

N.D.A.G. Letter to Backes (Feb. 13, 1990)

February 13, 1990

Mr. Richard J. Backes
Director, North Dakota
Department of Transportation
608 East Boulevard Avenue
Bismarck, ND 58505-0700

Dear Mr. Backes:

Thank you for your January 19, 1990, letter requesting an opinion concerning your authority to eliminate the payment of Transportation Department employee meal allowances incurred during the first, second, and third quarters of the day as provided for by N.D.C.C. § 44-08-04.

N.D.C.C. § 44-08-04 provides that elective and appointed officers, as well as employees and agents of this state and its agencies, may make claim for meal allowances when discharging a public duty away from their normal working and living residence for any part of any quarter of a day. The statute further provides meal allowance rates for the first three quarters of a twenty-four hour period. The statute also states that "[t]he head of any department, institution, or agency of this state may set a rate for such expenses less than those set forth in this section for any person or person under his authority."

N.D.C.C. § 24-02-07 specifically addresses the expenses of Highway (Transportation) Department employees. This statute provides that Department employees are entitled to received expenses actually and necessarily incurred in performing their duties "the amount of the expenses so allowed to be fixed and determined by the commissioner."

By the literal words of N.D.C.C. §§ 24-02-07 and 44-08-04, the commissioner of the Department of Transportation is authorized to set the amount of expense allowance rates for the first three quarters of a twenty-four hour period as the commissioner believes appropriate. However, your primary question concerns your ability to eliminate altogether the expense allowance rates for employees for the first three quarters.

Both statutes speak of a department head's ability to set an expense allowance rate which differs from that provided for by law. Neither statute speaks of a department head's ability to determine whether any expense allowance rate is to be allowed for department employees. Indeed, N.D.C.C. § 24-02-07, which allows the commissioner some variance in establishing expense allowance rates specifically mentions that employees "shall be entitled to receive their expenses actually and necessarily incurred." An interpretation of this statute allowing the commissioner to eliminate all department employee expense allowances reduces the quoted language to a nullity or a useless legislative act. The rules of statutory interpretation prohibit such a result. Apple Creek Tp. v. City of Bismarck, 271

N.W.2d 583, 587 (N.D. 1978).

Had the legislature intended department heads to determine whether expense allowances should be allowed for employees at all, it would have used a phrase similar to "if any". Thus, if a statute discussed the commissioner's ability to set a rate, if any, for those expenses incurred by department employees, the authority to eliminate all employee allowance rates would have been provided. Because the Legislature has not unequivocally authorized a department head, including the highway commissioner, to determine whether any expense allowance rate shall be available to department employees, I do not believe that you have the authority to eliminate the expense allowance payments for the first three quarters of a twenty-four hour period.

Finally, you ask what limitation exists on your authority to set the amount for expenses allowed for Transportation Department employees. Neither N.D.C.C. § 24-02-07 nor N.D.C.C. § 44-08-04 addresses the scope or extent of your ability to fix and determine expense allowance rates. Thus, I am unable to fill this void with any further guidance or standard other than the suggestion that you act in a reasonable and prudent manner in implementing this discretionary authority.

I hope this discussion is helpful for your purposes.

Sincerely,

Nicholas J. Spaeth

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