



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

April 24, 1997

Mr. John P. Maline  
Executive Director  
Executive Council of Physical Therapy  
and Occupational Therapy Examiners  
333 Guadalupe, Suite 2-510  
Austin, Texas 78701-3942

Letter Opinion No. 97-045

Re: Per diem compensation and reimbursement of travel expenses for members of the Executive Council of the Physical Therapy and Occupational Therapy Examiners, Texas Board of Occupational Therapy Examiners and the Texas Board of Physical Therapy Examiners (ID# 38787)

Dear Mr. Maline:

You ask generally about the per diem compensation and reimbursement of travel expenses for members of the Executive Council of Physical Therapy and Occupational Therapy Examiners, as well as for the members of the Texas Board of Occupational Therapy Examiners and the Texas Board of Physical Therapy Examiners.

You first ask whether members of the Executive Council of Physical Therapy and Occupational Therapy Examiners (the "council"), other than the presiding officer, are entitled to a compensatory per diem<sup>1</sup> as an Occupational Therapy or Physical Therapy Examiners' Board member when attending council meetings. The legislature created the council in 1993.<sup>2</sup> The council is comprised of two members from each of the Texas Board of Occupational Therapy Examiners (the "OT board") and the Texas Board of Physical Therapy Examiners (the "PT board") and a member appointed by the governor.<sup>3</sup> Members of the council who are also members of the PT board or OT board are appointed to the council by their respective boards.<sup>4</sup> The council member appointed by the governor

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<sup>1</sup>You ask whether the members may receive a "per diem." Based on the context of your question and the fact that members of the Texas Board of Physical Therapy Examiners (the "PT board") and the Texas Board of Occupational Therapy Examiners (the "OT board") under their respective statutes are not entitled to meals and lodging, it is assumed that your question relates to compensatory per diem.

<sup>2</sup>See Act of May 19, 1993, 73d Leg., R.S., ch. 352, § 1.01, 1993 Tex. Gen. Laws 1578.

<sup>3</sup>V.T.C.S. art. 4512c-1, § 2(a), (b).

<sup>4</sup>*Id.* § 2(b).

serves as the presiding officer of the council.<sup>5</sup> The council's enabling statute provides as follows with respect to compensation and reimbursement of expenses:

The presiding officer of the executive council is entitled to a per diem as set by the General Appropriations Act for each day that the presiding officer engages in the business of the executive council. Other members of the executive council may not receive compensation for service on the council. A member may not receive any reimbursement for travel expenses, including expenses for meals and lodging, other than transportation expenses as provided by the General Appropriations Act.

V.T.C.S. art. 4512e-1, § 3(b).

By the terms of section 3(b) of article 4512e-1, receipt of compensatory per diem for service on the council by other than the presiding officer is expressly prohibited. We believe, however, that those council members who are also members of either the PT or OT board are entitled to a compensatory per diem for service to their respective board when attending council meetings. We first examine the PT and OT board statutory provisions dealing with compensation. A member of the PT and OT board is entitled to a "per diem as set by the General Appropriations Act for each day that the member engages in the *business of the board*."<sup>6</sup> The term "board" in each of these statutes is defined as the PT and OT board,<sup>7</sup> respectively. Neither the language of the PT nor the OT board statute indicates that *business of the board* encompasses service on the council.<sup>8</sup> It is our view, however, that *business of the board* in each case does include service on the council based on the function and composition of the council which we examine next. Both the PT and OT boards were subject to the Sunset Act and being abolished September 1, 1993, unless continued by the legislature.<sup>9</sup> The Sunset Advisory Commission recommended abolishing the two boards and forming a combined Texas State Board of Physical Therapy Examiners and the Texas Advisory Board.<sup>10</sup> The legislature, however, retained the two separate boards and instead created the council to oversee and administer the PT and OT board

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<sup>5</sup>*Id.* § 2(c).

<sup>6</sup>V.T.C.S. art. 4512e, § 2A, art. 8851, § 3A(b) (emphasis added).

<sup>7</sup>*Id.* art. 4512e, § 1(15), art. 8851, § 2(4).

