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July 2, 1986

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STATEHOUSE MAIL

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION  
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Dear Mr. Peterson:

You have asked this office to research the following two questions:

1. Does Idaho Code § 59-509 limit compensation of the board and commission members only to those days the board or commission actually met?
2. If the answer to question 1 is no, should the per diem rates set out in § 59-509 be converted to hourly rates based upon an assumed eight-hour day?

I.

It is my understanding that your inquiry was caused by actions taken by the Outfitters and Guides Board. Members of the board spend several hours a week individually working on board activities and when one has accumulated eight hours of work, application is made for the \$35 per diem rate provided for by statute. The statute in question is Idaho Code § 59-509 which reads in pertinent part:

Mr. Martin L. Peterson  
Administrator  
Financial Management  
Page 2  
July 2, 1986

The members of part-time boards, commissions, and councils shall receive for each day spent in the actual performance of duties, an honorarium, compensation, or expense provided in the following schedule:

...

In order to answer your first inquiry one must ascertain what the legislature intended by the words "actual performance of duties." There is no legislative history and our research has revealed no appellate court decision interpreting the statute in question.

There is one very old Idaho Supreme Court case that an appellate court may look to for guidance on this subject. The case, handed down in 1895, interpreted a statute concerning the compensation of county commissioners. Rankin v. Jauman, 4 Idaho 394, 39 P. 1111. A now repealed statute provided that if a public official charged and collected for illegal fees, the court could fine the individual \$500 and remove him from office. A member of the Ada County Commissioners was charged under this statute. The commissioner had collected a per diem allowance for 96 days, although the board had only met for 14 days. The commissioner also submitted a bill for traveling a little more than 61 miles for each day the board met even though the commissioner lived only one-half mile from the board meeting place.

In 1895, the compensation statute for commissioners read as follows:

County commissioners of each county shall receive the sum of six dollars for each day actually engaged in transacting county business, and twenty cents per mile for each mile necessarily traveled in transacting county business. (Laws, 1891, p. 179)

Id. at 397. The court construed the statute very narrowly and held that "county business" could only be conducted if the full board was in session. In holding that the commissioner violated the statute by accepting illegal fees, the court stated:

Mr. Martin L. Peterson  
Administrator  
Financial Management  
Page 3  
July 2, 1986

But it is claimed by counsel for the respondent that if the services were actually rendered, a mere irregularity in the account would not be construed into a corrupt extortion. The board of county commissioners are an entirety; they can only act collectively, and as empowered by law. They are only engaged in "transacting county business," as that term is used in § 5 of the Act of 1891, when acting as a board; and it is only while so acting that they can legally charge only per diem or mileage. It needs no authority to support this proposition. Should the board see fit to employ one of its members to perform certain services for the county, permissible by law to be performed by such officer, such member would act, not as a member of the board of county commissioners, but as an individual, and must present his claim for such services and is subject to the same rules as any other individual presenting a claim against the county.

Id. at 400.

For several decades, the case was often quoted whenever a public official was charged under the statute which penalized public officials for illegally accepting fees. See, Miller v. Smith, 7 Idaho 204, 61 P. 824 (1900). Robinson v. Huffaker, 23 Idaho 173, 129 P. 334 (1912). The Idaho Supreme Court might apply the logic of the Rankin case to Idaho Code § 59-509.

Most state boards have their powers and duties enumerated by statute. The statutory duties of the Idaho Outfitters and Guides Board are provided for in Idaho Code § 36-2107. Listed among the powers and duties of the board are the following: Conduct examinations to ascertain the qualifications of applicants; prescribe and establish rules of procedure and regulations to carry into effect the provisions of the act; to conduct hearings; to cooperate with federal government agencies.

Mr. Martin L. Peterson  
Administrator  
Financial Management  
Page 4  
July 2, 1986

As one can tell from the above-listed examples, the powers and duties of the Outfitters and Guides Board seem to demand full board action. An Idaho court could construe Idaho Code § 59-509 narrowly and hold that board members are entitled to compensation only when the full board is in session.

On the other hand, because the Rankin decision was interpreting a now repealed statute concerning compensation for county commissioners instead of state board members, it is difficult to determine how much weight the courts would give to the decision in attempting to discern the intent of the legislature in passing Idaho Code § 59-509. First of all, the facts left no doubt that the Ada County Commissioner of 1895 was abusing the system and taking advantage of the tax payers. Under these circumstances, it is easy to understand why the court felt compelled to narrowly construe the statute.

More importantly, however, the language of the two compensation statutes is not the same. The compensation statute for county commissioners in 1895 provided that each commissioner receive \$6 per day while "conducting county business." The court reasoned that only the board and not an individual board member could conduct county business. Thus, the board must be in session to conduct county business.

By contrast, the compensation statute for state board members provides that board members shall be paid for each day spent in "actual performance of duties." It is conceivable, and even likely, that an individual board member may perform actual duties without the full board being in session. For example, the chairman of a state board may be asked to address a legislative committee; or a state board could direct one of its members to attend a meeting pertinent to the business of the state board. The board member would be entitled to compensation even though the full board was not in session. It seems reasonable to expect that there would be numerous instances where a board member would be performing actual duties beyond actual attendance at a board meeting and that the legislature intended to pay board members the per diem allowance on the occasions when these extra duties should arise.

It very well may be more economical for the board to empower one of its members to act on its behalf. For instance,

Mr. Martin L. Peterson  
Administrator  
Financial Management  
Page 5  
July 2, 1986

the Outfitters and Guides Board is empowered to reach cooperative agreements with federal agencies. The board could deputize or empower by resolution one board member to meet with the federal agency to work out the details of the agreement. Once the details of the agreement have been finalized, the full board could meet to ratify the agreement. It would seem reasonable that such efficient use of manpower would have been contemplated or expected by the legislature when passing Idaho Code § 59-509.

