

January 10, 2025

OPINION
OF
RAÚL TORREZ
Attorney General

Opinion No. 2025-03

To: Carlos Medina, Chair of the New Mexico Music Commission

Re: Attorney General Opinion – Whether Section 18-16-3(E) precludes members of the State Music Commission from receiving reimbursement for travel to and from Commission meetings

Question

Does NMSA 1978, Section 18-16-3(E) (2009), which provides that the members of the State Music Commission (“Commission”) “shall not receive any compensation, perquisite or allowance,” preclude Members of the Commission from receiving reimbursement for travel expenses to and from Commission meetings?

Answer

No. While Section 18-16-3(E) prohibits a member of the Commission from receiving wages or pecuniary gain for their service, the statute should be read in the context of, and in harmony with, the Per Diem Mileage Act, NMSA 1978, Sections 10-8-1 through 10-8-8 (1963, as amended through 2021) (“PDMA”), which expressly allows “public officials” such as members of the Commission to be reimbursed for travel expenses. We opine that the PDMA applies to members of the Commission and authorizes them to be reimbursed for travel expenses as provided in Sections 10-8-4(A) and 10-8-4(D).

Analysis

I. Background

The Department of Cultural Affairs is an executive agency of the State of New Mexico that oversees various boards and commissions. Those boards and commissions are created by the New Mexico Legislature as codified in Chapter 18 of the New Mexico Statutes Annotated. The Music

Commission is one such commission and is overseen by the Arts Division of the Department of Cultural Affairs. NMSA 1978, § 18-16-2 (2009).

The Commission is made up of fifteen members appointed by the Governor. NMSA 1978, § 18-16-3(B) (2009). However, the Commission may also appoint its own members if necessary. *See* NMSA 1978, § 18-16-3(D) (2009). Members must be residents of New Mexico and be widely known for their professional competence and experience in the field of music. Section 18-16-3(B). The Commission is required to meet at least four times per year. Section 18-16-3(D). Given the geographic scope of the New Mexico, at least some members of the Commission are therefore likely to travel considerable distances for meetings.

The question presented is whether members of the Commission may receive travel reimbursement for attending Commission meetings, particularly considering that Section 18-16-3(E) expressly states that “[m]embers of the commission shall not receive any compensation, perquisite or allowance.”

We rely on New Mexico law governing statutory construction. When construing statutory language, the guiding principle is to determine and give effect to legislative intent. *Taylor v. Waste Management of New Mexico, Inc.*, 2021-NMSC-026, ¶ 8. The first step in the construction analysis is to consider the plain meaning of the statutory language. *State v. Adams*, 2022-NMSC-008, ¶ 10. Unless ambiguity exists, courts adhere to the plain meaning of the statutory language. *Id.*

However, where one or more provisions give rise to genuine uncertainty as to what the Legislature was trying to accomplish, ambiguity is present and requires going beyond a plain language analysis. *State v. Rivera*, 2004-NMSC-001, ¶¶ 11-12. In such instances, a court must consider a statute’s background and history while considering the statute in reference to its larger statutory scheme as well as other statutes dealing with the same general subject matter. *Id.* ¶¶ 12-13. If two related statutes appear to conflict, then a court must construe the statutes in harmony if at all possible. *Id.*; *State v. Smith*, 2004-NMSC-032, ¶ 13; NMSA 1978, § 12-2A-10(A) (1997).

II. The PDMA assists in interpreting the legislative intent of Section 18-16-3(E) because Section 18-16-2(E) is ambiguous as to the question presented.

We first attempt to resolve the question presented through a plain language analysis of Section 18-16-3(E). *See Adams*, 2022-NMSC-008, ¶ 10.

