STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

July 15, 2016

Opinion No. 16-25

Reimbursement and Meetings of the Underground Utility Damage Enforcement Board

Question 1

May the members of the Underground Utility Damage Enforcement Board ("UUDEB" or "the Board") receive reimbursement for travel expenses or per diem for travel and incidental expenses incurred in attending Board and executive committee meetings?

Opinion 1

Yes.

Question 2

If the answer to Question 1 is yes, in the performance of its administrative duties on behalf of the Board and executive committee, may the Tennessee Regulatory Authority (the "Authority") include such reimbursement costs as part of UUDEB's annual operating costs under Tenn. Code Ann. § 65-31-115?

Opinion 2

Yes.

Question 3

Must UUDEB or its executive committee have a quorum physically present to hold a meeting and consider business?

Opinion 3

Yes, unless a "necessity" exists under Tenn. Code Ann. § 8-44-108(b)(2).

Question 4

If a meeting of UUDEB or its Executive Committee is conducted with a quorum by electronic means is the Board or its executive committee subject to the requirements of Tenn. Code Ann. § 8-44-108(b)(2) and (3)?

Opinion 4

Yes.

Question 5

Would the fact that members of the Board and its executive committee are from different areas of Tennessee and not eligible for reimbursement of travel expenses constitute a "necessity" as defined by Tenn. Code Ann. § 8-44-108(a)(3), and if so, could a consistent finding of "necessity" on those grounds by UUDEB and its Executive Committee be used to meet by electronic means?

Opinion 5

Since the Board members are eligible for reimbursement of travel expenses, ineligibility for reimbursement is not a factor in determining "necessity." "Necessity" under the statute must be determined on a case-by-case basis. There may be instances in which matters to be considered by the Board at a particular meeting require timely action and physical presence by a quorum of the members is not practical within the period of time requiring action because the members reside in many different and distant parts of Tennessee so that a non-physical-presence quorum may become necessary for that particular meeting within the meaning of Tenn. Code Ann. § 8-44-108(b)(2). But the fact that Board members are dispersed throughout the State cannot be used to make a blanket determination of "necessity" for all meetings.

ANALYSIS

1. Tennessee Code Ann. § 65-31-114 creates the Underground Utility Damage Enforcement Board ("UUDEB" or "the Board"), which was established "for the purpose of enforcing [Title 65, Chapter 31, of the Tennessee Code]." "The members of the board shall serve without compensation." Tenn. Code Ann. § 65-31-114(e).

"Compensation" is not a defined term in Title 65, Chapter 31 (see Tenn. Code Ann. § 65-31-102), but "compensation" typically means "[r]emuneration and other benefits received in return for services rendered; esp., salary or wages." *Black's Law Dictionary* (10th ed. 2014). Thus, the directive that board members "shall serve without compensation" means that members may not receive payment or other benefits in return for their service on the Board.

But the statute does not preclude *reimbursement* to Board members for travel and related incidental expenses they incur while performing their official duties. In fact, Tenn. Code Ann. § 8-26-116, which governs public officers and employees, contemplates that such reimbursements are available:

> Notwithstanding any law to the contrary, claims for official travel expenses of state employees and members of boards and commissions shall be subject to the uniform travel rules and regulations issued by the commissioner of finance and administration pursuant to § 4-3-1008 . . . .

This statute permits members of any state board, including members of UUDEB, to make claims for official travel expenses pursuant to the Department of Finance and Administration's Comprehensive Travel Regulations. *See* Tenn. Code Ann. § 4-3-1008. Those regulations currently provide for travel reimbursements and per diem allowances for meals and incidentals, among other things. UUDEB members may take advantage of these regulations under Tenn. Code Ann. § 8-26-116.

