

## LEGISLATIVE EXPENSE REIMBURSEMENT POLICY

This memorandum addresses the question of the applicable policy for travel expense reimbursement for the legislative branch. A copy of Office of Management and Budget *Policy 513 - Lodging Receipts and Payments*, dated December 6, 2001, is attached to this memorandum. The policy provides, in part:

Only receipts from bona fide lodging establishments should be accepted for reimbursement by the agency. Receipts from relatives for the provision of lodging services will not be acceptable. The receipt must be the official receipt from the lodging establishment and not a charge slip from a credit card system.

The policy defines bona fide lodging establishments as hotels, motels, college dormitories, hospitals, military facilities, and similar institutions.

Another issue raised by the policy is the provision that "a lodging facility should not be paid directly by the agency" unless the Office of Management and Budget has obtained a sales tax exemption from the destination state or unless the lodging is obtained at a reduced cost as part of a combination of travel-related expenses purchased together.

These provisions raise issues because many legislators rent houses, apartments, and condominiums from private parties and some legislators are reimbursed for lodging based on receipts from relatives or other individuals. In addition, hotels have sometimes been reimbursed directly when the rooms must be guaranteed and paid for before it is known which legislators will be attending a function, e.g., presidential inaugurations.

### CONSTITUTIONAL PROVISION

Article XI, Section 26, of the Constitution of North Dakota provides:

The legislative, executive, and judicial branches are *coequal* branches of government. Elected members and officials of each branch shall receive as compensation for their services only such amounts as may be specifically set by law. Payment for necessary expenses shall not exceed those allowed for other state employees. (emphasis supplied)

This section of the constitution formalizes the doctrine of separation of powers, with each branch supreme in its own sphere. *State v. Hanson*, 558 N.W.2d 611 (N.D. 1996).

### STATUTORY PROVISIONS

North Dakota Century Code (NDCC) Section 44-08-03 provides no elective or appointive officer or employee of the state may claim or receive public funds for traveling expenses while engaged in public business in an amount in excess of that allowed by law for such travel. Section 44-08-04(1) provides each elective or appointive officer or employee of the state "may make claim for meals and lodging while engaged in the discharge of a public duty away from the claimant's normal working and living residence for all or any part of any quarter of a day. . . . Reimbursement is allowed only for overnight travel or other travel, away from the normal place of employment, for four hours or more. Verification of expenses by receipt is required only for lodging expenses." Reimbursement for the fourth quarter "must be the actual lodging expenses not to exceed forty-five dollars plus any additional applicable state or local taxes." Under Section 44-08-04(6), the allowance for lodging outside the state is the actual lodging expense. Under Section 44-08-04(7):

A department, institution, or agency of this state may set a rate for travel expenses outside the state less than those set forth in this section. Verification of any *other* type of expense not prescribed by this section must be as prescribed by the office of the budget except no receipt may be required for taxi or cab fares of ten dollars or less. The office of management and budget shall disapprove any claim it determines to be in error or unlawful or not within the limits of legislative appropriations. (emphasis supplied)

Under NDCC Section 54-03-20, each member of the Legislative Assembly is entitled to receive reimbursement for lodging, subject to a maximum of \$650 per calendar month for lodging in state, at the rates and in the manner provided in Section 44-08-04 for each calendar day during the period of any organizational, special, or regular session.

North Dakota Century Code Section 44-08-04.4 provides:

Any travel expense, including airline tickets and registration fees, that must be incurred more than five weeks in advance of approved travel of any elected or appointed officer, employee, representative, or agent of this state to meet necessary deadlines or to obtain low rates must be purchased

prepaid by the state. No state entity may require an officer, employee, representative, or agent of the state to pay these expenses.

North Dakota Century Code Section 44-08-04.5 requires the Office of Management and Budget to seek to obtain sales tax exemptions for state employee travel lodging expense from all other states and the District of Columbia. A state agency may arrange with an out-of-state lodging provider to have the agency prepay the lodging expense or to have a lodging expense directly billed to the agency and obtain the benefit of the sales tax exemption. If a state agency makes out-of-state travel plans involving a lodging expense when the lodging expense may be obtained at a reduced cost because it is part of a combination of travel-related expenses purchased together, the agency may arrange with the lodging provider or travel agency to have a lodging expense prepaid by the agency or billed directly to the agency.

