensation for services rendered. Such payment would violate the letter and the spirit of Section 55-2-1, and the Per Diem and Mileage Act. Accordingly, unsalaried public officers may not claim per diem allowances while working at home or in their personal business offices.

2. Section 5-10-3(A) authorizes non-salaried officers to receive twenty-four dollars per diem allowance for each day spent in the discharge of official duties within the State of New Mexico and Section 5-10-3(C) authorizes a per diem allowance of thirty-six dollars for each day of travel outside the State of New Mexico in the discharge of public business. As we have indicated, these payments are intended to defray costs incurred in travel associated with the performance of public business rather than serve as salary for services performed. Since the amount of expenses incurred for such items as meals, lodging and the like do not necessarily correlate with the amount of time actually consumed in the performance of the public business, it seems reasonable, in the absence of any contrary statutory or administrative directives, to conclude that Section 5-10-3(A) and Section 5-10-3(C) authorize the statutory reimbursement for each day involving travel away from place of residence and personal business premises while conducting public business without regard to the amount of time actually expended in traveling and conducting public business.

It should be noted, however, that Section 5-10-3.1(C) authorizes the director of DFA to reduce the rates set for the per diem expense otherwise specified in the Per Diem and Mileage Act. Such reduction may be in the form of a lesser maximum payment per day or it may be in the form of incremental reimbursement based on the number of hours devoted to public business and travel associated with the performance of such business. The director has established such a schedule for salaried employees based upon {^{*}134} the number of hours actually expended while away from place of residence and post of duty in the performance of public business on any given day. The director has not, however, established such a schedule for non-salaried public officers.

Accordingly, in the absence of statutory or administrative direction to the contrary, it would appear that non-salaried public officers may receive the statutory per diem allowance for each day on which public business involving the requisite travel is performed without regard to the number of hours actually expended while away from place of residence and personal business premises in the performance of public duties.

3. In reference to your third question, we would first set out certain statutory definitions. Section 5-10-2.1(D) defines "state agency" to mean:

each department, institution, board, bureau, commission or committee of the government of the state, including but not limited to state institutions, district courts, magistrate courts and district attorneys.

Section 5-10-2.1(A) defines "director" as used in the "Per Diem and Mileage Act" as "the director of the department of finance and administration."

Section 5-10-3.1(C) sets forth the procedures by which the rates provided for in the "Per Diem and Mileage Act" may be reduced. This section states in part:

. . . The director may at the request of any state agency or local government and for good cause shown reduce the rates of per diem and mileage for that state agency or local government. The director may, in extraordinary circumstances, and with the prior approval of the state board of finance in public meeting allow actual expenses rather than the per diem rates set in the Per Diem and Mileage Act. (Emphasis added.)

Accordingly, in response to your third question we would conclude that a state agency may reduce rates of per diem and mileage for that state agency, subject to the prior approval of the director of the department of finance and administration. Section 5-10-3.1(C).

We would note for your information that Directive DFA 63-9, Paragraph 5 states:

Reduced rates for per diem and mileage must be approved by the Department of Finance and Administration. Requests for reduced rates should be sent to the Chief of the State Budget Division. Blanket authorization may be requested to travel to locations in bordering states within a 150 mile radius at in-state per diem rates.

ATTORNEY GENERAL

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