

2538

REGARDING REIMBURSEMENT TO STATE OFFICIALS OF EXPENSES INCURRED WHILE PERFORMING OFFICIAL DUTIES "OUTSIDE THE STATE OF OHIO"—§§127.05, 141.15, 4901.09, R.C.

SYLLABUS:

1. Pursuant to Section 127.05, Revised Code, no state officer or employee may perform official duties outside the state, at state expense, unless authorized by law or by the emergency board.

2. Where a state officer or employee is authorized by a specific statute, other than Section 141.15, Revised Code, to be reimbursed for his necessary expenses incurred in the performance of his official duties, he is "authorized by law" within the purview of Section 127.05, Revised Code, to travel on official duties outside the state at state expense, and does not need the approval of the emergency board to so travel at state expense; however, where there is no such specific statute authorizing the officer or employee to be reimbursed for his necessary expenses, he must obtain the approval of the emergency board to travel on official business outside the state, at state expense.

3. Whether the official duties of a state officer or employee require that he travel outside the state depends on the statutes pertaining to said duties and the particular facts involved.

4. Section 4901.09, Revised Code, authorizing the reimbursement of expenses incurred by members, officers and employees of the public utilities commission, incurred while on the business of the commission, authorizes said members, officers and employees to travel outside the state on the business of the commission, at state expense, without the approval of the emergency board.

Columbus, Ohio, September 26, 1961

Public Utilities Commission of Ohio
Columbus 15, Ohio
Attention: R. Martin Galvin, Secretary

Dear Sir:

I have your request for my opinion which reads as follows:

"It is the desire of this Commission to obtain a written opinion from your office relative to future Commission action as affected by SB 589, passed in the 104th General Assembly. This bill prescribes the method by which state departments and commissions may obtain authority for out-of-state travel on the part of its members, staff and employees.

"Under Section 4901.09, this Commission is authorized all expenses incurred by its officers and employees while on the business of the Commission, including the actual and necessary traveling expenses. It is our belief that SB 589 authorizes us "by law" to expend funds for out-of-state travel on official business and to conferences and conventions without a requirement that we obtain approval of the Emergency Board. We believe this on the basis of the language in SB 589 in conjunction with our statute 4901.09."

In order to properly determine the status of the law regarding the payment of out-of-state travel expenses of state officers and employees, it is perhaps advisable to consider the circumstances which undoubtedly led to the enactment of Amended Substitute Senate Bill No. 589 by the 104th General Assembly.

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.

Such a conclusion was reached by one of my predecessors, C. William O'Neill, in Opinion No. 1126 and Opinion No. 1869, Opinions of the Attorney General for 1952, at pages 97 and 703, respectively, and in Opinion 690, Opinions of the Attorney General for 1951, page 405. Also, in 44 Ohio Jurisprudence 2d, Section 58, page 544, it is stated:

“In a broad sense, a public officer is an agent of the public, and as such is governed, as to the expenses which he may in good faith incur, by the same rule that would be applicable to like acts of a private agent, or of a guardian or administrator, and is entitled to be reimbursed therefor.”

The theory of the general rule above noted was that the reimbursement of expenses to officers and employees was not the payment of additional compensation but was a reimbursement of part of the compensation to which they were entitled by law, and which, as a result of the required performance of their duties, had been expended by them.

The Ohio Supreme Court, in rendering its decision in the case of *The State ex rel. Ferguson v. Maloon*, 172 Ohio St., 343, voided the general rule and longstanding administrative practice discussed above by holding that there must be a specific statute authorizing the reimbursement for travel expenses before such can be paid from public funds. The opinion by O'Neill, J., at page 349, states in this regard:

“The law is plain and settled, and has not been deviated from, that public funds cannot be expended for the travel of a public officer unless such expenditure is specifically authorized by law, and such authority can not be implied.”

The decision in *Maloon, supra*, made by the highest court of the state, must be followed by all public officials, and such decision precluded the use of the theory of implied power to make payment for reimbursement of expenses of an officer or employee. Thus, the 104th General Assembly enacted Amended Senate Bill No. 589, effective July 26, 1961, to provide authority for reimbursement of expenses where such authority was lacking.

Section 127.05, Revised Code, as amended by the bill, reads:

“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.”

Section 141.15, Revised Code, as enacted by the bill, reads :

“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.”

Previous to the enactment of said bill there was no general authority for state officers and employees to be reimbursed for their necessary traveling expenses incurred while performing their official duties. In many instances, however, there were, and still are, specific provisions of law providing for reimbursement for necessary expenses for certain state personnel. For example, Section 4901.09, Revised Code, pertaining to the public utilities commission, reads :

“All expenses incurred by the public utilities commission pursuant to Chapters 4901., 4903., 4905., 4907., 4909., 4921., 4923., 4925. of the Revised Code, including the actual and necessary traveling and other expenses and disbursements of the commission, its officers and employees, incurred while on the business of the commission, shall be paid from funds appropriated for the use of the commission after being approved by the commission. An itemized statement of such expenses, when signed and submitted by the person who incurred them, shall be audited and paid in the same manner as other expenses.”