North Dakota Century Code Section 54-14-07 provides, in part:

In order to ensure that sufficient information is provided *to verify claims and determine the exact purpose of expenditures*, the office of the budget shall set policies which it deems necessary for an adequate accounting and shall direct the preparation of standard forms or vouchers upon which claims against any public fund must be submitted. (emphasis supplied)

## **APPLICATION OF POLICIES**

### **Legislative Session Expense Reimbursement Policy**

Article XI, Section 26, of the Constitution of North Dakota was approved at the June 1982 primary election. In 1985 the Legislative Assembly amended NDCC Section 54-03-20 to authorize legislators to receive up to \$600 per month as reimbursement for lodging. Reimbursement was made under the only established policy at that time, which was the policy established by the Office of Management and Budget with respect to state employees who rent apartments while away from their usual work locations for extended periods of time. Several questions arose after the 1985 legislative session, however, as to the reimbursement of items such as utilities, furniture rental, and repairs. The Legislative Council staff had followed the Office of Management and Budget policy, and legislators were reimbursed for what the executive branch policies identified as lodging expenses, including utilities and furniture rentals. The Legislative Council referred the expense reimbursement issue to the Legislative Procedure and Arrangements Committee (the predecessor to the Legislative Management Committee) during the

1985-86 interim. In 1986 the committee recommended a policy similar to that followed in 1985 which included utilities and furniture rental, but which also included repairs (except for repairs for damage outside a legislator's tenancy) as reimbursable lodging expenses. This policy has been recommended by the Legislative Management Committee and adopted by the Legislative Council for reimbursing lodging expenses for every legislative session since then.

Thus, the legislative branch has recognized Office of Management and Budget policies but has "revised" the policies when appropriate to recognize the uniqueness of the legislative branch, in accordance with the separation of powers provision of Section 26 of Article XI.

### **Legal Effect of Rules**

Notwithstanding the ability of the legislative branch to establish its own policy, an issue may be raised as to the legal effect of the policy adopted by the Office of Management and Budget. The general statutory authority of state agencies to adopt rules is provided by NDCC Chapter 28-32, the Administrative Agencies Practice Act. Under Section 28-32-01, a rule is defined as an agency's statement of general applicability which implements or prescribes law or policy or the organization, procedure, or practice requirements of the agency. Under Section 28-32-06, upon becoming effective, rules "have the force and effect of law until amended or repealed by the agency, declared invalid by a final court decision, suspended or found to be void by the administrative rules committee, or determined repealed by the office of the legislative council because the authority for adoption of the rules is repealed or transferred to another agency." The significance of having the force and effect of law is that a valid rule is "binding upon all persons, and on the courts, to the same extent as a statute." 2 Am. Jur. 2d, Administrative Law, Section 160.

### **Legislative Versus Interpretive Rules**

Courts often distinguish legislative rules and interpretive rules. A "legislative" rule is issued by an agency in compliance with statutory procedural requirements such as public notice and hearings before adoption. An "interpretive" rule is a statement of what an agency believes a statute means, a clarification or explanation of law rather than a substantive modification, and a guide to an administrative agency in the performance of its duties, until otherwise directed by court decisions. Agency manuals, guidelines, and memoranda may be construed to be interpretive rules. 2 Am. Jur. 2d, Administrative Law, Section 161.

The United States Supreme Court has recognized a distinction between legislative and interpretive rules at the federal level in *Skidmore v. Swift and Company*, 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124 (1944) (interpretive rules are not binding on a reviewing court

but serve only as a source of guidance) and in *Martin v. Occupational Safety and Health Review Commission*, 499 U.S. 144, 111 S. Ct. 1171, 113 L. Ed.2d 117 (1991) (interpretive rules are not entitled to the same deference as norms that derive from the exercise of delegated lawmaking powers).

State courts have also distinguished legislative from interpretive rules:

1. Interpretive rules only interpret the statute to guide the administrative agency in the performance of its duties until directed otherwise by decisions of the courts (*Waverly Press v. Department of Assessment and Taxation*, 539 A.2d 223 (Md. 1988)).
2. Agencies may adopt internal policies for carrying out their duties; however, these policy statements do not have the legal force of a statute or regulation (*Town of Northbridge v. Town of Natick*, 474 N.E.2d 551 (Mass. 1985)).
3. A statement of policy does not have the force of law, is merely interpretive in nature, and is only persuasive so long as it represents an accurate interpretation of the relevant statute or other authorities from which it is derived (*Shenango Township Board of Supervisors v. Pennsylvania Public Utilities Commission*, 686 A.2d 910 (Pa. 1996)).
4. Legislative rules are those affecting private rights, privileges, or interests in what amounts to a legislative act. Legislative rules have the force of law. Interpretive rules, on the other hand, do not create rights but merely clarify an existing statute or regulation. Because they only clarify existing law, interpretive rules need not go through the legislative authorization process. Although they are entitled to some deference from the courts, interpretive rules do not have the force of law nor are they irrevocably binding on the agency or the court. (*Appalachian Power Co. v. Tax Dept.*, 466 S.E.2d 424 (W.Va. 1995)).
5. Legislative rules are promulgated pursuant to specific statutory authority provided by the legislature and have the force and effect of law and a presumption of validity attached to them. Interpretive rules are not specifically authorized by legislative enactment but are promulgated by an administrative agency for the purposes of guidance and definition, and enjoy no presumption of validity, and a court considering enforcement of interpretive rules may substitute its own judgment for that of the administrative agency. (*Great American Nursing Centers, Inc. v. Norberg*, 567 A.2d 354, (R.I. 1989)).

