

## **Opinion No. 67-54**

April 3, 1967

**BY:** OPINION OF BOSTON E. WITT, ATTORNEY GENERAL

**TO:** Mr. Alex J. Armijo Acting Legislative Auditor State Capitol Building Santa Fe, New Mexico

### **QUESTION**

#### **FACTS**

The records of the bureau of revenue indicate that property appraisers were given per diem and mileage to attend a oneday in-service training school in Albuquerque, New Mexico. The payments were made pursuant to purchase vouchers for professional services. However, the dollar amounts of the vouchers together with the background material which has been submitted with the vouchers indicates that the payments were in fact for per diem at the rate of \$ 10.00 per day and mileage at the rate of 10c per mile.

#### **QUESTION**

Is it permissible for the bureau of revenue to reimburse appraisers for per diem and mileage for attending an in-service training program outside their home county?

#### **CONCLUSION**

See Analysis.

### **OPINION**

#### **{\*74} ANALYSIS**

Section 31-3-5, New Mexico Statutes Annotated, 1953 Compilation requires the commissioner of revenue to appoint two resident property owners to serve as appraisers at the pleasure of the commissioner. A copy of the appointment and removal of the appraisers is required to be filed with the county clerk of the county from which the appraiser is appointed.

Section 31-3-5.1, New Mexico Statutes Annotated, 1953 Compilation provides that appraisers shall appraise the property of each estate administered in their county at its full value at the time of the decedent's death.

Section 31-3-5.4, New Mexico Statutes Annotated, 1953 compilation provides:

Compensation and expenses of appraisal are a part of the cost of administration and shall be paid out of the estate. Each appraiser shall receive compensation at the rate of ten dollars (\$ 10.00) a day, not to exceed five days, and mileage reimbursement at the same rate as established for {<sup>\*</sup>75} state employees, while necessarily engaged in the performance of duty . . .

It is apparent that Section 31-3-5.4, supra, establishes the reimbursement of appraisers for the expenses of appraising an estate. No provision is made in Section 31-3-5.4 for reimbursing appraisers out of bureau of revenue funds for expenses incurred in attending an in-service training school. If the per diem and mileage which was paid the appraisers is permitted under the law, the authority for the payment must be found elsewhere.

The General Appropriations Act of 1965 (being Laws 1965, Chapter 313, Section 18) provides:

Section 18. TRAVEL EXPENSES. -- The state board of finance shall allow in lieu of actual expenses of subsistence and lodging for official travel of public officers and employees an amount not to exceed twenty dollars (\$ 20.00) per diem for travel within the state. The rate of per diem or expense allowance for out-of-state travel shall be at the discretion of the governor but not to exceed twenty-five dollars (\$ 25.00) per diem, The state board of finance shall allow a mileage rate for travel by privately owned automobiles in an amount not to exceed ten cents (\$ .10) per mile, and for travel by privately owned aircraft in an amount not to exceed fifteen cents (\$ .15) per air mile.

If the appraisers appointed by the commissioner were public officers or employees and if they were on official business while attending the in-service training program then they were entitled to be paid per diem and mileage out of bureau of revenue funds and the bureau of revenue was authorized to pay them for these expenses.

In **Pollack v. Montoya**, 55 N.M. 390, 234 P.2d 336 (1951) the New Mexico Supreme Court said that the chief elements to be considered in determining whether one is a public officer are:

The specific position must be created by law: there must be certain definite duties imposed by law on the incumbent, and they must involve the exercise of some portion of the government power.

The Court in **Pollack v. Montoya**, supra, also quoted with approval from **State ex rel Gibson v. Fernandez**, 40 N.M. 288, 58 P.2d 1197 (1936) which set forth six elements which are necessary in any public employment to make the office a public office and the person holding the position a public officer. (1) The office must be created by the Constitution or by the legislature; (2) it must possess a delegation of a portion of the sovereign power of government to be exercised for the benefit of the public; (3) the powers conferred and the duties to be discharged must be defined by the legislature or through legislative authority; (4) the duties to be performed must be performed

independently and without control of a superior power, other than the law, unless they be those of an inferior or subordinate office, created or authorized by the legislature, and by it placed under the general control of a superior officer or body; (5) it must have some permanency and continuity; and (6) the officer must take and file an official oath, hold a commission or other written authority, and give an official bond if required by law to so do.

Applying these tests to the appraisers whose reimbursement is here in question and giving appropriate regard to those criteria which are said to be most important we find that the appraisers are public officers.

The office is created by the legislature. See Section 31-3-5, New Mexico Statutes Annotated, 1953 Compilation.

The appraisers are delegated a portion of the sovereign power of the state. Section 31-3-5.1, New Mexico Statutes Annotated, 1953 Compilation requires that the appraisers appraise all property of each estate administered in their respective counties at its full value at the time of the decedent's death.

The powers conferred and the duties to be discharged are defined. See Sections 31-3-5.1 through 31-3-5.6 New Mexico Statutes Annotated, 1953 Compilation.

The duties of the appraisers are performed independently. The appraiser works for the bureau of revenue and the chief value of the appraisal enures to the benefit of the bureau of revenue. However, we note that the appraisal of an estate by a bureau of revenue appraiser is final unless the bureau of revenue or other interested parties can convince a court that the appraisal is incorrect. See Section 31-3-5.5, New Mexico Statutes Annotated, 1953 Compilation. We believe that the appraiser is sufficiently independent to meet requirement number four.

The office of appraiser has some permanency or continuity. The appraiser serves at the pleasure of the commissioner. However, this duty is continuous enough to meet the test set forth in **State ex rel Gibson v. Fernandez**, supra. See **Pollack v. Montoya**, supra, which so holds.

The officer must take and file an official oath, hold a commission or other written authority and give an official bond if a bond is required by law. No bond is required, nor is the appraiser required to take an oath. The appraiser does, however, have to have a commission and this commission is filed as a matter of public record with the county clerk.

The appraisers here in question travelled to Albuquerque on orders from the bureau of revenue to attend a training program which benefited both the appraiser and the bureau of revenue. The appraisers, therefore, were public officers on official travel within the meaning of Section 18 of the 1965 appropriations act. The bureau was authorized to pay the appraisers per diem and mileage at the rates which were paid.

By: Joel M. Carson

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