<sup>8</sup>*See generally id.* art. 4512e, art. 8851.

<sup>9</sup>*See id.* art. 4512e, § 2(g), art. 8851, § 3(g), amended by Act of May 19, 1993, 73d Leg., R.S., 352, § 4.02, 1995 Tex. Gen. Laws 1578, 1607.

<sup>10</sup>*See* House Comm. on Public Health, Bill Analysis, S.B. 690, 73d Leg., R.S. (1993) at 1 (*see* "Background").

statutes.<sup>11</sup> As part of this reorganization, a number of functions required of the PT and OT boards were transferred to and are now performed by the council.<sup>12</sup> Moreover, as indicated previously, board members serving on the council do so by virtue of being a member of the respective OT or PT board.<sup>13</sup> Thus, service on the council is an additional duty of office imposed on members of the PT and OT boards to effectuate the respective PT and OT board statutes.<sup>14</sup>

Your next series of questions relate to the preemptive effect of Government Code sections 659.031 through 659.033. Specifically, you first ask whether the reimbursement provisions of the PT board statute have been superseded by sections 659.031 - .033 such that PT board members are authorized to receive reimbursement for travel expenses<sup>15</sup> in accordance with the current General Appropriations Act. You additionally inquire whether the OT board and the council statutes have been similarly preempted by sections 659.031 - .033 with respect to compensation and reimbursement of expenses.

The legislature, in an effort to standardize the per diem allowances for all state boards and commissions, adopted in 1981 an omnibus per diem statute, V.T.C.S. article 6813f, the predecessor to Government Code sections 659.031 - 659.033.<sup>16</sup> Sections 659.031 - .033, containing substantially the same language as the originally enacted article 6813f, provide as follows:

#### Section 659.031. Definition

In this subchapter, "state board" means a board, commission, committee, council, or similar agency in the executive or judicial branch of state government that is composed of two or more members.

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<sup>11</sup>*Id.* at 1 ("The purpose of this bill is to maintain two separate policy boards that regulate the practice of physical therapy and occupational therapy, [and] to create an executive council to oversee the boards . . ."); *see also* V.T.C.S. art. 4512e-1, § 10.

<sup>12</sup>*See* V.T.C.S. art. 4512e-1, §§ 10 - 16; *see also* Act of May 30, 1993, 73d Leg., R.S., ch. 352, §§ 2.02 - 4.01, 1993 Tex. Gen. Laws 1578, 1584-1607.

<sup>13</sup>*See* V.T.C.S. art. 4512e-1, § 2(a), (b).

<sup>14</sup>*Id.*; *cf.* Attorney General Opinions DM-55 (1991) at 2; JM-903 (1988) at 3-4.

<sup>15</sup>You ask whether PT board members are authorized to "receive travel expenses and compensatory per diem as stated in the biannual [*sic*] Appropriations Act?" Since the PT board's statute already authorizes the payment of compensatory per diem as set by the general appropriations act, we understand your inquiry to be with respect to the travel expenses not authorized by article 4512e.

<sup>16</sup>*See* Act of May 31, 1981, 67th Leg., R.S., ch. 428, 1981 Tex. Gen. Laws 1840, *repealed by* Act of May 4, 1993, 73d Leg., R.S., ch. 268, § 46(1), 1993 Tex. Gen. Laws 583, 986.

**Section 659.032. Per Diem Entitlement**

(a) A member of a state board is entitled to a per diem in an amount set by the General Appropriations Act for the member's service on the board.

(b) This section does not apply to a member of the legislature who serves on a board by virtue of the member's office as a legislator.

**Section 659.033. Statutory Per Diem Suspended**

(a) A law setting the amount of per diem for members of a state board is suspended to the extent of conflict with this subchapter.

(b) The law setting the amount of per diem for a member of a state board is not suspended if the General Appropriations Act does not set the amount of per diem to which the member is entitled.

(c) A law setting a limit on the number of days for which a state board member is entitled to a per diem is not suspended by this subchapter.

