

## OPINION NO. 74-099

**Syllabus:**

R.C. 4735.03 was not impliedly repealed by the enactment of R.C. 141.15, and that the former Section still controls the reimbursement of expenses incurred by members of the Real Estate Commission while traveling on official business within the state.

To: John L. Tranter, Chairman, Ohio Real Estate Commission, Columbus, Ohio  
By: William J. Brown, Attorney General, November 25, 1974

Your request for my opinion reads as follows:

"Enclosed please find a copy of a resolution passed by the Ohio Real Estate Commission on June 5, 1974.

"The Auditor of State has refused to honor the Commissioner's invoices for expenses incurred in the discharge of their official duties if those invoices exceed \$25.00 per day. It is the Commission's position that the expenses shown on the invoices that were submitted were actual and necessary expenses incurred in the discharge of their official duties, and that Ohio Revised Code, Section 4735.03 provides that they should be reimbursed in full for expenses incurred.

"I would appreciate your rendering an opinion as soon as possible as the Commission members have not received reimbursement since February, 1974."

The resolution referred to in the first sentence of your request reads as follows:

"That the Commission hereby request an official opinion from the Attorney General relative to the interpretation of the apparent conflict between that portion of the Ohio Revised Code, Section 4735.03, which states, 'Each member of the Commission shall receive an amount fixed pursuant to Section 143.09 [now Section 124.14] of the Revised Code, for each day employed in the discharge of his official duties, and his actual and necessary expenses incurred in the discharge of such duties', and Department of Finance, Rule No. 2, adopted pursuant to Section 141.15, Ohio Revised Code."

Although neither your letter nor the resolution specifically so states, I assume from the context that your concern is with expenses incurred while traveling on state business within the state.

The statutory authority of the members of the Real Estate Commission to receive reimbursement for "actual and necessary expenses" has been in existence for many years. It was originally enacted in 1925 as Section 6373-27 of the General Code which provided (111 Ohio Laws, 393-394):

"There shall be a state board of real estate examiners consisting of three members \* \* \*. Each member of the state board of real estate examiners shall receive fifteen dollars for each day of actual service during the meetings of the board and his actual and necessary expenses incurred in the discharge of his official duties." (Emphasis added.)

Although the General Assembly has amended the statute numerous times the emphasized language has never been changed. See 118 Ohio Laws, 491; 122 Ohio Laws, 561; 124 Ohio Laws, 480; 129 Ohio Laws, 1091; 132 Ohio Laws, 1767; 132 Ohio Laws, 1768; 133 Ohio Laws, 1683; 135 Ohio Laws, S.B. No. 131. The former board of examiners has now become the Ohio Real Estate Commission, and in its present form, as R.C. 4735.03, the pertinent language of the statute reads as follows:

\* \* \* \* \*                      \* \* \*                      \* \* \*

\* \* \* \*Each member of the commission shall receive an amount fixed pursuant to section 143.09 [now Section 124.14] of the Revised Code for each day employed in the discharge of his official duties, and his actual and necessary expenses incurred in the discharge of such duties. (Emphasis added.)

\* \* \* \* \*                      \* \* \*                      \* \* \* \*

There are numerous other sections of the Revised Code which authorize the reimbursement of the actual and necessary expenses of specific state officials or employees. See, e.g., R.C. 117.02, 121.12, 3335.02, 3337.01, 3341.02, 3343.04, 4731.03, 4901.09, 5501.03 and 5501.10. And see, Opinions No. 2538 and No. 2674, Opinions of the Attorney General for 1961.

On the other hand, until 1961 there was no general statute authorizing such reimbursement. Nevertheless, the practice was to reimburse necessary expenditures despite the absence of a statutory provision. In Opinion No. 2538, *supra*, my predecessor said, "Up to recent date, the general rule of law was that where a public officer or employee was, in the proper performance of his duties, required to travel, his expenses incurred in such travel could be lawfully reimbursed to him." See also Opinions No. 1126 and No. 1869, Opinions of the Attorney General for 1952. In June 1961, however, the Supreme Court voided this general rule and long standing administrative practice, by holding that there must be some statutory authorization for reimbursement of expenditures, and that such authority cannot be implied. *State, ex rel. Ferguson v. Maloon*, 172 Ohio St. 343; (1961) Opinion No. 2538, *supra*. In less than a month corrective legislation was enacted as an emergency measure for the reason that "payment of expenses of state officers and employees is necessary for the efficient operation of state government." Am. Sub. S.B. No. 589, 129 Ohio Laws, 580. The bill amended the existing R.C. 127.05 to permit the payment of official traveling expenses outside the state, and enacted a new R.C. 141.15 covering the reimbursement of necessary official traveling expenses within the state. With no material changes those two sections now provide as follows:

