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**THE JOINT LEGISLATIVE ETHICS COMMITTEE**

Advisory Opinion 96-006  
November 21, 1996

**Syllabus by the Committee:**

- (1) A member may accept the mileage allowance as provided for in R.C. 101.27 as part of the member's legislative compensation;
- (2) A member's mileage allowance may not be increased during his or her term of office;
- (3) A member may accept a mileage allowance after sharing a ride to Columbus or when the member is already present in Columbus;
- (4) A member may accept a mileage allowance for traveling to Columbus to conduct legislative business other than attendance at a floor session; and
- (5) A member may not accept a mileage allowance for a week where the member, unless excused, is not present in Columbus.

**Jurisdiction and Question Presented**

Pursuant to sections 101.34 and 102.08 of the Revised Code that direct the Joint Legislative Ethics Committee to act as an advisory body to the members and employees of the General Assembly on questions relating to ethics, conflicts of interest, and financial disclosure, the Joint Legislative Ethics Committee advises the members of the General Assembly on the

following questions: (1) May a member accept the mileage allowance as provided for in section 101.27 of the Revised Code as part of the member's legislative compensation; (2) May the mileage allowance be increased during the term of office; (3) May a member accept the full mileage allowance after sharing a ride to Columbus or where the member is already present in Columbus and therefore did not make a round-trip trip; (4) May a member accept a mileage allowance for traveling to Columbus to conduct legislative business other than attendance at floor session; and (5) May a member accept a mileage allowance for a week where the member is not present in Columbus?

#### Background

A review of the legislative history and applicable case law is necessary for a determination of these questions.

Ohio's first constitution, adopted in 1802, set forth specifically the amount of legislative salaries and created the travel allowance. Article I, Section 19 of the 1802 Constitution provided "no member of the legislature shall receive more than two dollars per day during his attendance on the legislature, nor more for every twenty five miles he shall travel in going to, and returning from, the general assembly." This constitutional provision for a travel allowance remained unchanged until 1851.

In 1851, a constitutional convention met in Columbus and adopted a new state constitution. The 1851 Constitution did not contain a specific amount for legislative compensation or a travel allowance but stated that "the members and officers of the general assembly shall receive a fixed compensation, to be prescribed by law, and no other allowance or perquisites, either in the payment of postage or otherwise; and no change in their compensation shall take effect during their term of office." Art. II, Sec. 31. This section remains in force today.

The 50th General Assembly, the first to hold session under the 1851 Constitution, enacted the first statute to provide for a travel allowance. The Act, adopted March 3rd, 1852, was modeled after the 1802 constitutional provision, and set forth a legislative salary of four dollars

for each day's attendance during the session of the General Assembly "and also four dollars for every twenty-five miles distance by the most direct route of public travel from his place of residence, in traveling to and returning from the seat of the General Assembly; provided, that no route on which there shall not be some mode of public conveyance for travelers or passengers, shall be considered as a public traveled route." 50 v 117.

In 1862, the 55th General Assembly reduced the salary to three dollars per day and the travel allowance to three dollars per twenty-five miles. Act of May 1, 1862, (59 v 114). The 57th General Assembly in 1866 inserted the word "actual" before attendance, therefore requiring "actual attendance" at the session for payment of the salary, which was increased to five dollars per day. The travel allowance remained unchanged. Act of April 2, 1866, (63 v 65).

The enactment of section 40 of the Revised Statutes in 1880 marked the first adoption of a biennial salary and a per mile travel allowance:

Section 40. Each member of the general assembly shall receive for his term of office the sum of twelve hundred dollars, one-half thereof to be paid each year, in monthly installments, not exceeding one hundred and fifty dollars; provided, that there shall be paid at the close of each session the amount due for that year, and also twelve cents per mile each way for traveling from and to his place of residence, by the most direct route of public travel to and from the seat of government, but if any member is absent without leave, or is not excused on his return, there shall be deducted from his compensation the sum of five dollars for each days' absence. 77 v 86.

No amendment to the mileage allowance was enacted until 1906 when the 77th General Assembly increased legislative salaries to \$1000 per year and restricted the mileage to "twelve cents per mile each way for traveling not exceeding twice per month from and to his place of residence. . . ." (Emphasis added.)

This mileage allowance of twelve cents a mile twice a month was further amended in 1909 by the 78th General Assembly to two cents per mile each way "once a week" during the

session. 100 v 53. After the adoption of the General Code in 1910, section 50, formerly Revised Statutes section 40, was redrafted and the salary and mileage provisions were split into separate paragraphs. 102 v 274.

In 1919, the 83rd General Assembly adopted a new mileage allowance, based upon the rate of railroad transportation: "Each member shall receive the legal rate of railroad transportation each way for mileage once a week during the session from and to his place of residence, by the most direct route of public travel to and from the seat of government, to be paid at the end of each regular or special session." 108 v Pt. I 262.

Railroad rates remained the measure of the mileage allowance from 1919 until 1939 when the 93rd General Assembly enacted a statute which is the basis for the present mileage allowance: "Each member shall receive a travel allowance of five cents a mile each way for mileage once a week during the session from and to his place of residence, by the most direct highway route of public travel to and from the seat of government, to be paid at the end of each regular or special session." 118 v 659. This statute contains the first usage of the term "travel allowance."

Sections 50 of the General Code and 101.27 of the Revised Code, pertaining to the mileage allowance, have been amended numerous times since 1939 to increase the amount of the mileage allowance, but no substantive changes in the language of the sections were made. Currently, R.C. 101.27 provides:

Each member shall receive a travel allowance of twenty and one-half cents a mile each way for mileage once a week during the session from and to his place of residence, by the most direct highway route of public travel to and from the seat of government, to be paid quarterly on the last day of March, June, September, and December of each year.

