

N.D.A.G. Letter to Kloubec (April 6, 1992)

April 6, 1992

Representative Richard Kloubec
House Majority Leader
3233 16th Avenue S
Fargo, ND 58103

Dear Representative Kloubec:

Thank you for your March 9, 1992, letter concerning the payment of mileage and travel expense of state officers and employees. Specifically, you ask (1) whether a state agency may provide an unvouchered expense allowance to an officer or employee in lieu of reimbursing that individual in the amounts provided by statute, (2) whether a state agency may provide an unvouchered expense allowance to an officer or employee in lieu of complying with a statute that requires the filing of specific claims to justify travel expenses, (3) whether a state agency may enter an agreement with an officer or employee to reimburse that individual for mileage in excess of the statutory mileage allowance, (4) whether a state agency may provide by contract to reimburse an officer or employee in amounts that are different from those provided by statute, and (5) whether a state agency may provide an expense allowance to an officer or employee for commuting between that individual's normal living residence and normal working residence without specific statutory authorization.

North Dakota has for many years borne the expense of the transportation of state officers and employees while necessarily engaged in the performance of official duties. State v. Guy, 107 N.W.2d 211, 216 (N.D. 1961). To achieve this purpose, our legislature enacted N.D.C.C. § 54-06-09, which provides, in relevant part:

State officials, whether elective or appointive, and their deputies, assistants, and clerks, or other state employees, entitled by law to be reimbursed for mileage or travel expense, must be allowed and paid for mileage and travel expense the following amounts:

1. The sum of twenty cents per mile [1.61 kilometers] for each mile [1.61kilometers] actually and necessarily traveled in the performance of official duty when such travel is by motor vehicle or twenty-seven cents per mile [1.61 kilometers] if the travel is by truck, the use of which is required by the employing subdivision, agency, bureau, board, or commission.

....

Before any allowance for any such mileage or travel expenses may be made, the official, deputy, assistant, clerk, or other employee shall file with the employee's department, institution, board, commission, or agency an itemized statement showing the mileage traveled, the hour or departure and return, the days when and how traveled, the purpose thereof, and such other information and documentation as may be prescribed by rule of the employee's department, institution, board, commission, or agency. The statement must be submitted to the employee's department, institution, board, commission, or agency for approval and must be paid only when approved by the employee's department, institution, board, commission, or agency.

N.D.C.C. § 44-08-05.1 provides for the system of vouchering and approval of travel expenses. It requires public officers or employees entitled to approve those expenses to ascertain before making that approval (1) that the expenditure for travel was lawful and for an official purpose, (2) that the travel actually occurred, and (3) the sums being claimed are actually due the individual seeking reimbursement.

N.D.C.C. § 44-08-03 prohibits an officer or employee from making a claim for or receiving travel expenses "while engaged upon public business, in an amount in excess of that allowed by law for such travel." Any officer or employee who receives reimbursement in excess of the statutory mileage allowance is subject to a civil suit for the recovery of the excess amount. N.D.C.C. § 44-08-05.

In answer to your first and second concerns, it is my opinion that a state agency must comply with N.D.C.C. § 54-06-09 and N.D.C.C. ch. 44-08 in order to reimburse state officers and employees for mileage necessarily traveled in the performance of official duty. To conclude otherwise would frustrate the legislative purpose of N.D.C.C. §§ 44-08-5.1 and 54-06-09 of ensuring that mileage and travel reimbursement be paid only for lawful and official purposes and to guard against fraud and abuse in the payment of such expenses.

In regard to your third and fourth questions, it is my opinion that a state agency may not, either by contract or agreement, reimburse an officer or employee, entitled to be reimbursed for mileage necessary for the performance of official duties, in an amount that is different than that provided by statute.

In regard to your fifth question, it is my opinion that a state agency may not provide a mileage allowance to an officer or employee for commuting between that individual's residence to his work place unless such an allowance has been specifically authorized by the legislature. As explained by the Arizona Supreme Court in Thompson v. Frohmiller, 107 P.2d 375, 377 (Ariz. 1940), "unless the legislature has expressly and explicitly included in the expenses to be allowed such officers the cost of travel from their homes to the places where their regular duties are to be performed, such expenses are not a legitimate public charge." See also Kemp v. Boyd, 275 S.E.2d 297, 299 (W. Va. 1981) ("No public officer, agent or employee is entitled to publicly provided carriage or to reimbursement for

expenses incurred in traveling from his residence to his workplace and returning unless such a subsidy has been specifically authorized by the legislature.").

However, providing for the expense of travel of public officers and employees while engaged in official business or reimbursement to them for the expenses of such travel does not constitute salary. State v. Guy, 107 N.W.2d at 216. On the other hand, providing an increase in the amount of salary to compensate an official or employee for the costs of commuting from his residence to his work place does not constitute a reimbursed mileage expense. Geyso v. City of Cudahy, 149 N.W.2d 611, 614 (Wis. 1967) ("The words salary and expense are separate and distinct terms which connote entirely different concepts.").

As indicated in the December 18, 1991, agreement between Governor George A. Sinner and Mr. Mitchell D. Bohn, Mr. Bohn's "starting salary will be \$100,000 per year [and] a car allowance of \$500 per month." I understand that the \$500 per month car allowance is being treated as part of Mr. Bohn's salary in accordance with instructions from the Office of Management and Budget. As part of salary, it does not constitute reimbursement for mileage expense and, therefore, N.D.C.C. § 54-06-09 and N.D.C.C. ch. 44-08 are not violated.

Sincerely,

Nicholas J. Spaeth

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