

OPTOMETRY BOARD: OFFICERS: COMPENSATION: FEES: Members of State Board of Optometry are entitled to per diem for days necessarily used in travel to and from **necessary** meetings of the board, when travel is made by the usual and most direct route. Fraction of day spent in service at meeting taken as a whole day.

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1-23  
January 22, 1934



Dr. J. F. Brawley  
Secretary State Board of Optometry  
Jefferson City, Missouri

Dear Doctor Brawley:

This Department acknowledges receipt of your letter dated December 30, 1933, as follows:

"I would like an opinion from you, if the members of the State Board of Optometry have a right to charge seven dollars per day while going to a Board meeting and returning from same.

It has been the custom in the past where the board met for one day for the members of the State Board of Optometry to charge for three days.

Will you please give me your opinion, if it is right for them to charge this amount, or, are they entitled to seven dollars per day only when the Board is in session.

Section 13498 provides that the members of the Board of Optometry shall within thirty days after appointment, and annually thereafter in the month of July, organize by the election of a president and secretary of the board.

Section 13499 provides it shall be the duty of the board to examine applications for registration and to grant certificates of registration to such persons as the same are entitled to be issued, and to cause the prosecution of all persons violating the provisions of the law, to report annually to the Governor and furnish a record of the proceedings of the board for the year and an itemized statement of all

moneys received and disbursed by the board. Under the latter section the president of the board may call a special meeting at any time.

Section 13505 requires the board of Optometry to hold examinations of applicants for certificates of registration at such times and places as the board may determine.

Section 13509 states the grounds upon which the State Board of Optometry may either refuse to issue or renew or may suspend or revoke any certificate of registration. This section also provides for a hearing by the board on such matters.

Section 13500 requires the board to hold meetings for the examination of applicants for registration and the transaction of such other business as shall pertain to its duties, at least once in three months, one of which meetings in every year shall be held in the City of St. Louis and one in Kansas City.

The foregoing epitomizes the general duties of the State Board of Optometry and indicates a rather wide scope of activities.

Section 13500 further provides:

"\* \* \* Each member of the board shall receive as compensation for his service the sum of seven dollars for each day engaged in this service, and all legitimate and necessary expenses incurred in attending the meeting of the board \* \* \* \* \*."

Section 13498 empowering the Governor to appoint the State Board of Optometry requires that the members thereof be selected from among the practicing optometrists of the state, and such members shall have had not less than five years' practical experience in optometry. As stated above, the board is required to hold meetings for the purpose of examination of applicants for registration and the transaction of such other business as shall pertain to the duties of the board. These meetings shall be held at least once each three months and special meetings may be called by the president of the board at any time. We take notice of the fact that it is the custom to appoint members of state boards, such as the Board of Optometry, from different localities over the state. Members of the Optometry Board may be selected from among optometrists not living in either Kansas City

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or St. Louis or any other place where a meeting of the board might be held. In view of the powers of the board with reference to hearings, it is apparent that it might be necessary to hold meetings at many different points in the state, other than Kansas City and St. Louis.

We are not unaware of the settled law of this state that before certain officers are entitled to fees such officers must be able to point to some provision of the constitution or statute law entitling them to receive such compensation. However, the case of Board of Commissioners v. Blakely 123 Pac. 72,77, distinguishes between the fees of officers and the compensation of members of boards. We do not find any decisions in this state dealing directly with the question of law your letter presents, but there are decisions by foreign courts, which if followed, control our conclusion thereon.

The case of State ex rel Van Horn v. Briggs, State Auditor, 63 N. W. 206, was decided by the Supreme Court of North Dakota in 1895. Van Horn was a member of the Board of Trustees of the penitentiary of North Dakota. The capital of North Dakota was Bismark where the penitentiary was located. Van Horn lived at Hillsboro some distance from Bismark. Van Horn consumed a day or part of a day in traveling from Hillsboro to Bismark, attended a session of the trustees one day and traveled a day or part of a day in returning to Hillsboro. He traveled in the most usual and direct route from Hillsboro to Bismark. The Auditor contended the trustee was not entitled to compensation for the days spent in going to and returning from Bismark. The statute controlling the compensation of such trustees, as quoted in the opinion, reads:

"The said trustees shall be entitled to receive the sum of three dollars per day for each day employed in attendance upon said sessions, and all traveling expenses necessarily incurred therein."

Our section 13500 allows compensation for service

"\* \* \* for each day engaged in this service \* \* \* \* \*".

It would seem that the North Dakota statute allowing compensation only for 'attendance' would be stronger against the allowance of compensation for time spent in going to and from the

meeting than is our statute which allows compensation for 'service'. Disposing of the case the court at page 207 of the opinion held:

"The legislative purpose is clearly manifested that the office of a trustee shall not be a purely honorary office. The intention to compensate for their services by a per diem is clearly expressed in the statute; and we are unable to see, either in the language employed by the legislature or in reason, why members should not be compensated for all the time necessarily and actually employed in the service of the state as members of such board. Our views are strengthened by the consideration that no mileage is given to members of the board, which is often done as a compensation for time spent in traveling in the public service, as well as for disbursements therein."