\* \* \*

If a member is absent without leave, or is not excused on his return, there shall be deducted from his compensation twenty dollars for each day's absence.

The single challenge to the constitutionality of the mileage allowance was decided in Harbage v. Ferguson (1941), 68 Ohio App. 189. The plaintiff argued in Harbage that the language in section 50 of the General Code which provided for payment of a "travel allowance" was in conflict with Article II, Section 31 of the Ohio Constitution, which prohibits the payment of an "allowance or perquisite" to members of the General Assembly. The court held the statute not to be in conflict with the Constitution:

The Legislature seems to have been careless in the use of the word 'allowance', which is definitely prohibited by the Constitution. However, we are of the opinion that in spite of the carelessness in the drafting of this act we may consider 'travel allowance' as if it were a part of the members' compensation. In doing this the first difficulty we meet is that the Constitution provides that it must be fixed, ...

Is compensation of \$2,000 plus mileage, which of necessity differs with the distance that each member must travel 'from and to his place of residence', a fixed compensation?

If this provision gives a different compensation to the different members of the Legislature, it may be difficult to say how it can be reconciled with constitutional provisions. However, we are of the opinion that the provision is of uniform operation as it appeals uniformly to all members who are equidistant from Columbus. In view of the duty imposed upon us to sustain an act of the Legislature, where not hopelessly repugnant to the Constitutional provisions, we arrive at the conclusion that if we were wrong in our former statement that the mileage is but a reimbursement, we may still preserve the constitutionality of the act by holding that the provisions as to the mileage is in fact a part of the compensation, and the fact that the final payment to a member of the Legislature shall depend upon the distance from which he may live to the seat of government does not render the act unconstitutional. Id. at 201, 202.

Consideration of the Issues

Can a member accept the mileage allowance as provided for in R.C. 101.27 as part of the member's legislative compensation?

A member of the General Assembly may accept the mileage allowance as a part of his legislative compensation. The allowance has been a part of legislative compensation since Ohio's admission to statehood and permits, through a uniform application of the statute, a recognition that the cost of transportation to and from the General Assembly varies greatly, depending upon the distance of the member's home from Columbus. Moreover, the Ohio Supreme Court has upheld the constitutionality of the allowance in Harbage vs. Ferguson, supra.

Can the mileage allowance be increased during the term of office?

It is the law of Ohio that the mileage allowance may not be increased during the present term of office. Since the courts have held the mileage allowance is a part of the compensation of members, an increase during the present term of office would be in violation of Article II, Section 31 of the state constitution which states:

The members and officers of the general assembly shall receive a fixed compensation, to be prescribed by law, and no other allowance or perquisite, either in the payment of postage or otherwise, and no change in their compensation shall take effect during their term of office.

Can a member accept the full mileage allowance after sharing a ride to Columbus or where the member is already present in Columbus and therefore did not make a round-trip trip?

It is the opinion of the Committee that a member may accept the mileage allowance after sharing a ride to and from Columbus or where the member is already present in Columbus. The allowance was not intended as a strict reimbursement for out-of-pocket travel expenses, but rather a part of the fixed compensation of a member. The mode of travel to and from Columbus bears no relationship to the acceptance of the mileage portion of the compensation; a member

may travel as expensively or inexpensively as he or she wishes, but the compensation for travel remains the same.

Can a member accept a mileage allowance for traveling to Columbus to conduct legislative business other than attendance at a floor session?

It is the opinion of the Committee that a member may accept a mileage allowance for traveling to and from Columbus to conduct legislative business other than attendance at a floor session during the legislative session, which extends from the convening of the Assembly to its adjournment *sine die*. The role of the modern legislator has changed greatly over the years; presently many members are engaged in the conduct of legislative duties virtually all year. We recognize that as legislative responsibilities and constituent expectations have increased, presence in Columbus is sometimes required although floor sessions may not be held. As long as the member has traveled to Columbus to perform duties incident to his or her office, he or she may request and accept a mileage allowance.

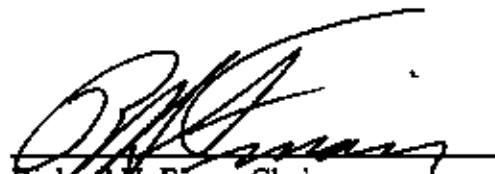
Can a member accept a mileage allowance for a week where the member is not present in Columbus?

It is the opinion of the Committee that a member, unless excused, must actually be present in Columbus during a given week in order to receive the mileage allowance. Present law provides for a reduction of a member's salary for "unexcused absences" from session. The same principle should apply to the mileage allowance. Therefore, the Committee suggests that the Senate Clerk and Executive Secretary establish procedures to withhold payment of the mileage allowance when a member is absent from session for an entire week.

This advisory opinion is based on the facts presented. It is limited to questions arising under Chapter 102, and Sections 2921.42 and 2921.43 of the Revised Code and does not purport to interpret other laws or rules.

Conclusion

Accordingly, the Committee finds and the members and employees of the General Assembly are so advised (1) A member may accept the mileage allowance as provided for in R.C. 101.27 as part of the member's legislative compensation; (2) A member's mileage allowance may not be increased during his or her term of office; (3) A member may accept a mileage allowance after sharing a ride to Columbus or when the member is already present in Columbus; (4) A member may accept a mileage allowance for traveling to Columbus to conduct legislative business other than attendance at a floor session; and (5) A member may not accept a mileage allowance for a week where the member, unless excused, is not present in Columbus.



Richard H. Finan, Chairman  
Joint Legislative Ethics Committee