**Gov't Code §§ 659.031 - .033.**

The appropriations act for the current biennium sets forth the following per diem allowances:

**Sec. 4. Per Diem of Board or Commission Members.**

1. As authorized by Section 659.032, Government Code, the per diem of state board and commission members shall consist of (1) compensatory per diem, if specifically authorized by law, at \$30 per day; (2) reimbursement of actual expenses for meals and lodging not to exceed \$80 per day when traveling within the State of Texas and reimbursement of actual expenses for meals and lodging when traveling outside of the State of Texas and in an amount not to exceed the rates specified in Sections 15.3 and 15.4 of this article; and (3) reimbursement of transportation and incidental expenses at the rates specified in this Act for state employees.
2. If a law enacted after former Article 6813f, V.T.C.S., authorizes per diem for members of a particular state or commission, but does not specify the amount of the per diem, then the amount of the per diem shall be as listed in the preceding subsection.

General Appropriations Act, 74th Leg., R. S., ch. 1063, art. IX, § 4, 1995 Tex. Gen. Laws 5242, 6062.

Section 2A of article 4512e, pertaining to the PT board, effective September 1, 1993, provides as follows:

A member of the board is entitled to a per diem as set by the General Appropriations Act for each day that the member engages in the business of the board. A member may not receive any reimbursement for travel expenses, including expenses for meals and lodging, other than transportation expenses as provided by the General Appropriations Act.

V.T.C.S. art. 4512e, § 2A. Prior to 1993, the applicable compensation section, as amended in 1981,<sup>17</sup> read as follows:

Each member of the board is entitled to a per diem as set by legislative appropriation for each day that the member engages in the business of the board. A member may not receive any compensation for travel expenses, including expenses for meals and lodging, other than transportation expenses. A member is entitled to compensation for transportation expenses as provided by the General Appropriations Act.

V.T.C.S. art. 4512e, § 5(a), *repealed by* Act of May 19, 1993, 73d Leg., R.S., ch. 352, § 4.02(1), 1995 Tex. Gen. Laws 1578, 1607. The allowance for food and lodging provided by Government Code sections 659.031 - .033 in conjunction with the current appropriations act conflicts with the provision of the PT board's enacting statute prohibiting the receipt of reimbursement for meals and lodging, and gives rise to the present question with regard to preemption.

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<sup>17</sup>Prior to 1981, section 5(a) of article 4512e, *amended by* Act of June 1, 1981, 67th Leg., R.S., ch. 779, § 1, 1981 Tex. Gen. Laws 2936, 2939, provided that:

The members of the board shall receive a per diem fixed by the board, not to exceed \$30 per day for each day they are actually engaged in the work of the board. The members shall be reimbursed for all actual and necessary expenses incurred in the performance of the duties required by this Act.

The 1981 amendment prohibiting reimbursement of any travel expenses other than for transportation was approved on June 17, 1981 and became effective September 1, 1981. The omnibus per diem statute was passed May 31, 1981 with an effective date of August 30, 1981. The 1981 amendment would arguably have prevailed over the omnibus statute until 1983 when the omnibus per diem statute was again substantively amended.

In 1985, the Attorney General stated the following with respect to the preemptive operation of the omnibus statute and the General Appropriations Act:

[T]he basic preemptive effect of article 6813f must depend primarily upon when it was enacted. As a general rule, when two statutes deal with the same subject, the most recently enacted statute prevails. Consequently, a statute which is passed subsequent to article 6813f and which concerns the amount of per diem a particular board's members are entitled to receive would create an exception to article 6813f with regard to that board or commission.