2. UUDEB may include in its "annual operating cost" expense reimbursements and per diem allowances made pursuant to Tenn. Code Ann. § 8-26-116. *See* Tenn. Code Ann. § 65-31-115(b)(5). Subsection 115(b)(5) requires the Board to "[a]ssess its annual operating cost to operators in an amount equal to the amount necessary to offset the cost of investigative and administrative services performed by the Tennessee regulatory authority at the direction of the [B]oard." Among the "administrative services" the Authority may provide to UUDEB is the processing and fulfillment of travel claims made under Tenn. Code Ann. § 8-6-116 and the Department of Finance and Administration's travel regulations. *See Black's Law Dictionary* (10th Ed. 2014) (defining "administrative" as "relating to, or involving the work of managing a company or organization; executive"). Once the Authority performs the administrative services of processing and fulfilling UUDEB members' travel claims, the Authority then "shall charge the expenses associated with the administration and investigative duties of the [B]oard back to the [B]oard, subject to concurrence by the [B]oard." Tenn. Code Ann. § 65-31-114(b) (citing Tenn. Code Ann. § 65-2-122). The Board would then include these charges from the Authority in its annual operating cost. *See* Tenn. Code Ann. § 65-31-115(b)(5).

3, 4, and 5. UUDEB must adhere to the quorum requirements of Tenn. Code Ann. § 8-44-108(b)(1) but may, under appropriate circumstances, invoke the "necessity" provisions of Tenn. Code Ann. §§ 8-44-108(b)(1) and (2) which allow for a quorum by electronic or other means when there is a demonstrable necessity.

Tennessee's Open Meetings Act (Tenn. Code Ann. § 8-44-101, *et seq.*) declares that "[a]ll meetings of any governing body are . . . public meetings open to the public at all times . . . ." Tenn. Code Ann. § 8-44-102(a). "'Governing body' refers to boards, agencies and commissions of state government." Tenn. Code Ann. § 8-44-108. UUDEB—a board of state government—therefore is subject to the Open Meetings Act and must comply with all of its requirements, including the requirement that "a physical quorum [be] present at the location specified in the notice of the meeting as the location of the meeting." *Id.* § 8-44-108(b)(1).

The Board and its executive committee are required to conduct meetings and hearings periodically and for special purposes. *See* Tenn. Code Ann. § 65-31-115. UUDEB is to be composed of sixteen members: one ex officio member and fifteen other members, each representing the interests of a particular Tennessee industry or entity. Tenn. Code Ann. § 65-31-114(c). With such a diverse board composition, Board members are likely to reside throughout the state, instead of being concentrated in a particular city or region. *See id.* (requiring members to represent the interests of assorted entities, including Tennessee natural gas distribution systems, Tennessee utility districts, the Tennessee cable industry, and others). As a result, the Board or its

executive committee may sometimes be unable to garner a physical quorum in time for a particular hearing or meeting on a matter that requires timely action.

The Open Meetings Act recognizes that a physical quorum may not always be possible for a governing body and provides an alternative when circumstances so necessitate:

> If a physical quorum is not present at the location of a meeting of a governing body, then in order for a quorum of members to participate by electronic or other means of communication, the governing body must make a determination that a necessity exists. Such determination, and a recitation of the facts and circumstances on which it was based, must be included in the minutes of the meeting.

Tenn. Code Ann. § 8-44-108(b)(2). For purposes of invoking this alternative,

> "[n]ecessity" means that the matters to be considered by the governing body at that meeting require timely action by the body, that physical presence by a quorum of the members is not practical within the period of time requiring action, and that participation by a quorum of the members by electronic or other means of communication is necessary[.]

Tenn. Code Ann. § 6-44-108(a)(3).

"Necessity" under the statute must be determined on a case-by-case basis—i.e., for "that meeting," meaning for a particular or given meeting. There may be instances in which matters to be considered by the Board at a particular meeting require timely action and physical presence by a quorum of the members is not practical within the period of time requiring that action because the Board members reside in many different and distant parts of Tennessee so that a non-physical-presence quorum becomes necessary for that particular meeting within the meaning of Tenn. Code Ann. § 8-44-108(b)(2). But the fact that Board members are dispersed throughout the State cannot be used to make a blanket determination of "necessity" for all meetings.

If the Board determines that there is a "necessity" for a particular meeting to be conducted with a quorum present by electronic or other means of communication instead of a physical quorum, the Board must adhere to the requirements of Tenn. Code Ann. § 8-44-108(b)(2) and (3). The minutes of that meeting must reflect the determination of necessity and must detail the facts and circumstances on which the determination was based. And the Board will be required to "file such determination of necessity, including the recitation of the facts and circumstances on which it was based, with the office of the secretary of state no later than two (2) working days after the meeting." Tenn. Code Ann. § 8-44-108(b)(2), (3).

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