This concept is indirectly recognized in NDCC Section 28-32-01, which excludes from the definition of rule any material, such as a guideline, interpretive statement, statement of general policy, manual, brochure, or pamphlet, which is explanatory and not intended to have the force and effect of law.

The North Dakota Supreme Court has ruled that an "informal policy" or administrative construction of a statute by the agency administering the law is entitled to "deference," "appreciable deference," or "some weight" if that interpretation does not contradict clear and unambiguous statutory language. *Western Gas Resources, Inc. v. Heitkamp*, 489 N.W.2d 869 (1992); *Schaefer v. Job Service North Dakota*, 463 N.W.2d 665 (1990); *True v. Heitkamp*, 470 N.W.2d 582 (1991); *Gofor Oil, Inc. v. State*, 427 N.W.2d 104 (1988).

An additional issue is whether NDCC Chapter 28-32, and the deference entitled to rules adopted pursuant to that chapter, applies to the policy in question. Although Section 28-32-01 defines an agency as each administrative unit of the executive branch of state government, the Office of Management and Budget is excluded from the definition except with respect to rules relating to its risk management motor vehicle accident review board, the Capitol grounds, Central Personnel, and state purchasing practices. With regard to the question of the status of rules adopted by agencies that are not subject to Chapter 28-32, it appears the most significant decision of the North Dakota Supreme Court is *Jensen v. Little*, 459 N.W.2d 237 (1990). In that decision, a Penitentiary inmate challenged the validity of the Penitentiary drug testing program and penalties as being adopted in violation of the Administrative Agencies Practice Act. The Supreme Court observed that the Department of Corrections and Rehabilitation was at that time a part of the Office of the Director of Institutions (the department became independent pursuant to 1991 legislation) and that the Director of Institutions was excluded from the definition of administrative agency and not subject to the Administrative Agencies Practice Act under Section 28-32-01. Although the court did not directly address the effect of rules adopted by an agency outside the Administrative Agencies Practice Act, and in a footnote urged the director and warden to adopt more formal approval procedures for Penitentiary rules to diminish future challenges to the rules, the court tacitly upheld the Penitentiary rules by allowing the penalty to stand.

Thus, it would appear that rules adopted by an agency exempt from the Administrative Agencies Practice Act have been upheld, although a court has not stated whether these rules have "the force and effect of law."

## CONCLUSION

North Dakota Century Code Section 44-08-04 requires lodging expenses to be verified by receipt in

order to be reimbursed. Verification of any other type of expense not prescribed by Section 44-08-04 must be as prescribed by the Office of the Budget. The section, however, does not specify the type of receipt or the type of entity for which a receipt must be obtained. The language, "any other type of expense," would appear to apply to an expense other than a lodging expense because the section provides for lodging expense verification. Under Section 54-14-17, any policy adopted by the Office of the Budget would presumably be that necessary for adequate accounting. With respect to whether the policy adopted by the Office of Management and Budget with respect to lodging receipts and payments applies to all branches of government, Section 26 of Article XI specifically provides the three branches of government as coequal entities. Each branch of government is a separate and coequal entity. One branch may decide to follow policies followed by another branch but is not constitutionally required to do so except as specifically required in the constitution. The limit in Section 26 is that payment for necessary expenses of elected members and officials of each branch "shall not exceed those allowed" for other state employees.

Thus, although *Policy 513 - Lodging Receipts and Payments* may be used as a guide in preparing

vouchers for the legislative branch, a policy could be adopted for the legislative branch that does not go beyond the statutory requirement for "a receipt" for lodging expenses. In addition, the allowance for direct billing could be made as long as there is no violation of applicable statutory provisions, e.g., NDCC Section 44-08-04.4 allows direct billing for certain travel expenses that must be incurred more than five weeks in advance of approved travel to meet necessary deadlines or to obtain low rates, and Section 44-08-04.5 allows direct billing to obtain a sales tax exemption or to obtain a reduced cost when combined with other travel arrangements purchased together. A suggested policy could be:

A receipt for lodging must be provided for reimbursement. Lodging may be provided by an individual or establishment. Direct payment for lodging may be made as provided by statute. In those instances not covered by statute, direct payment may be made as authorized by the chairman of the Legislative Council to ensure adequate lodging arrangements are available.

ATTACH:1