Sec. 127.05. "No executive, legislative, or judicial officer, board, commission, or employee of the state shall, at state expense, attend any association, conference, convention, or perform official duties outside the state unless authorized by law or by the emergency board. Before such allowance may be made, the head of the department shall make application in writing to the emergency board showing necessity for such attendance and the probable cost to the state. If a majority of the members of the emergency board approve the application, such expense shall be paid from any moneys appropriated to said department, board, bureau, or commission for traveling expenses."

Sec. 141.15. "Any elected or appointed state officer or state employee of any department, office, or institution of this state, whose compensation is paid, in whole or in

part, from state funds, may be reimbursed for his actual and necessary traveling and other expenses incurred while traveling within this state on official business authorized by law or required in the performance of duties imposed by law.

"Such reimbursement shall be made in the manner and at the rates provided by rules and regulations governing travel adopted by the department of finance, in accordance with and subject to the provisions of Chapter 119. of the Revised Code, except that reimbursement for expenses incurred by a member, officer, or employee of any bureau, commission, or committee created under the provisions of Chapters 103. or 105. of the Revised Code whose membership includes members or officers of the general assembly shall be made in the manner and at the rates established by the appropriate bureau, commission or committee."

Pursuant to the last paragraph of the new R.C. 141.15, rules were adopted by the Department of Finance, now the Office of Budget and Management. As of 1972 Rule No. 2, applicable here, provided in pertinent part as follows:

"Reimbursement of expenses for travel on official state business within the State of Ohio.

"This rule is established under the authority of Section 141.15 of the Ohio Revised Code and supersedes any similar rules and regulations adopted by the Department of Finance or any other agency of the State. Notwithstanding any other provision of law, the application of this rule shall apply to all departments, institutions, boards, commissions, and agencies of the State as provided in Section 141.15 of the Ohio Revised Code.

" \* \* \* \* \* "

"4.2 Meals, Lodging, and Incidentals

"(A) An employee authorized to travel on official State business may claim a maximum of \$25.00 for any calendar day during which he is on travel status involving overnight lodging. An employee authorized to travel on official state business may claim a maximum of \$12.00 for each day or part of a day during which he is on travel status not requiring overnight lodging. These maximums allow an employee to be reimbursed for the actual, reasonable, and necessary expenses incurred for meals, lodging, and incidentals not otherwise provided for in this rule.

" \* \* \* \* \* "

Despite the very broad language of the rule, I am informed that the \$25.00 maximum has not, until very recently, been applied to those agencies and commissions, such as the Real Estate Com-

mission, which had, prior to the enactment of R.C. 141.15, specific authority by statute to reimburse their officers and employees for actual and necessary expenses incurred. There is, therefore, no long-standing, consistent interpretation of the effect of this aspect of R.C. 141.15.

What we have, then, is an earlier special statute, and a later general one in which the language is, on its face, broad enough to include the subject matter of the earlier statute. The Supreme Court was confronted with a similar situation in Leach v. Collins, 123 Ohio St. 530 (1931). The earlier section of the General Code prescribed the form of ballot to be used in submitting to the voters the issue of detachment of a portion of a village. The later section, part of a general revision of election laws, prescribed a different form of ballot and provided that it "shall supersede all other forms \* \* \* now provided by law." Despite this language, the Court held that the earlier special statute had not been repealed. The Court held (at pp. 533-534):

"Section 3577-1, General Code, is a special statute enacted for a particular purpose and provides for a specific and definite proceeding and prescribes in detail the method and form of procedure. It is well settled that such specific statutory provisions are to be regarded as exceptions to general statutory provisions, and that the rule that repeals by implication are not favored has additional force under such circumstances. State, ex rel. Elliott Co. v. Connar, Supt. of Dept. of Pub. Works, ante, 310, 175 N.E., 200. The rule applicable here is stated by the Supreme Court of the United States in Rodgers v. United States, 185 U.S., 83, 22 S. Ct., 582, 583, 46 L. Ed., 816, as follows: 'Where there are two statutes, the earlier special and the later general, (the terms of the general being broad enough to include the matter provided for in the special), the fact that one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special.'"

