STATE OF NEBRASKA
# Office of the Attorney General
2115 STATE CAPITOL BUILDING
LINCOLN, NEBRASKA 68509-8920
(402) 471-2682
TDD (402) 471-2682
CAPITOL FAX (402) 471-3297
1235 K ST. FAX (402) 471-4725

DON STENBERG
ATTORNEY GENERAL

L. STEVEN GRASZ
SAM GRIMMINGER
DEPUTY ATTORNEYS GENERAL

#94005

NO.
STATE OF NEBRASKA
OFFICIAL
JAN 21 1994
DEPT. OF JUSTICE

DATE: January 21, 1994

SUBJECT: Reimbursement of Expenses of Public Service Commissioners for Travel from their Residences to Lincoln, Nebraska

REQUESTED BY: Senator Scott Moore
Nebraska State Legislature

WRITTEN BY: Don Stenberg, Attorney General
L. Jay Bartel, Assistant Attorney General

You have requested our opinion on several questions relating to the propriety of providing reimbursement to members of the Nebraska Public Service Commission [the "Commission"] for expenses incurred by Commissioners in traveling from their residences to work at the Commission's office in Lincoln, Nebraska. As you note in your request letter, this office previously issued an opinion concluding that expenses incurred by Commissioners in traveling from their residences to Lincoln, Nebraska, were not reimbursable. 1977-78 Rep. Att'y Gen. 443 (Opinion No. 282, dated September 15, 1978). You have asked us to reconsider the conclusion reached in our prior opinion, and indicate that, if necessary, you may introduce legislation allowing reimbursement of such expenses.

Initially, you request a "clarification" of the basis for our prior conclusion that expenses incurred by Commissioners in traveling from their residences to work in Lincoln, Nebraska, were not reimbursable. As stated in our earlier opinion, these expenses

David K. Arterburn
L. Jay Bartel
J. Kirk Brown
David T. Bydalek
Laurie Smith Camp
Delores N. Coe-Barbee
Dale A. Comer
James A. Elworth
Lynne R. Fritz
Royce N. Harper
Mary L. Hewitt
Lauren Lee Hill
Amy Hollenbeck
William L. Howland
Marilyn B. Hutchinson
Kimberly A. Klein
Donald A. Kohtz
Joseph P. Loudon
Charles E. Lowe
Lisa D. Martin-Price
Lynn A. Melson
Harold I. Mosher
Fredrick F. Neid
Marie C. Pawol
Kenneth W. Payne
Paul N. Potadle
Jan E. Rempe
James H. Spears
Mark D. Starr
John R. Thompson
Barry Waid
Terri M. Weeks
Alfonza Whitaker
Melanie J. Whittamore-Mantzios
Linda L. Willard
Printed with soy ink on recycled paper

> "simply and straightforwardly [involve] travel to and from work. Generally, it may be stated that no employee of the State of Nebraska is entitled to be reimbursed for the expense of traveling from his residence to the headquarter city of the agency to which he is attached. This, of course, is also true of officers. Generally, employees or officers may choose to live wherever they wish within the State of Nebraska. Having made that choice, the expense of commuting to work will be a personal expense and not a public expense. . . . Public Service Commissioners are fully entitled to reside in Lincoln, Nebraska or in any other area of the state. The fact that they reside in a city different than that from which their duties are to be performed raise[s] no right on their behalf to receive reimbursement for travel to and from those locations.

1977-78 Rep. Att'y Gen. at 445.

"The right of an officer to compensation for expenses incurred by him in the performance of an official duty must be found in a provision of the constitution or a statute conferring it either directly or by necessary implication,. . . ." 67 C.J.S. Officers § 225 (1978). A public officer is not entitled to reimbursement for expenses incurred in traveling from his or her residence to his or her "workplace and returning unless such a subsidy has been specifically authorized by the legislature." ***Kemp v. Boyd,*** 166 W. Va. 471, 483, 275 S.E.2d 297, 306 (1981). ***Accord State ex rel. Carman v. Sims,*** 145 W. Va. 245, 115 S.E.2d 140 (1960); ***Thompson v. Frohmiller,*** 56 Ariz. 313, 107 P.2d 375 (1940).