Other examples of specific provisions of law authorizing the reimbursement of necessary expenses are Section 117.02, Revised Code, pertaining

to state examiners; Section 121.12, Revised Code, pertaining to the many directors of state departments, and to other personnel; Sections 5501.03, Revised Code, pertaining to the director of highways; and Section 5501.10, Revised Code, pertaining to certain employees of the department of highways. I might add that there are many other sections of law specifically providing for the reimbursement of necessary expenses, but time and space do not allow my detailing the same in this opinion.

Where there is such a special provision, I have no doubt that the person coming within the purview of the provision should be reimbursed his actual and necessary expenses incurred in the performance of his official duties, whether such duties are performed within the state or without. In this regard, I note that the special provisions above referred to provide simply for reimbursement and do not specify that reimbursement will be only for expenses incurred within the state.

Section 141.15, *supra*, does limit reimbursement for expenses to those expenses incurred while traveling within the state. That section is, however, of a general nature while the sections providing for reimbursement to a particular officer or employee, or group, are of a special nature. (For example, Section 4901.09, *supra*). It is a well settled rule that a special statutory provision which applies to a specific subject matter constitutes an exception to a general statutory provision covering other subject matter as well as the specific subject matter (*Fisher Bros. Co., v. Bowers*, 166 Ohio St., 191, 196). Thus, where there is such a specific provision as to reimbursement, said specific provision takes precedence over the provisions of the general section, Section 141.15, *supra*; but said Section 141.15 will apply where there is no such special section.

Considering the provision of Section 127.05, *supra*, as to expenses incurred outside the state, if the person claiming the reimbursement is entitled to reimbursement for necessary expenses under a special provision of law such as above discussed, and if the expenses were incurred in pursuance of his official duties, then such person is entitled to be reimbursed for the expenses incurred without any action by the emergency board. On the other hand, if no such special provision exists, then it can not be said that the particular person is authorized by law to perform duties outside the state, *at state expense*; and such a person would be required to get the approval of the emergency board to be reimbursed for his expenses. As noted above, I am of the opinion that Section 4901.09, *supra*, is such a special provision.

As to whether the officer or employee concerned may perform official duties outside of the state, that is dependent upon the particular statutes pertaining to his duties and to the facts involved. Referring to Section 4901.09, *supra*, reimbursement is made only for expenses incurred "while on the business of the commission." Thus, in traveling to the conference, convention, or on official business, the expense incurred must be on the business of the commission in order for reimbursement to be made.

In summary, under Section 127.05, Revised Code, no state officer or employee may perform official duties outside the state, at state expense, unless authorized by law or by the emergency board. Where a particular officer or employe is authorized by a specific statute, other than Section 141.15, Revised Code, to be reimbursed for his expenses incurred in the performance of his official duties, he is "authorized by law" within the purview of said Section 127.05, and does not need the approval of the emergency board to travel, *at state expense*, outside the state on his official duties. Some examples of such a specific statute are Sections 117.02, 121.12, 4901.09, 5501.03 and 5501.10, Revised Code. Section 4901.09, *supra*, being such a special statute, members, officers, and employees of the public utilities commission are authorized by law to travel at state expense outside the state on the business of the commission without the approval of the emergency board.

Accordingly, it is my opinion and you are advised:

1. Pursuant to Section 127.05, Revised Code, no state officer or employee may perform official duties outside the state, at state expense, unless authorized by law or by the emergency board.

2. Where a state officer or employee is authorized by a specific statute, other than Section 141.15, Revised Code, to be reimbursed for his necessary expenses incurred in the performance of his official duties, he is "authorized by law" within the purview of Section 127.05, Revised Code, to travel on official duties outside the state at state expense, and does not need the approval of the emergency board to so travel at state expense; however, where there is no such specific statute authorizing the officer or employee to be reimbursed for his necessary expenses, he must obtain the approval of the emergency board to travel on official business outside the state, at state expense.

3. Whether the official duties of a state officer or employee require that he travel outside the state depends on the statutes pertaining to said duties and the particular facts involved.

4. Section 4901.09, Revised Code, authorizing the reimbursement of expenses incurred by members, officers and employees of the public utilities commission, incurred while on the business of the commission, authorizes said members, officers and employees to travel outside the state on the business of the commission, at state expense, without the approval of the emergency board.

Respectfully,

MARK MCELROY

Attorney General