Attorney General Opinion JM-382 (1985) at 7. Consequently, whether the provisions of sections 659.031 - 659.033 supersede section 2A of article 4512e depends on which of the statutes was enacted most recently. In this regard, we note that even a slight amendment to a statute, originally enacted before the omnibus statute, serves to preempt sections 659.031 - .033 if such amendment is substantive and adopted after the enactment of the omnibus per diem statute. In 1988, the Attorney General determined that a 1985 amendment to the statute providing per diem for members of the Texas Board of Irrigators reflected a legislative intent to reinstate actual travel expenses authorized by an earlier provision and prevailed over the omnibus per diem statute.<sup>18</sup> The amendment in question replaced a \$25 a day compensatory per diem provided for in the original statute with a reference to the General Appropriations Act but retained the exact language of the prior statute with respect to actual expenses.<sup>19</sup> The Attorney General concluded that the amendment reenacted authorization of actual expenses because the statutory reference to the General Appropriations Act eliminated any argument that the legislature was unaware of the appropriations act and the conflict between the provision of the appropriations act and that of the Board of Irrigators statute.<sup>20</sup>

Since its adoption in 1981, the omnibus per diem provision was last substantively amended in 1983.<sup>21</sup> The only other change made to the omnibus statute thereafter was its recodification in 1993 as part of the nonsubstantive codification of the executive branch statutes as the Government Code.<sup>22</sup> The 1993 change to the omnibus per diem statute does not constitute a reenactment of the omnibus statute since the legislature did not intend to substantively change the law.<sup>23</sup>

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<sup>18</sup>Attorney General Opinion JM-888 (1988).

<sup>19</sup>*Id.* at 2.

<sup>20</sup>*Id.* at 3-4.

<sup>21</sup>See Act of May 30, 1983, 68th Leg., R.S., ch. 761, § 1, 1983 Tex. Gen. Laws 4571.

<sup>22</sup>See Act of May 4, 1993, 73d Leg., R.S., ch. 268, § 1, 1993 Tex. Gen. Laws 583, 703.

<sup>23</sup>*Id.*; see also Gov't Code § 323.007(a), (b).

With respect to the PT board, section 2A was added to article 4512e in 1993 as part of the legislation continuing<sup>24</sup> and modifying the PT board as well as the OT board and creating the council.<sup>25</sup> Unlike the per diem statute for the Board of Irrigators, however, the only change to the PT board provision in 1993 was to replace compensatory per diem set by *legislative appropriation* with reference to the *General Appropriations Act*. It is unclear from simply examining the language of the statute, whether the legislature intended to make a substantive change in 1993<sup>26</sup> and, thereby override the omnibus per diem statute and the appropriations act for the biennium<sup>27</sup> allowing reimbursement for meals and lodging. The legislative history of the PT board statute and the circumstances of its adoption in conjunction with the 1993 statutory modification, however, does demonstrate a legislative intent to override the omnibus per diem statute.

The legislative history of the PT board statute indicates that the legislature was aware that the 1993 legislation authorized reimbursement solely for transportation expenses.<sup>28</sup> Moreover, the legislature used the same language with respect to the council and the OT board, again, apparently with the awareness that reimbursement only for travel expenses was being authorized.<sup>29</sup> It is unlikely that the legislature intended that the PT board members receive reimbursement for meals and lodging but not the members of the OT board or the council notwithstanding the similarity in language.<sup>30</sup> Additionally, prior

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<sup>24</sup>See *supra* notes 9 and 11.

<sup>25</sup>See *supra* note 2.

<sup>26</sup>It would appear that the Comptroller of Public Accounts staff view is that the 1993 amendment was non-substantive and, therefore, section 2A of article 4512e was probably superseded by the omnibus per diem statute as was the predecessor PT board compensation provision.

<sup>27</sup>The General Appropriations Act for the 1993-95 biennium also authorized a per diem inclusive of actual expenses for meals and lodging not to exceed \$75 per day. General Appropriations Act, 73d Leg., R.S., ch. 1051, art. V, § 4, 1993 Tex. Gen. Laws 4518, 5325.

<sup>28</sup>House Comm. on Public Health, Bill Analysis, S.B. 690, 73d Leg., R.S. (1993) at 5 ("Sec. 2A [s]pecifies that a member of the board is entitled to a per diem as set by the General Appropriations Act, and may only be reimbursed for transportation expenses.").

<sup>29</sup>*Id.* at 2.