Later the Supreme Court of North Dakota ruled in the case of State v. Richardson, et al, 109 N. W. 1026 that certain officers were not entitled to their per diem for time spent in going to and from meetings of the board, but in that case the statute provided mileage for the distance traveled in attending such meetings, which was held to exclude the right to per diem on account of such travel. The court at page 1029 of the opinion said:

"Provision is only made for mileage for travel. The per diem is for 'time they are necessarily employed in the duties of their office', and five cents per mile is allowed for the 'distance actually traveled in attending the meetings of the board.' "

The case of State v. Howard 74 Atl. 392, decided by the Supreme Court of Vermont, involved the same question of law presented here. The court at page 398 of the opinion said:

"The statute allowed the defendant a fixed sum per day for his services, and his necessary expenses when away from home. No question regarding time spent in the actual performance of official duties is involved. The time necessarily spent by a commissioner in traveling to and from the place of his appointment is time spent in the service of the state, so no distinction is to be made between the two classes of items under consideration. The law allows for this service and these expenses if they are necessary, and the question of necessity depends upon the facts, and the auditor is empowered to determine the facts. Whether the running time of available trains is such that the official is justified in traveling to or towards his destination the day before his services are to be rendered, or in deferring his return until the morning after they are concluded; and whether the public conveyance in some stage of his journey is of such a character that the particular official is justified in going by private conveyance; and whether in a case of this kind the circumstances were such as required that the conveyance be summoned by telephonic message - are all matters to be determined by the auditor in the proper exercise of his discretion, and his determination thereof so made will be binding on the state."

**Board of Commissioners v. Blakely** 123 Pac. 72, decided by the Supreme Court of Wyoming, presented the same question, on principle, as we have before us. The controlling statute of Wyoming provided that county commissioners should receive

"\* \* \* a per diem and compensation of five dollars for each day actually employed in the discharge of the duties of his office, and his traveling expenses, not exceeding ten cents per mile for each mile actually and necessarily traveled in going to and returning from the meetings of the board, and no other compensation whatever."

Determining the case, the court at page 77 of the opinion held:

"Coming to a consideration of our own statute, we are to determine whether it covers time that is actually taken and necessarily required to go to the county seat to attend a board meeting, and thereafter to return home. During that time is the commissioner employed in the discharge of the duties of his office? The answer to the question does not depend, we think, upon whether he may individually bind the county, or whether county business can be transacted only by the board when assembled as such. When a public officer is required by law to travel away from his home or the place of his official residence to perform an official act, such business, though more time may be necessarily occupied in such travel than in the actual transaction of the business which has required it. And we do not regard it as a misuse of language to say that all the time so occupied is employed in performing the duty imposed. It is only upon that principle that mileage or actual traveling expenses are allowed by law to a public officer."

On the same page and distinguishing between fees for official acts and the statute then under review the court further said:

"It is, of course, essential that authority for the payment of compensation by the day or otherwise for time employed in traveling upon public business or for any service by a public officer be found in the statute. The statute in question is not like one prescribing fees for particular official acts. It prescribes a daily compensation for time employed, and it was unquestionably intended that, in addition to the annual salary allowed to each commissioner, he should receive a compensation for the discharge of the duties of his office measured by the time actually and necessarily employed therein."

And on the general issue, further on page 77,

" The time employed by a commissioner in discharging his duty to attend a meeting of the board necessarily includes, not only the days upon which he attends the meeting, but as well those occupied in going to and returning from the place of the meeting. The necessity of returning is caused by the duty to attend. This is recognized by the statute, for it provides for the payment of the commissioner's actual traveling expenses incurred in going to and returning from the meetings of the board. It is not to be supposed that such expenses would have been declared a charge upon the county treasury, except upon the theory that they are incurred in the performance of a duty of the office. "

We believe it to be a rule of the federal government that, unless the statute or terms of employment expressly or by clear implication provide otherwise as to compensation, an officer or employe who is paid by the day is during his term of office, or the period of his employment, entitled to the daily pay while traveling in the performance of his duty. See *Wertz v. U.S.*, 40 Ct. Cl. 397."

The Kansas City Court of Appeals in *Holman v. City of Macon* 155 Mo. App. 398, in passing on the right of the police judge of the City of Macon to certain claimed compensation, said;

"A recognized rule of statutory construction is that a public officer can not demand any compensation for his services not specifically allowed by statute, and that statutes fixing such compensation must be strictly construed."

If the above declared principle of statutory construction applies to compensation of boards as well as to fees of officers, using the word fees in its strict sense, then construing 'service' as used in Section 13500 and as rendered by the State Board of Optometry it seems to us, in view of the above quoted

declaration of the courts, that for all practical purposes the time necessarily spent by a member of the board in going to and returning from a meeting of the board is as much a part of the service of the member of the board as is the time actually spent in and at a meeting of such board.

CONCLUSION.

The foregoing seem to be the controlling authorities on the matter at issue here, and, from which, and a construction of Chapter 101, we are of the opinion that the members of the State Board of Optometry are entitled to their per diem for the days necessarily spent in traveling to and from necessary meetings of the board, when such travel is made by the usual and most direct route.

According to the case of State ex rel. Greb v. Hurn 1 A. L. R. 274, where a statute fixes a per diem compensation, the official entitled thereto is entitled to such compensation named for every day on which he performs substantial service, although the time actually consumed was merely a fraction of a day.

Very truly yours,

GILBERT LAMB  
Assistant Attorney General

APPROVED:

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Attorney General.

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