Neb. Rev. Stat. § 75-104 (1990) provides that Commissioners "shall be entitled to receive from the state their actual necessary traveling expenses, which shall include the cost of transportation while traveling on the business of the commission,. . . ." (emphasis added). As stated in our prior opinion, travel by a Commissioner from his or her residence to Lincoln "does not involve business of the commission but [a] private choice[ ] made by commissioners." 1977-78 Rep. Att'y Gen. at 445. ***See Kemp v. Boyd,*** 166 W. Va. at 484, 275 S.E.2d at 306 (holding mileage allowance provisions authorizing county officials to receive expense reimbursement when "required to drive their personally owned vehicles in the actual performance and discharge of their official duties" was intended to authorize reimbursement only where official was required to drive his or her own vehicle to some location other than his or her ordinary place of official employment). "Any job will require some sort of transportation expense from the residence of the individual to the location where the job is to be performed. Generally, that may be characterized as a private expense and not one that is job related." 1977-78 Rep. Att'y Gen. at 445.

Thus, reimbursement for expenses incurred by a public official in traveling from his or her residence to his or her place of work and returning may not be made absent specific constitutional or statutory authorization for the payment of such expenses from public funds. Section 75-104 does not specifically provide for the payment of expenses incurred by Commissioners for travel to and from their residences to their place of work in Lincoln, Nebraska. The cost of travel to and from work is a personal expense, and does not constitute "transportation while traveling on the business of the commission" within the intent and meaning of § 75-104. [1]

Your second question is whether the conclusion reached in our prior opinion should be altered because of a recently adopted amendment to Neb. Rev. Stat. § 32-303 (Cum. Supp. 1992). In 1992, § 32-303 was amended to include a provision requiring that "[a]ll candidates [for the Public Service Commission] shall be residents of the district from which they seek election." 1992 Neb. Laws LB 424, § 4.

In our view, the 1992 amendment to § 32-303, requiring that candidates for election to the Commission be residents of the

---

[1] In ***State ex rel. Douglas v. Beermann***, 216 Neb. 849, 347 N.W.2d 297 (1984), the Nebraska Supreme Court "declared Neb. Rev. Stat. §§ 50-201 and 50-202 (Cum. Supp. 1982) constitutional under article III, § 7, of the Nebraska Constitution, and held that legislators may receive reimbursement for expenses incurred in connection with the performance of their duties in addition to their salary and actual expenses in traveling by the most usual route once to and returning from each regular or special session." ***Jaksha v. Thomas***, 243 Neb. 794, 798, 502 N.W.2d 826, 830 (1993). The Court has interpreted the "expenses" of legislators subject to reimbursement under article III, § 7, to "include transportation, meals, and lodging while traveling." ***State ex rel. Douglas v. Beermann***, 216 Neb. at 856, 347 N.W.2d at 302. In ***Jaksha v. Thomas***, the Court stated that the decision in ***Beermann*** demonstrated it is "constitutionally permissible for legislators to receive reimbursement for all expenses incurred in connection with the performance of their duties, <u>including mileage for round trips made from the legislator's residence to the state capitol."</u> 243 Neb. at 800, 502 N.W.2d at 830 (emphasis added). Thus, members of the Legislature are entitled to receive reimbursement for expenses incurred in traveling from their residences to the state capitol based on the provisions of article III, § 7, of the Nebraska Constitution, and §§ 50-201 and 50-202, as interpreted by the Nebraska Supreme Court. No similar constitutional or statutory authorization exists to allow reimbursement of expenses of Commissioners incurred in traveling from their residences to and from their workplace in Lincoln, Nebraska.

district they seek to represent, has no impact on the conclusion reached in our previous opinion. Section 32-303 continues to provide, as it did at the time of the issuance of our earlier opinion, that "[a]ll members [of the Commission] shall be residents of the district from which they are elected." As we noted in this opinion, the term "residence", as used in § 32-303, should be construed as being "synonymous with domicile." 1977-78 Rep. Att'y Gen. at 443-44.