<sup>30</sup>In a letter to the Comptroller of Public Accounts, dated December 2, 1994, Senator Carriker, the sponsor of the 1993 legislation creating the council and continuing and modifying the PT and OT boards, states that the intent of the language in article 4512e, section 2A, article 4512e-1, section 3(b), and article 8851, section 3A(b) was to ensure that all council members and board members would receive the same treatment. Additionally, Senator Carriker states that the language with respect to reimbursement in the three statutes was intended to allow reimbursement for meals, lodging, and transportation expenses as provided by the General Appropriations Act and as the PT board members had been receiving since the creation of the board. We may not, however, consider such a post-legislative statement in our analysis. See *e.g.*, *Texas v. United States*, 951 F.2d 645, 650 (5th Cir. 1992) (citing *Bread Political Action Committee v. Federal Election Com.*, 455 U.S. 577 (1982) & *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974)); *Rogers v. Frito Lay, Inc.*, 611 F.2d 1074, 1080 (5th Cir. 1980).

to 1981, receipt of all actual expenses was authorized for the PT board.<sup>31</sup> The legislature in 1981, subsequent to the initial enactment of the omnibus per diem statute,<sup>32</sup> however, expressly amended the PT board statute to prohibit reimbursement of travel expenses other than for transportation with the intent, it would appear, to do exactly that.<sup>33</sup> The history of the PT board statute indicates a legislative intent to prohibit reimbursement for travel expenses other than for transportation. To conclude otherwise would ascribe to the legislature an intent to continue to enact ineffectual statutes.<sup>34</sup> Based on the foregoing, it is our view that the legislature intended to reinstate the prohibition against reimbursement of expenses other than for transportation. Therefore, it is our opinion that section 2A of article 4512e, enacted by the legislature in 1993, supersedes Government Code sections 659.031 - .033. Accordingly, members of the PT board are not entitled to reimbursement for meals and lodging.

The OT board is governed by article 8851, V.T.C.S. Section 3A(b) was also added by the legislature in 1993 to article 8851 as part of the legislation continuing and modifying the OT board.<sup>35</sup> Such section provides as follows:

A member of the board is entitled to a per diem as set by the General Appropriations Act for each day that the member engages in the business of the board. A member may not receive any ~~reimbursement for travel expenses, including expenses for meals and lodging~~, other than transportation expenses as provided by the General Appropriations Act.

V.T.C.S. art. 8851, § 3A(b). Prior to the 1993 amendment, the OT board compensation provision stated that “[e]ach member of the board is entitled to a per diem as set by legislative appropriation for each day that the member engages in the business of the board.”<sup>36</sup> Clearly, the legislature in 1993 substantively amended the OT board’s compensation provision such that section 3A(b) was enacted subsequent to the omnibus per diem statute. Consistent with Attorney General Opinions JM-888 and JM-382 as set

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<sup>31</sup>See *supra* note 17.

<sup>32</sup>See *supra* note 17.

<sup>33</sup>See Senate Comm. on Government Organization, Bill Analysis, C.S.S.B. 750, 67th Leg., R.S. (1981) at 6 (one of the substantial differences between S.B. 750 and C.S.S.B. 750, among others, was that the latter only allowed compensation for transportation expenses in addition to the legislatively set per diem).

<sup>34</sup>See *State v. School Trustees of Shelby County* 239 S.W.2d 777, 781(Tex. 1951) (“We should not interpret the [statute] . . . so as to convict the legislature of foolish and futile action.”).

<sup>35</sup>See *supra* notes 9 and 11.

<sup>36</sup>V.T.C.S. art. 8851, § 8, *repealed* by Act of May 19, 1993, 73d Leg., R.S., ch. 352, § 4.02(2), 1993 Tex. Gen. Laws 1578, 1607.



forth above, section 3A(b) of article 8851 supersedes sections 659.031 - .033 and governs reimbursement of expenses to the OT board members. Accordingly, OT Board members are not entitled to receive reimbursement for meals and lodging.

