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OPINION	:	No. 80-305
	:	
of	:	<u>October 10, 1980</u>
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SUBJECT: REIMBURSEMENT OF ADVISORY HEALTH COUNCIL MEMBERS PERFORMING APPEAL FUNCTIONS—Members of the Advisory Health Council performing appeal functions pursuant to Health and Safety Code section 438.8 are not entitled to receive reimbursement for those expenses reimbursed by the regular per diem rate for State employees in addition to the \$100 per diem authorized by section 437.3 but are entitled to reimbursement for other necessary expenses, including transportation expenses.

The Advisory Health Council has requested an opinion on the following: question:

Are members of the Advisory Health Council performing appeal functions pursuant to Health and Safety Code section 438.8 entitled to receive reimbursement at the regular State per diem rate in addition to the § 100 per diem authorized by section 437.3?

CONCLUSION

Members of the Advisory Health Council performing appeal functions pursuant to Health and Safety Code section 438.8 are not entitled to receive reimbursement for those

expenses reimbursed by the regular per diem rate for State employees in addition to the \$100 per diem authorized by section 437.3 but are entitled to reimbursement for other necessary expenses, including transportation expenses.

ANALYSIS

In part 1.5 of division 1 of the Health and Safety Code (§§ 437-439.5)¹ the Legislature has established a system for planning and controlling the providing of health care facilities throughout the State. (See 58 Ops. Cal. Atty. Gen. 507, 508 (1975).) A component of this system is the Advisory Health Council, an appointive body consisting of 21 members. (§ 437.) The Council performs an advisory and review function with respect to the planning process (§§ 437.5, 437.7, 437.8) (see 63 Ops. Cal. Atty. Gen. 274, 275 (1980)) and acts as an appellate tribunal to consider appeals from decisions of the Office of Statewide Health Planning and Development which grant or deny applications for certificates of need.² (§§ 438.5, 438.8.)

The present question concerns the payment of compensation and expenses to the members of the Advisory Health Council. With respect to such payments to members of State boards and commissions in general, section 11009 of the Government Code provides:

“Except as otherwise expressly provided by law, the members of State boards and commissions shall serve without compensation, but shall be allowed necessary expenses incurred in the performance of duty.”

(See also Gov. Code § 11030 providing for the payment *cf.* “the actual and necessary traveling expenses” to officers, agents and employees of the State.)³ With respect to such payments to the members of the Advisory Health Council in particular, section 437.3 provides:

“The members of the Advisory Health Council shall be reimbursed for any actual and necessary expenses incurred in connection with their duties as members of the council, except that the members shall receive per

¹ All section references are to the Health and Safety Code unless otherwise specified.

² A certificate of need is the authorization issued by the Office of Statewide Health Planning and Development to undertake one of the various types of health facility projects specified in section 437.10. (See also Cal. Admin. Code, tit. 22, §§ 90015, 90401.)

³ See 39 Ops. Cal. Atty. Gen. 310, 312–313 (1962) concluding that the term “traveling expenses” as used in Government Code section 11030 is to be broadly interpreted and not limited to reimbursement for transportation costs, nor necessarily limited to those expenses incurred while traveling away from home. (*Id.* at pp. 314–315; see also Cal. Admin. Code, tit. 2, § 707(c).)

diem of one hundred dollars (\$100) for each day actually spent in the discharge of official duties pursuant to Section 438.8 [which relates to the considering of certificate of need appeals]. Such per diem shall not exceed three hundred dollars (\$300) in any one calendar month.” (Emphasis added.)

The question presented requires us to determine the meaning of the term “per diem” as it is used in section 437.3.

In connection with this determination we initially note that the power to regulate and limit the disbursement of expenses to State officials has been vested in the State Board of Control by Government Code section 13920 which, in pertinent part, provides:

“By a majority vote, the board shall adopt general rules and regulations:

“(a) Limiting the amount, time, and place of expenses and allowances to be paid to officers, agents, and employees of the State while traveling on official state business.” (See 29 Ops. Cal. Atty. Gen. 11, 13–14 (1957); 39 Ops. Cal. Atty. Gen. 310, *supra*.)

Pursuant to its authority under Government Code section 13920, the Board of Control has promulgated a system of regulations (Cal. Admin. Code, tit. 2, § 700 *et seq.*) which governs the payment of expenses incurred by State officers and employees in the performance of their official duties. (See 60 Ops. Cal. Atty. Gen. 16, 26–27 (1977).) An examination of these regulations indicates that the Board of Control has ordered such expenses into three basic categories:

(1) Those it denominates “business expenses” which include expenditures for official telephone calls, necessary equipment and supplies, etc. (Cal. Admin. Code, tit. 2, § 701(c) (2).)

(2) Those it denominates “transportation expenses” which include expenditures for commercial transportation, private car use and related items. (Cal. Admin. Code, tit. 2, § 711(a).)

(3) Those it denominates “per diem expenses” which are basically personal living expenses and cover charges for meals, lodging, and personal expenses. (Cal. Admin. Code, tit. 2, § 2701 (c) (1).) The details for the payments of such per diem expenses are set forth by the Board in a regulation headed “Subsistence Allowance” (Cal. Admin. Code, tit. 2, § 706) which provides for an allowance of \$46 per 24-hour period for such expenses. (Cal. Admin. Code, tit. 2, § 706(c).) This \$46 allowance for meals, lodging and incidentals is

commonly referred to in State service as the “per diem.”

Viewing the question before us in the context of such Board of Control regulations, the issue is whether the \$100 per diem specified in section 437.3 is a substitute for the usual \$46 per diem allowed under the Board of Control regulations, or whether it is an allowance in addition to that \$46 per diem.