> Domicile is generally defined as being a legal relationship the individual has with a particular locality either because his home is there or it is because it is assigned to him by law. Every person has a domicile, although persons may have multiple residences or no residence. . . . [A]lthough a commissioner is required to maintain a residence in the district from which he is elected this requirement does not entail actual physical presence in that district. It is sufficient if the commissioner's domicile remains in the district from which he is elected and the commissioner does not intend to alter or change his legal domicile even though he may physically reside in some other area.

*Id.* at 444.

Thus, the amendment to § 32-303 requiring that candidates for election to the Commission "be residents of the district from which they seek election" does not alter the conclusion reached in our prior opinion that expenses incurred by members of the Commission for travel between their residences and their workplace in Lincoln, Nebraska, are not subject to reimbursement. First, as noted previously, there is no constitutional or statutory provision authorizing reimbursement for personal expenses of this nature. Second, the requirement that candidates for Commissioner be residents of the district from which they seek election, as well as the provision requiring members of the Commission to be residents of the district from which they are elected, requires only that candidates or elected members have or maintain their domicile in the district. While candidates or members must maintain their domicile or residence in the district from which they seek to be elected or are elected to represent, these requirements do not preclude Commissioners from physically residing at any location in the state. The 1992 amendment to § 32-303 provides no basis for us to alter our previous conclusion.

Your next question is whether Neb. Rev. Stat. § 75-104 (1990), which provides Commissioners are "entitled to receive from the state their actual necessary traveling expenses, which shall include the cost of transportation while traveling on the business of the commission,. . .", could be interpreted to authorize

reimbursement for expenses incurred by Commissioners in traveling from their residences to Lincoln, Nebraska. As we explained in response to your first question, § 75-104 provides only for reimbursement of travel expenses incurred by Commissioners while "on the business of the commission. . . ." Travel by Commissioners from their residences to work is not travel "on the business of the commission". Rather, transportation costs incurred by a Commissioner in going from his or her residence to his or her workplace is, under the general rule, a personal expense, and not an expense incurred in connection with a Commissioner's official duties. Accordingly, expenses incurred by a Commissioner in traveling to and from work are not public expenses subject to reimbursement within the intent and meaning of § 75-104.

Finally, if § 75-104 does not currently authorize Commissioners to claim and receive reimbursement for expenses incurred in traveling to and returning from their place of work in Lincoln, Nebraska, you ask if the statute may be amended to specifically permit such reimbursement. As stated previously, expenses incurred by public officials in traveling from their residence to their workplace and returning are not subject to reimbursement from public funds absent a constitutional or statutory provision clearly authorizing payment of such expenses. While reimbursement for expenses of this nature incurred by Commissioners is, in our opinion, presently not authorized, we do not believe that the Legislature is necessarily precluded from adopting statutory language clearly permitting the reimbursement of such expenses.

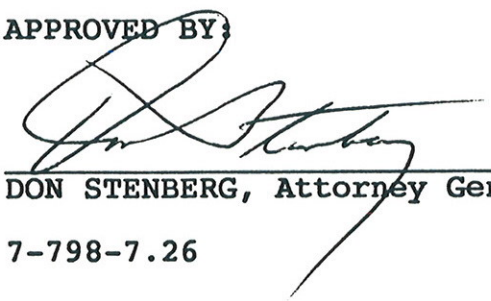
Very truly yours,

DON STENBERG
Attorney General

L. Jay Bartel
Assistant Attorney General

cc: Patrick O'Donnell
Clerk of the Legislature

APPROVED BY:



DON STENBERG, Attorney General

7-798-7.26