Section 18-16-3(E)’s prohibition of “compensation, perquisite or allowance” suggests that members of the Commission cannot be paid wages, receive special privileges or benefits, or obtain other pecuniary gain as a result of their service. However, reimbursement for travel expenses is not a pecuniary benefit amounting to “compensation” because it logically places an individual back in the same position they were prior to reimbursement. *See also Antillon v. New Mexico State Highway Dept.*, 1991-NMCA-093, ¶ 17 (reasoning that reimbursement for travel expenses does not economically benefit a public employee unless the amount of reimbursement is in excess of the employee’s actual expenses). Despite that, Section 18-16-3(E)’s prohibition of “perquisite” or “allowance,” could still be read to mean that the Legislature did not intend to grant members of the Commission certain reimbursements typically associated with travel expenses such as per diem

funds. Unfortunately, Section 18-16-2 does not define “compensation, perquisite or allowance” or provide helpful context through other definitions.

For these reasons, we opine that Section 18-16-3(E) presents ambiguity as to whether the Legislature intended for members of Commission to be reimbursed for travel expenses. *See Rivera*, 2004-NMSC-001, ¶¶ 11-12. Thus, we depart from a plain language analysis of Section 18-16-3(E). *See Adams*, 2022-NMSC-008, ¶ 10.

We look to the PDMA to help us ascertain what the Legislature meant when prohibiting Members from receiving “compensation, perquisite or allowance.” We do so because the PDMA predates Section 18-16-3(E) and because it governs reimbursement of travel expenses incurred by public officials, and thus can assist in construing Section 18-16-3(E). *See Rivera*, 2004-NMSC-001, ¶¶ 11-12; *Doe v. State ex rel. Governor’s Organized Crime Prevention Comm’n*, 1992-NMSC-022, ¶ 12, 114 N.M. 78 (“We presume that the [L]egislature knew about the existing law and did not intend to enact law inconsistent with any existing law”).

If (1) the PDMA applies to Commission members and also (2) authorizes reimbursing the members’ travel expenses, then we may conclude that the Legislature intended for the members to have their travel expenses reimbursed consistent with the PDMA. These questions require us to also consider (3) whether any apparent conflict between the PDMA and Section 18-16-3(E) can be reconciled. *See Smith*, 2004-NMSC-032, ¶ 13. We address each issue in turn.

III. The PDMA applies to members of the Commission.

We first consider whether the Legislature intended for the PDMA to apply to members of the Commission.

Section 10-8-2 states the “[p]urpose of the [PDMA]” is to “establish standard rates for reimbursement for travel for public officers and employees coming under the [PDMA].” NMSA 1978, § 10-8-2 (1963). The PDMA requires certain travel reimbursements for “public officers” or “public officials.” *See generally* NMSA 1978, § 10-8-4 (2021). Thus, we must consider whether Members of the Commission are “public officers” or “public officials” within the meaning of the PDMA.¹ If so, we may then conclude the Legislature intended for the PDMA to govern members of the Commission.

The PDMA defines “public officer” or “public official” to mean

every elected or **appointed officer of the state**, local public body or any public post-secondary educational institution. “Public officer” or “public official” includes members of advisory boards appointed by any state agency, local public body or public post-secondary educational institution.

NMSA 1978, § 10-8-3(H) (emphasis added).

¹ Unfortunately, Section 18-16-2 does not define or otherwise provide helpful context as to whether the members of the Commission are indeed “public officers” or “public officials.”

We rely on the broad and plain meaning of this language to opine that the PDMA applies to members of the Commission because they are “appointed” by the Governor of New Mexico, as provided in Section 18-16-3(B), to serve the State of New Mexico in an official capacity through the Music Commission, which is subject to the authority of an executive State agency.

Our conclusion is driven by the plain meaning of the terms “officer” and “official,” which mean “one who holds an office of trust, authority or command,” and “one who holds or is invested with a office,” respectively.² Members of the Commission are appointed to hold an office of trust or authority on behalf of the State. It follows that members of the Commission are subject to the PDMA and thus may be reimbursed as set forth in the PDMA.

IV. The PDMA authorizes per diem and mileage reimbursement for members of the Commission as provided in Sections 10-8-4(A) and (D), respectively.

We next consider the extent to which the PDMA allows members to be reimbursed for certain travel expenses, and, if so, what expenses.