Your attention is also directed to the decision of the Court of Appeals for Cuyahoga County in State, ex rel. Stokes v. Probate Court, 17 Ohio App. 2d 247 (1969), appeal dismissed as moot, 22 Ohio St. 2d. 120 (1970). The earlier specific sections of the Revised Code (R.C. 733.72 - 733.77) established a procedure for removal of a municipal officer by the probate court. The later general sections (R.C. 3.07 - 3.10) provided an all-inclusive method for removal of all public officers by the court of common pleas. In refusing to hold that the earlier sections had been impliedly repealed by those which were enacted later, the Court of Appeals said (at pp. 249-250, 254, 257):

"We must start with the presumption that, where two similar statutes exist, their co-existence was intended by the General Assembly. Once such intent is questioned, as here, the courts may inquire into the language and effect of the statutes, to see whether a conflict or logical inconsistency is apparent. Even then, however, the courts must see whether such conflict or inconsistency may be reconciled by some reasonable interpretation. Only if such reconciliation is thereby impossible, may repeal by implication be found. State, ex rel. Fleisher Engineering & Const. Co., v. State Office Bldg. Comm. (1930), 123 Ohio St. 70, 74; Henrich v. Hoffman, Judge (1947), 148 Ohio St. 23, 26; O'Neil v. Board of County Commissioners (1965), 3 Ohio St. 2d 53, 57, and cases cited therein.

"It is a general rule that repeals by implication are not favored. Where a prior enactment of a special statute is followed by a later enactment in general terms, which does not expressly contradict the provisions of the prior act, the general act will not be said to repeal the prior one, 'unless such intention is clear.' Even where two such acts have conflicting terms, 'neither necessarily abrogates the other, \* \* \* and it is immaterial which is of the later date.' Commissioners v. Board of Public Works (1884), 39 Ohio St. 628, 632.

\* \* \* \* \*

"It is also settled that, where two statutes are enacted at different times, and both are subsequently and simultaneously re-enacted as part of a recodification, there is no longer the element of a subsequent enactment, which is a sine qua non of repeal by implication. State v. Hollenbacher (1920), 101 Ohio St. 478, 485-486. Such obviously was the case with the statutes herein involved, when the General Code of Ohio was recodified into the Revised Code.

\* \* \* \* \*

"Where two statutes appear contradictory, but are both susceptible of reasonable construction and interpretation which will not nullify either statute, the courts have a duty to so construe and interpret them. Paragraph one of the syllabus of Humphrys v. Winous Co. (1956), 165 Ohio St. 45.

\* \* \* \* \*

In view of these holdings I conclude that the earlier specific statute here, R.C. 4735.03, is still controlling as to the traveling expenses of members of the Real Estate Commission within the state. As has been pointed out, the pertinent language of that section has been retained intact despite the fact that it has been amended in other respects

since the enactment of the later general statute, R.C. 141.15. Furthermore, the history of its enactment shows that R.C. 141.15 was designed to provide authority for reimbursement of necessary expenses which had not previously existed, rather than to repeal such specific authority as was already in existence. Finally, it is, in my opinion, not necessary to read the two sections as manifestly inconsistent with each other. The language of the earlier specific section provides that a member of the Real Estate Commission "shall receive \* \* \* his actual and necessary expenses \* \* \*." The later general section, on the other hand, provides that, "Any elected or appointed state officer or state employee of any department \* \* \* may be reimbursed for his actual and necessary traveling and other expenses incurred while traveling within this state \* \* \*." This language certainly gives no very clear indication that all existing authority to reimburse was to be replaced. Had the General Assembly intended to repeal R.C. 4735.03 it could have done so specifically, or, at the least, it would have said that "all employees of all departments shall be reimbursed." See Opinion No. 73-075, Opinions of the Attorney General for 1973; and Sutherland, Statutory Construction, Section 23.15.

In specific answer to your question it is my opinion, and you are so advised, that R.C. 4735.03 was not impliedly repealed by the enactment of R.C. 141.15, and that the former Section still controls the reimbursement of expenses incurred by members of the Real Estate Commission while traveling on official business within the state.