As discussed above, compensation to the council is provided for by section 3(b) of article 4512e-1, newly enacted by the legislature in 1993. Similar to the PT and OT board statutory provisions, this section prohibits the reimbursement of travel expenses for other than transportation. Additionally, section 3(b) prohibits payment of compensatory per diem to council members other than the presiding officer. Again, since article 4512e-1 was enacted subsequent to the passage and amendment of the omnibus per diem statute, it preempts sections 659.031 - .033.<sup>37</sup> Therefore, section 3(b) governs the payment of compensatory per diem and reimbursement to members of the council.<sup>38</sup> Pursuant to such section, council members, other than the presiding officer, are not entitled to receive compensatory per diem as a council member, nor are any council members entitled to reimbursement for meals and lodging.

Your next questions relate to the meaning of the terms "per diem," "transportation expenses," and "travel expenses," in relation to compensation and reimbursement of state boards and commissions. The term "per diem" may encompass both a compensatory per diem, which represents payment for services, and a per diem that represents reimbursement for expenses.<sup>39</sup> Sections 659.031 - .033 in conjunction with section 4(1) of article IX of the current General Appropriations Act embraces both types of per diem: (1) a compensatory per diem, and (2) reimbursement for meals, lodging and transportation expenses when traveling.<sup>40</sup> However, in the statutes governing the council, and the PT and OT boards, reimbursement for travel expenses, including meals and lodging, and transportation expenses is specified separately from the per diem authorization.<sup>41</sup> Clearly "per diem" as used in these statutes represents payment other than for reimbursement of expenses, namely compensation for services. Furthermore, "travel expenses" as used in the PT and OT board statutes encompass cost of meals, lodging, and "transportation expenses" since the statutes provide that "[a] member may not receive any reimbursement for *travel expenses including expenses for meals and lodging, other than transportation expenses.* . . ."<sup>42</sup>

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<sup>37</sup>See Attorney General Opinions JM-888 (1988); JM-382 (1985).

<sup>38</sup>*Id.*

<sup>39</sup>See Attorney General Opinions JM-382 (1985); JM-349 (1985); MW-388 (1981).

<sup>40</sup>See Attorney General Opinions JM-426 (1986) at 2; MW-388 (1981) at 3.

<sup>41</sup>V.T.C.S. art. 4512e, § 2A, art. 4512e-1, § 3(b), art. 8851, § 3A(b).

<sup>42</sup>*Id.* (emphasis added).

You next ask whether the provisions of the current General Appropriations Act supersede the compensation provisions of the council, PT board, and OT board statutes. A rider to a general appropriations bill cannot amend, modify, or repeal a general law.<sup>43</sup> Previous opinions of this office have addressed a similar question and determined that to the extent the compensation provision of the General Appropriations Act could not be reconciled with that in the enabling act, the latter controlled.<sup>44</sup> Attorney General Opinion MW-365 summarized the resolution of such conflict as follows: "Insofar as the bill [amending article 4413(41)] and the General Appropriations Act provision cannot be reconciled, the former must automatically be deemed controlling. This is not an instance involving a conflict between two pieces of legislation standing on equal footing."<sup>45</sup> Accordingly, compensation provisions in the council, PT board, and OT board statutes govern receipt of compensation and reimbursement of expenses by the respective council and board members.

### S U M M A R Y

Members appointed to the Executive Council of Physical Therapy and Occupational Therapy Examiners by the Texas Board of Physical Therapy Examiners and the Texas Board of Occupational Therapy Examiners are authorized to receive compensatory per diem as a Physical Therapy Examiner Board or Occupational Therapy Board member for attending council meetings. Members of the council, other than the presiding officer, are not entitled to receive compensatory per diem as a council member and are entitled to receive reimbursement only for transportation expenses. Members of the Board of Physical Therapy Examiners and the Board of Occupational Therapy Examiners are entitled to receive reimbursement only for transportation expenses.

Yours very truly,



Sheela Rai  
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Opinion Committee

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<sup>43</sup>See Tex. Const. art. III, § 35; *Moore v. Sheppard*, 192 S.W.2d 559, 562 (Tex. 1946); Attorney General Opinion JM-382 (1985) at 2.

<sup>44</sup>See Attorney General Opinions MW-388 (1981); MW-365 (1981).

<sup>45</sup>See Attorney General Opinion MW-365 (1981) at 3.