The PDMA authorizes numerous travel reimbursements for public officers and employees and sets forth eligibility criteria. Here, the pertinent Sections are 10-8-4(A) and 10-8-4(D).

Section 10-8-4(A) provides, in pertinent part:

Notwithstanding any other specific law to the contrary and except as provided in Subsection I of this section, **every nonsalaried public officer** shall receive either reimbursement pursuant to the **provisions of Subsection K or L of this section** or per diem expenses in the following amounts for a board or committee meeting attended; provided that the officer shall not receive per diem expenses for more than one board or committee meeting that occurs on the same day; or for each day spent in discharge of official duties for travel within the state but away from the officer's home[.]

NMSA 1978, § 10-8-4(A) (emphasis added; cost schedule omitted). Section 10-8-4(A) makes clear that per diem allowances are available to “every” nonsalaried public officer “except as provided in Subsection I.”³

² *Officer*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/officer> (last accessed Jan. 7, 2025); *Official*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/official> (last accessed Jan. 7, 2025).

³ Subsection I states: “The provisions of Subsection A of this section do not apply to payment of per diem expense to a nonsalaried public official of a municipality for attendance at board or committee meetings held within the boundaries of the municipality.” NMSA 1978, § 10-8-4(I). By this plain language, Subsection A is only inapplicable to nonsalaried public officers serving in a municipal capacity. As appointees of an executive agency, members of the Commission are categorically *not* municipal public officers, so this exception does not apply.

We note that even though Section 18-16-3(E) provides that public officers serving on the Commission “shall not receive any compensation, perquisite or allowance,” the first sentence of Section 10-8-4(A) is clear that the PDMA applies to “every nonsalaried public officer” regardless of whether another statute says otherwise. Here, Commission members are indeed nonsalaried public officers. The language “notwithstanding any other specific law to the contrary” plainly means that regardless of any statute that may say otherwise, nonsalaried public officers shall receive the benefits of Section 10-8-4(A). This plain language indicates a legislative intent to reimburse members for per diem expenses as provided in the PDMA. *See also Doe*, 1992-NMSC-022, ¶ 12.

The PDMA also provides for mileage reimbursement pursuant to Section 10-8-4(D), which states:

Every public officer or employee shall receive up to the internal revenue service standard mileage rate set January 1 of the previous year for each mile traveled in a privately owned vehicle or eighty-eight cents (\$.88) a mile for each mile traveled in a privately owned airplane if the travel is necessary to the discharge of the officer’s or employee’s official duties and if the private conveyance is not a common carrier; provided, however, that only one person shall receive mileage for each mile traveled in a single privately owned vehicle or airplane, except in the case of common carriers, in which case the person shall receive the cost of the ticket in lieu of the mileage allowance.

NMSA 1978, § 10-8-4(D) (emphasis added). This Section broadly provides that “every” public officer or employee “shall” be able to claim mileage reimbursement as described therein. The plain language is clear, unconditional and requires mileage reimbursement at the rates set therein.

Following the plain language of the PDMA, we conclude that the PDMA authorizes members of the Commission, as “public officers” or “public officials,” to receive the mileage reimbursement for privately owned vehicles for travel “necessary to the discharge of the officer’s official duties” pursuant to Section 10-8-4(D). This naturally includes mileage reimbursement for driving one’s private vehicle to and from a Commission meeting. Following the plain statutory language, we also conclude that members of the Commission are eligible to claim per diem allowances as permitted in Section 10-8-4(A), which references Section 10-8-4(K) and (L).

We caution, however, that claims for per diem expenses must follow the requirements and limits set forth in detail throughout Sections 10-8-4(A), (K) and (L), in addition to any procedures or limitations in the PDMA, regulations or procedures imposed by the Department of Finance and Administration, or other agency-specific regulations concerning travel reimbursements. A per diem benefit may be deemed to stray into the realm of “compensation, perquisite or allowance” prohibited by Section 18-16-3(E) if a member is compensated beyond any necessary and actual expenses incurred. *See, e.g., Antillon*, 1991-NMCA-093, ¶ 17. In practice, it may be prudent for members to evaluate whether it is appropriate to claim per diem expenses if they have not travelled significant distances for a Commission meeting so as not to run afoul of the PDMA or Section 18-6-3(E).