A board or commission should only deputize one of its members to carry out board or commission duties. As the Rankin court explained, no per diem compensation could be allowed for board members conducting activities that would normally be the function of an employee of the board. In order for a member of a board or commission acting in an individual capacity to qualify for per diem compensation, the member must not be simply furthering the work of the board or commission but representing the board or commission in an official capacity.

In summary, the law on this subject is scant and offers little guidance. Without more legal authority, it is impossible to provide a definitive answer. However, it is the opinion of this office that the more likely intent of the legislature was that, under proper circumstances, compensation of board or commission members should not be limited to only those days the board or commission meets. To avoid impropriety, the board or commission should specifically authorize or deputize one of its members to carry out the statutory duties or powers of the board or commission when it is reasonable for an individual member to do so.

## II.

You have also asked whether the per diem rates set in Idaho Code § 59-509 should be converted to hourly rates. There is also no legislative history or appellate court decision that gives any guidance as to whether per diem rates set out in § 59-509 should be converted to hourly rates based upon an assumed eight-hour day. Members of the Outfitters and Guides Board are paid a per diem in accordance with Idaho Code § 59-509(g). It reads as follows:

Mr. Martin L. Peterson  
Administrator  
Financial Management  
Page 6  
July 2, 1986

Members shall receive the sum of thirty-five dollars (\$35.00) per day and shall be reimbursed for actual and necessary expenses, subject to the limits provided in § 67-2008, Idaho Code.

Neither the statute nor any legislative history gives any guidance as to what the legislature meant by "day," whether a day constitutes 24 hours, 12 hours, eight hours, or two hours.

There is no doubt that if the full board is in session, they are not required to spend eight hours in session before being entitled to their per diem. A board could conceivably meet for four hours, and be entitled to the full per diem compensation. This same reasoning, however, does not necessarily apply to an individual member who chooses to perform two hours of actual duties in one day.

No Idaho Supreme Court case has ever decided the issue of whether a county commissioner or a state board member may total up their hours worked on individual days of a week in order to collect a statutory per diem rate for one day's work. Many courts, however, have addressed the issue of how many hours a person must be engaged in performing actual duties in one day in order to collect the per diem rate. Almost all unanimously hold that the individual need not spend a full eight-hour day in order to collect the full per diem rate. See, Annot. 1 ALR 276 (1919).

Our research revealed one case that did address the issue of whether hours may be accumulated. Hoffman v. Lincoln County, 118 N.W.Rept. 850 (Wis. 1908). A Wisconsin statute provided that when a probate judge was required to hear criminal matters, he should be compensated at the rate of \$5 per day for each day actually engaged in criminal examinations. Often, the judge would only be engaged in criminal matters for perhaps one hour per day. The judge would keep track of his time and when he had accumulated six hours, would submit a bill to the county for the per diem rate of \$5. In holding the procedure proper, the court stated:

It has sometimes been held that, under statutes allowing a per diem compensation to

Mr. Martin L. Peterson  
Administrator  
Financial Management  
Page 7  
July 2, 1986

officers for certain services, a day could not be split up, and that the officer was entitled to a full day's pay if any time was occupied in the service, although the whole day was not consumed. (citations omitted) We are not inclined, however, to give this construction to the law before us. The words "for each day he shall be actually engaged" in the matter seem to us clearly indicative of the intention only to allow for the time actually consumed. This construction necessitates a splitting up of days and a charge by the hour, and a charge by the hour necessitates the establishment of some arbitrary number of hours as a day's work. In this case six hours was considered a day's work, and no contention is made that a longer time should have been fixed.

Id. at 852.

This reasoning seems equally applicable to Idaho Code § 59-509. It does not seem reasonable that the legislature would have intended that members of boards not be paid for time "spent in the actual performance of duties." It seems equally unreasonable that the legislature intended members of state boards to voluntarily work for two hours in one day and receive the full per diem compensation. The most reasonable construction is that if an individual member performs actual duties while the board is not in session, the compensation for those actual duties should be converted to an hourly rate.

Just as in the Wisconsin case, an arbitrary number of hours must be set in order to establish a work day. Since state employees are paid for an eight-hour day, this number seems to be the most logical. This construction of Idaho Code § 59-509 could lead to abuse in certain individual cases. However, it is the opinion of this office that such individual abuse may be addressed on a case-by-case basis whenever it arises. In addressing a similar statute concerning county commissioners, the Supreme Court of Pennsylvania stated:

Mr. Martin L. Peterson  
Administrator  
Financial Management  
Page 8  
July 2, 1986

It is difficult to determine exactly where the line should be drawn to secure the proper service of the interest and convenience of the public, on the one hand, and to guard against an abuse of the office on the other. Each case must depend upon its own facts, and the necessity of attendance must be left largely to the discretion of the commissioners themselves. They are public officers, presumably acting in good faith, and the presumption is in favor of the correctness and regularity of all their official acts. Their conduct and their discretion as to attendance are subject to review on an appeal, such as this; where there is any evidence of an abuse for the purpose of an unfair increase in the emoluments of their office, the question is for the jury.

Mansel v. Nicely, 34 A. 793 (Penn. 1896).

In summary, it is the opinion of this office that board or commission members are probably entitled to compensation when performing actual duties even though the board or commission is not in session. Furthermore, converting the per diem rates to hourly rates in such a situation seems to most correctly comply with legislative intent.

Sincerely yours,

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