

Attorney General Opinion
No. 88-65

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OPINION
OF
HAL STRATTON
Attorney General

BY: E. Maine Shafer, Jr.
Assistant Attorney General

TO: Honorable Harold W. Foreman
New Mexico State Senate
2245 Thomas Drive
Las Cruces, New Mexico 88001

QUESTION:

1. Is a county commissioner's "designated post of duty", as referred to in Section 10-8-4 NMSA 1978, his home or the county seat?

2. Does the authority to designate a commissioner's "post of duty" lie with the board of county commissioners or with the Department of Finance and Administration?

3. If a county commissioner's "designated post of duty" is his home or town of residence, is he entitled under the Per Diem and Mileage Act to compensation:

- a. For mileage for travel away from his home, even if that travel involves business at the county, and;
- b. For per diem away from his home but within the county, even if that travel involves business at the county?

4. Does the Department of Finance and Administration Rule 87-2

exceed its rulemaking authority?

CONCLUSIONS:

1 and 2. The "designated post of duty" of a county commissioner is established by reference to Section 4-38-8 NMSA 1978 at the county seat.

3.a. and 3.b. No, but see analysis.

4. No.

ANALYSIS:

A Dona Ana County Commissioner's home and place of business is in Garfield, which is over fifty highway miles from Las Cruces. We understand that the Dona Ana County Commission holds both regular and special meetings at the county offices in Las Cruces, and that the County provides the Commissioner with an office in a county building in Las Cruces. The issue is whether the Commissioner may receive reimbursement for mileage and per diem when he attends commission meetings and attends to other commission business in Las Cruces.

The Per Diem and Mileage Act, Sections 10-8-1 to 10-8-8 NMSA 1978, "establishes rates for reimbursement for travel for public officers." Section 10-8-2. The Act applies to county commissioners' travel. Subsections 10-8-3(C) and 10-8-3(E). Section 10-8-4 establishes the standard for reimbursement of travel expenses:

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 ... up to sixty-five dollars (\$65.00) per diem expenses for each day spent in

the discharge of his official duties.

....

D. Every public officer or employee shall receive twenty-five cents (\$.25) a mile for each mile travelled in a privately owned vehicle ... if the travel is necessary to the discharge of his official duties and if the private conveyance is not a common carrier.

A county commissioner is a salaried public officer. Sections 4-44-1 to 4-44-12, 4-44-14 NMSA 1978.

Although the Act does not define "home," "designated post of duty," or "travel," Section 3 Department of Finance and Administration ("DFA") Rule No. 87-2 [effective October 1, 1987], which governs the payment of per diem and mileage and the reimbursement of all expenses for salaried and non-salaried public officers (except state legislators), defines them: "home" means "the place of residence or within fifteen miles thereof"; "designated post of duty" means "an officer's or employee's assignment as determined by the agency"; and, for per diem purposes but not for mileage purposes, "travel" means "away from home and at least 15 miles away from the designated post of duty." Although Section 3 does not define travel "necessary to the discharge of ... official duties" Section 7 of Rule 87-2 sets forth the measuring points for official travel: "F. Mileage shall be reimbursed for travel on official business from the designated post of duty or from the point of origin if closer to the destination than the designated post of duty."

We turn now to the questions raised in this request.

1 and 2. DFA Rule 87-2 provides that the "agency" will determine a public officer's "designated post of duty." Ordinarily, the board of county commissioners would determine a county officers designated post of duty. However, we believe that Section 4-38-8 NMSA 1978 establishes a county commissioner's post. That section provides that a board of county commissioners shall hold its quarterly meetings at the county seat, and may hold other meetings in the municipality with the largest population in the county or, if the meeting concerns only matters of local interest, in the affected community. Therefore, Dona Ana county commissioners' designated post of duty is the county seat at Las Cruces.

3. Notwithstanding our conclusion that the county seat is the designated post of duty for county commissioners, the question remains whether a commissioner may be entitled to per diem or mileage reimbursement from his home or "point of origin" to the county seat. To be eligible for reimbursement for per diem expenses, a public officer must travel on official business away from both his home and his designated post of duty. Subsection 10-8-4(B). Although a Dona Ana County Commissioner who lives in Garfield would travel from his place of residence to attend commission business and meetings at the county seat, he would not travel away from his designated post of duty. For this reason, we conclude that a county commissioner may not receive per diem for travel to commission meetings or other official business at the county seat.

The question of whether a county commissioner may receive mileage for travel on official business to the county seat is more complicated. Subsection 10-8-4(D) states only that every public officer shall receive mileage for each mile travelled in a privately owned vehicle "if

the travel is necessary to the discharge of his official duties." Section 3 of Rule 87-2 defines "travel" only for per diem purposes. However, Section 7F of DFA Rule 78-2 states that the beginning points for calculating mileage shall be "from the designated post of duty or from the point of origin if closer to the destination than the designated post of duty." The point of origin may be the initial measuring point only if it is closer to the destination than the designated post of duty. When a county commissioner travels from home to a meeting at the county seat, his home is the "point of origin" and the county seat is both the "designated post of duty" and the "destination" point. He therefore is entitled to no mileage under this rule. We conclude, therefore, that although the language is not as clear as it could be, DFA Rule 87-2 prohibits a commissioner from receiving mileage reimbursement for travel from home to county commission meetings or other official business that takes place at the county seat.

4. Subsection 9-6-5(E) NMSA 1978 authorizes the Secretary of Finance and Administration to "make and adopt such rules and regulations as may be necessary to carry out the duties of the department and its divisions." Subsection 10-8-5(A) provides: "Public funds shall be paid out under the Per Diem and Mileage Act only upon vouchers duty presented...." The DFA must approve all vouchers. Section 6-5-8 NMSA 1978.

Administrative bodies have no common law or "inherent" powers, and may act only on those matters that are within the scope of authority delegated to them. In re Proposed Revocation of Food and Drink, 102 N.M. 63, 66, 691 P.2d 64, 67 (Ct. App. 1984); Public Serv. Co. of N.M. v. New Mexico Env'tl Improvement Bd., 89 N.M. 223, 226, 549 P.2d 638, 641 (Ct. App. 1976). In approving per diem and mileage vouchers,

DFA necessarily must construe the Act's provisions. Subsection 9-6-5(E) authorizes DFA to enact rules to carry out that task.

We conclude that Rule 87-2 does not exceed DFA's delegated authority. Subsection 7F of Rule 87-2 is not broader than the guideline set by the Legislature. See Family Dental Center v. New Mexico Bd. of Dentistry, 97 N.M. 464, 467, 641 P.2d 495, 498, (1982). Section 7F attempts to provide guidance about what travel is "necessary" to the discharge of official duties. Administrative interpretations of a statute by an appropriate agency are set aside only if the regulation is found to be contrary to law, arbitrary, capricious or an abuse of discretion, or against the clear weight of substantial evidence of record. Subsection 61-1-31(C) NMSA 1978. Pharmaceutical Mfrs. Ass'n v. New Mexico Bd. of Pharmacy, 86 N.M. 571, 576, 525 P.2d 931, 936 (Ct. App. 1974). We cannot say that Rule 87-2 violates this standard.

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