

**OPINION
75-22**

October 13, 1975 (OPINION)

Mr. Thomas B. Jelliff
States Attorney
P.O. Box 607
Grand Forks, ND 58201

Dear Mr. Jelliff:

This is in response to your letter of 12 August 1975 with regard to the expense account authorization for the members of the Board of County Commissioners. You call our attention to the provision of subsection 5 of Section 11-10-10 of the North Dakota Century Code that:

* * * In addition, there shall be an allowance for meals and lodging expenses at the same rate and under the same conditions as provided for state officials and employees. * * *

You indicate that the members of your Board of County Commissioners have by resolution elected to receive a monthly salary and are elected at large. You indicate that all but one of those elected at large live in various areas of the county outside the county seat city and drive to the courthouse for each meeting and continuation of each meeting which generally is weekly and sometimes three days a week.

Your question is stated as:

" * * * are the Commissioners that drive into * * * (the county seat city) * * * to attend said meetings entitled to a mileage rate under the statute in addition to their annual salary voted in by their own resolution."

Noting that your first statutory reference is to meals and lodging expense and that your question is in reference to the "mileage rate", we should also consider another provision of subsection 5 of Section 11-10-10 and of Section 11-10-15 of the 1975 Supplement to the North Dakota Century Code as follows:

"11-10-10 * * *

5. * * * The allowance for travel expenses shall be at the same rate as provided by section 11-10-15, and shall be evidenced by a subvoucher or receipt as provided by section 21-05-01."

"11-10-15. MILEAGE OF OFFICIALS. - Unless otherwise provided by the laws of this state, every county official, whether elective or appointive, and every deputy of a county official, entitled by law to travel or mileage expense, shall be allowed or paid only the following amounts for each mile actually and necessarily traveled in the performance of official duties:

1. Fifteen cents per mile when such travel is by motor vehicle; and
2. When such travel is by rail or other common carrier, the amount actually and necessarily expended therefor."

We note that the statutory language from Section 11-10-10 quoted above has been in existence since the year 1971. We think it is of interest to compare same with the prior statute and for this purpose quote Chapter 99 of the 1969 Session Laws as follows:

"Section 1. AMENDMENT.) Subsection 3 of section 11-10-10 of the 1965 Supplement to the North Dakota Century Code is hereby amended and reenacted to read as follows:

3. Each county commissioner may, by resolution of the board, be allowed the sum of fifteen dollars per day while performing his duties in attending meetings of the board of county commissioners of which he is a member or when engaged in other official duties, whether outside or within the county, and an allowance for actual meals and lodging expenses in an amount not to exceed twelve dollars, but shall not be entitled to any allowance wherein he resides other than the attendance at meetings of the board of county commissioners of which he is a member as herein provided. Claims for lodging as herein provided, but not for meals shall be covered by a subvoucher or receipt as provided by section 21-05-01 of the Code as amended. If a meeting of a board of county commissioners is of more than one day's duration, a county commissioner may charge for and collect mileage or other transportation expense for travel actually made in going to his home and returning therefrom for each overnight period that the meeting may remain in session, but shall not be entitled to charge and collect for an evening meal on the date of going to his home or a morning meal on the date of his return. For the purpose of collecting per diem, living expenses, and transportation expenses incident to the attendance of any county commissioner at any statewide meeting of the North Dakota county commissioners association, such attendance at said meeting shall be considered the performance of an official duty within the meaning of this section. Each county commissioner while performing official duties shall be allowed his mileage and transportation expenses not in excess of the amounts provided in section 11-10-15, and when such transportation is furnished by rail or other common carrier including regularly scheduled airlines, such claims shall comply in all respects with section 21-05-01 of the code as amended. No county commissioner residing within the corporate limits of the county seat may charge for and collect for mileage or other sums in lieu thereof, or for meals and lodging, for attending any meeting of the board of county commissioners of which he is a member or for attending any statewide meeting of the North Dakota county commissioners association held in the county seat where he resides. Total compensation and expenses including per diem, board and lodging, and transportation

expense, received by any member of a board of county commissioners shall be charged to and paid from the general fund of the county only and shall not exceed for each fiscal year the following amounts: In counties having a population of eight thousand or less, three thousand two hundred dollars; in counties having a population of over eight thousand and less than fifteen thousand, three thousand seven hundred and fifty dollars; and in counties having a population of over fifteen thousand, four thousand five hundred dollars, and for the purpose of fixing the maximums herein provided, population figures shall be established by the most recent federal census."

Going first to the meals and lodging allowance, we note from the first statutory quotation above that same shall be "at the same rate and under the same conditions as provided for state officials and employees." The rate and conditions for payment of same to state officials and employees in this respect is specified in Section 44-08-04 of the 1975 Supplement to the North Dakota Century Code in the following language:

"* * * Except as provided in section 44-08-04.1, each elective or appointive officer, employee, representative, or agent of this state, or of any of its subdivisions, agencies, bureaus, boards, or commissions, may make claim and shall upon approval of such claim be paid as an allowance for meals and lodging while engaged within this state in the discharge of a public duty away from his normal working and living residence for all or any part of any quarter of a day at the following rates for each quarter of any twenty-four hour period: * * *" (Emphasis ours)

We note that the reference to the basic location is not limited to either the normal "living residence" or normal "working residence", but is expressed in the statute as the normal working and living residence. On the state level probably most officials are on a full-time basis on which basis the official or employee does not receive his meals and lodging reimbursement for travel from the place where he sleeps, etc., to his basic place of working at his state job.

The county commissioner, however, is on a different basis. Normally his formal duties as county commissioner are on a part-time basis, his basic living is earned at other activities, in many instances taking place around his home rather than the courthouse. Also, of course, while generally a county commissioner's formal actions must be as one member of the Board, many of his relationships with his constituents are based at his home rather than the county courthouse.

On this basis, and while there could be variations on account of special circumstances, we would conclude that the normal working and living residence of a county commissioner is at his home rather than the courthouse. We would thus conclude that commissioners that drive into the county seat city to attend meetings of the Board are entitled to receive the meals and lodging allowance for the time spent in driving to such meetings and attendance thereat.

Looking next to the mileage allowance, we note that same is not under the same statute but is governed by the heretofore quoted Section 11-10-15 of the North Dakota Century Code.

There is no mention in said Section 11-10-10 or 11-10-15 of same being on same basis as state officials, "normal living and working residence", "headquarters" or "normal place of employment." Also we think it quite obvious that county commissioners were paid mileage to and from meetings under the former statute as same specifically provided that even in the event of an overnight meeting such mileage could be paid to county commissioners.

On such basis we must necessarily conclude that in the language of Section 11-10-15, traveling to and from meetings of the Board of County Commissioners constitutes miles actually and necessarily traveled in the performance of official duties and, therefore, that the Commissioners that drive into the county seat city to attend such meetings are entitled to a mileage rate under the statute in addition to their annual salary voted in by their own resolution.

We hope the within and foregoing will be sufficient for your purposes.

Sincerely,

ALLEN I. OLSON

Attorney General