V. The PDMA and Section 18-16-3(E) may be read in harmony.

Finally, we address the interplay between PDMA and Section 18-16-3(E). New Mexico law requires us to read two apparently conflicting statutes in harmony if at all possible. *See Smith*, 2004-NMSC-032, ¶ 13. Here, such harmonization is possible.

We opine that the language in Section 18-16-3(E) limiting payments to members of the Commission should not be construed as precluding members from receiving reimbursements guaranteed by the PDMA. We believe Section 18-16-3(E), when considered in context of the PDMA, is better read as broadly prohibiting the members of the Commission from profiting or gaining special pecuniary benefits as a result of their service. This prohibition can be reconciled with the guarantees of the PDMA because a member of the Commission logically does not experience pecuniary gain or special privileges simply by being reimbursed for reasonable travel expenses they incur in the course of their duties. *See also Antillon*, 1991-NMCA-093, ¶ 17.

The key to striking a balance between the PDMA and Section 18-16-3(E) is whether the claim for reimbursement is indeed reasonable and actual, and whether the PDMA (and any other agency regulation promulgated pursuant to the PDMA) has been complied with in submitting that claim. This balance is implicitly recognized by the Legislature's codification of penalties for unjust enrichment resulting from violation of the PDMA. *See NMSA 1978 § 10-8-7 (1989)* (providing penalties for those who knowingly authorize or accept payment in excess of amounts allowed by the PDMA or other applicable authority).

In addition, the Music Commission was created by the Legislature in 2009, whereas the PDMA has been codified since 1963 with multiple amendments through 2021. We glean from this history that the Legislature intended for Section 10-8-4(A) to apply to members of the Commission despite the language in Section 18-16-3(E). This is because the Legislature is presumed to have considered the PDMA when it enacted Section 18-16-3(E), and we must presume, when possible, that the Legislature did not intend to contradict or undermine existing law when passing Section 18-16-3(E). *See Doe*, 1992-NMSC-022, ¶ 12. New Mexico law supports a harmonious reading of the PDMA and Section 18-16-3(E).

Finally, the Commission's duties, as codified by the Legislature, indicate that the Legislature intended for the Commission to promote, preserve, and enrich musical culture, education, and programming in New Mexico. *See NMSA 1978, § 18-16-4 (2009)*. These duties and goals are naturally furthered by encouraging service on the Commission. Our conclusion today aligns with the Legislature's intent in creating the Commission for the common-sense reason that it may prove difficult to get the best and brightest musicians to serve as members if they have to suffer pecuniary loss to do so. *See Taylor*, 2021-NMSC-026, ¶ 8 (providing that the guiding principle of statutory construction is to effectuate the Legislature's intent).

Conclusion

While Section 18-16-3(E) prohibits a member of the Commission from receiving wages or pecuniary gain for their service, the statute should be read in the context of, and in harmony with, the Per Diem Mileage Act, NMSA 1978, Sections 10-8-1 through 10-8-8 (1963, as amended through 2021) ("PDMA"), which expressly allows "public officials" such as members of the

Commission to be reimbursed for travel expenses. The PDMA applies to members of the Commission and authorizes them to be reimbursed for travel expenses as provided in Sections 10-8-4(A) and 10-8-4(D).

We emphasize that reimbursement of travel expenses must comply with the requirements of the PDMA, and where applicable, any requirements imposed by the Department of Finance and Administration and/or agency-specific regulations governing reimbursements under the PDMA.

Please note that this opinion is a public document and is not protected by the attorney-client privilege. It will be published on our website and made available to the general public.

RAÚL TORREZ
ATTORNEY GENERAL

/s/ Alexander W. Tucker
Alexander W. Tucker
Assistant Solicitor General