With regard to this question, we note that, as originally enacted, section 437.3 provided merely: “The members of the Health Planning [now Advisory Health] Council shall serve without compensation but shall be reimbursed for any actual and necessary expense incurred in connection with their duties as members of the Council.” (Stats. 1967, ch. 1597, § 1, p. 3828.)

As previously concluded by this office, where a statute provides for reimbursement of expenses incurred in connection with official duties, such reimbursement will be governed by the pertinent Board of Control regulations unless the statute provides otherwise. (60 Ops. Cal. Atty. Gen. 16, 26 (1977).) See also *Lertora v. Riley* (1936) 6 Cal. 2d 171, 180, where it was held that the statute granting to the Board of Control the authority to enact pertinent rules and regulations had “the effect of incorporating in the law of the state the rules of the board of control so far as they relate to matters specifically committed to the jurisdiction of that board.” And see *Chas. L. Harney, Inc. v. State of California* (1963) 217 Cal. App. 2d 77, 96, where the court stated that “the Board of Control] has the power to make rules and regulations . . . which have the effect of law”

Thus during the time section 437.3 was in its original form, the Board of Control regulations governed the reimbursement of the expenses of Council members. Also during that period the Advisory Health Council did not have the duty of hearing certificate of need appeals. Such duties were not conferred upon the Council until 1976. (Stats. 1976, ch. 854, § 25, p. 1946.) At the same time that such appellate duties were assigned to the Council, section 437.3 was amended to its present form wherein the provision that Council members were to receive the \$100 per diem when performing certificate of need appellate duties was added. (Stats. 1976, ch. 854, § 2.7, p. 1933.)

In evaluating the significance of these amendments we note first that the Board of Control regulations defining “per diem expenses” (Cal. Admin. Code, tit. 2, § 701 (c) (1)) has been in effect since 1970. (Reg. 70. No. 51, p. 58.) Pertinent to this fact is the observation of the Court of Appeal in *Western Contracting Corp. v. State Bd. of Equalization* (1974) 39 Cal. App. 3d 341. In that case the court noted a Board of Equalization rule giving a particular meaning to certain terms that had been widely applied for many years at the time the statute in question had been enacted. In construing that statute the court observed: “In view of these circumstances, it is ‘reasonable to assume’

that the Legislature used the terms ‘advisedly and in the sense which had been given’ them by the administrative ruling and the decision of the court.” (*Ibid.* at p. 347; see also *Action Trailer Sales, Inc. v. State Bd. of Equalization* (1975) 54 Cal. App. 3d 125, 133.)

It is thus reasonable to assume that when the Legislature amended section 437.3 by providing for the “per diem of one hundred dollars,” it utilized the term per diem” in the same sense that the word was defined in the widely applied regulations of the Board of Control which had been operative for a number of years. (See 39 Ops. Cal. Atty. Gen. 310, 313, *supra*.) Accordingly, the \$100 per diem would be applicable to that portion of a Council member’s expenses that was incurred in connection with meals, lodging and incidentals (i.e., the “per diem” element). Applying this evaluation to the interpretation of section 437.3, we conclude that when members of the Council are performing duties in connection with certificate of need appeals, that portion of the members’ expenses relating to meals, lodging, and incidentals will be reimbursed at the rate of \$100 per day rather than at the \$46 rate provided for in the Board of Control rules.

This conclusion is persuasively indicated by the Legislature’s use of the word “except” between the provision for reimbursement for “any actual and necessary expenses” and the new provision for the \$100 per diem. The dictionary defines the word “except” to mean “to take or leave out (something) from a number or a whole: exclude or omit” (Webster’s Third New International Dictionary (Unabr. 1961, p. 791).) This definition is consonant with the judicial definition of the word which has been uniformly construed by the courts to denote the concept of leaving out or excluding. (See, e.g., *Becker v. State Farm Mut. Auto. Ins. Co.* (1975) 52 Cal. App. 3d 282, 286; *State v. Atencio* (N.M. App. 1973) 513 P. 2d 1266, 1267; *In re Garvin’s Estate* (Pa. 1939) 6 A.2d 796, 800.)

Considering the use of the word “except” in section 437.3 in light of the rule that statutes are to be given “‘effect . . . ‘according to the usual, ordinary import of the language employed in framing them’”” (*Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified Sch. Dist.* (1978) 21 Cal. 3d 650, 658; accord, *People v. Belleci* (1979) 24 Cal. 3d 879, 884), we construe section 437.3 to mean that the subject matter of the clause relating to the “per diem of one hundred dollars,” which is applicable to the discharge of “official duties” in considering certificate of need appeals, must be excluded from the subject matter of the clause relating to actual and necessary expenses which is applicable to “duties as members of the Council.” As stated in *Becker v. State Farm Mut. Auto. Ins. Co.*, *supra*, 52 Cal. App. 3d at p. 286: “the clause which follows the word ‘except’ must be removed, excluded or omitted from the whole of the subject to which it refers. The subject reference, however, remains intact.”

With respect to section 437.3, “the whole of the subject to which [except] refers” is the subject of “actual and necessary expenses” which, as noted, comprehends, pursuant to

the applicable Board of Control rules, the elements of per diem expenses, business expenses, and transportation expenses. Thus the effect of the word “except” as used in section 437.3 is to remove the “per diem” element from the other two elements of “actual and necessary expenses” which are otherwise governed by Board of Control rules. (See 60 Ops. Cal. Atty. Gen. 16, 26, *supra*.) It therefore follows that the \$100 per diem is a substitute for, rather than an addition to, the \$46 per diem the Board of Control allows for meals, lodging and incidental personal expenses.
