



*Lynn Fitch*  
**ATTORNEY GENERAL**  
OPINIONS AND POLICY

July 21, 2021

Alfred Rankins, Jr., Ph.D.  
Commissioner of Higher Education  
3825 Ridgewood Road  
Jackson, Mississippi 39211

Re: Board of Trustees of State Institutions of Higher Learning

Dear Dr. Rankins:

The Office of the Attorney General has received your request for an official opinion.

### **Questions Presented**

1. If the Governor appoints four new Trustees to the Board of Trustees of State Institutions of Higher Learning ("IHL Board") in vacation when the legislature is not in session, and if those four new Trustees attend official meetings of the IHL Board and vote on matters before the IHL Board prior to being confirmed by the Senate, may those Trustees be legally paid the statutorily provided per diem for days during which they participate in the meetings of the IHL Board?<sup>1</sup>
2. May those four new Trustees be legally reimbursed for travel and lodging expenses incurred in order to participate in the IHL Board meetings before they are confirmed by the Senate?
3. Lastly, would those four Trustees be protected by the Mississippi Tort Claims Act and any other state law immunities normally applicable to official actions of the IHL Board, when participating in and voting at official IHL Board meetings before those Trustees are confirmed by the Senate?

### **Brief Response**

1. Pursuant to Section 25-3-69, board members appointed by the Governor may receive per diem compensation prior to confirmation by the Senate.

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<sup>1</sup> On May 18, 2021, Governor Reeves announced that he had appointed individuals to fill the four vacant seats on the IHL Board.

2. Pursuant to Section 25-3-41(8), board members appointed by the Governor may receive reimbursements for mileage and other actual expenses incurred in the performance of official duties prior to confirmation by the Senate.
3. IHL Board members fit within the broad definition of “employees of the state of Mississippi” as set forth in Section 11-46-1(f) and, when acting within the course and scope of their duties, are entitled to the protection of the MTCA.

### **Applicable Law and Discussion**

Section 37-101-3(1), governing the appointment of IHL Board members, states:

The Governor, by and with the advice and consent of the Senate, shall appoint the members of the Board of Trustees of State Institutions of Higher Learning, one (1) member from each congressional district of the state as existing as of March 31, 1944, one (1) member from each Supreme Court district and two (2) members from the state at large, with the terms of each to begin on May 8, 1944. One-third (  $\frac{1}{3}$  ) of the membership of said board so appointed shall be appointed for a period of four (4) years, one-third (  $\frac{1}{3}$  ) for a period of eight (8) years and one-third (  $\frac{1}{3}$  ) for a period of twelve (12) years. On the expiration of any of said terms of office the Governor shall appoint successors, by and with the advice and consent of the Senate, for terms of twelve (12) years in each case.

In 2001, the Legislature amended Sections 25-3-41 and 25-3-69 to allow reimbursements and per diem compensation for board or commission members appointed by the Governor, Lieutenant Governor or Speaker of the House prior to confirmation by the Senate. 2001 Miss. Laws Ch. 440 (H.B. 682). Section 25-3-41(8) now provides:

When the Governor, Lieutenant Governor or Speaker of the House of Representatives appoints a person to a board, commission or other position that requires confirmation by the Senate, the person may receive reimbursement for mileage and other actual expenses incurred in the performance of official duties before the appointment is confirmed by the Senate, as reimbursement for those expenses is authorized under this section.

With respect to per diem compensation, Section 25-3-69 provides:

Unless otherwise provided by law, all officers and employees of state agencies, boards, commissions, departments and institutions authorized by law to receive per diem compensation for each day or fraction thereof occupied with the discharge of official duties shall be entitled to Forty Dollars (\$40.00) per diem compensation. When the Governor, Lieutenant Governor or Speaker of the House of Representatives appoints a person to a board, commission or other position that requires confirmation by the Senate, the person may receive per diem compensation for the performance of official duties before such appointment is confirmed by the Senate, as such per diem compensation is authorized under this section.

Accordingly, in response to your first two questions, board members who have been appointed by the Governor may receive both reimbursements for mileage and other actual expenses incurred in the performance of their duties and per diem compensation prior to Senate confirmation in accordance with the above cited statutes.<sup>2</sup>

With respect to your third question,<sup>3</sup> whether the Mississippi Tort Claims Act (the “MTCA”) applies to a particular claim depends on questions of fact. MS AG Op., *Sutton* at \*3 (Apr. 22, 2016) (“Whether a claim is subject to defenses, including the applicability of the Tort Claims Act, is a determination that must be made by the local government based on the facts of the claim.”). Moreover, whether an individual’s actions are within the course and scope of his or her duties requires a factual determination. This office cannot address questions of fact by way of an official opinion.

The MTCA “provides a limited waiver of sovereign immunity by the State and its political subdivisions for claims for money damages arising from certain torts of these governmental entities and torts of their employees while acting within the course and scope of their employment.” MS AG Op., *Lucas* at \*2 (July 24, 2009). Section 11-46-1(f) defines the term “employee” applicable to the MTCA:

“Employee” means any officer, employee or servant of the State of Mississippi or a political subdivision of the state, including elected or appointed officials and persons acting on behalf of the state . . . in any official capacity, temporarily or permanently, in the service of the state . . . whether with or without compensation . . . .

Miss. Code Ann. § 11-46-1(f) (emphasis added). This definition is “very broad.” MS AG Op., *Howell* at \*3 (Mar. 8, 1996). It is the opinion of this office that IHL Board members serving prior to Senate confirmation fit within the broad definition of “employees” set forth in Section 11-46-1(f). “An employee may be joined in an action against a governmental entity in a representative capacity if the act or omission complained of is one for which the governmental entity may be liable, but no employee shall be held personally liable for acts or omissions occurring within the course and scope of the employee's duties.” Miss. Code. Ann. § 11-46-7.

If this office may be of any further assistance to you, please do not hesitate to contact us.

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<sup>2</sup> Prior to the enactment of 2001 Miss. Laws Ch. 440 (H.B. 682), this office opined that board members could not receive reimbursements or per diem compensation prior to confirmation. *See, e.g.*, MS AG Op., *Burnett* (June 12, 2000). To the extent that any prior opinions conflict with this opinion, the conflicting portions of those prior opinions are hereby modified.

<sup>3</sup> To the extent your third question asks this office to opine regarding “any other state law immunities normally applicable to official actions of the IHL Board,” it is too broad to address by official opinion. *See* MS AG Op., *Barrett* at \*1 (Aug. 29, 1984) (refusing to respond by official opinion on the basis that the question posed was overly broad).

Alfred Rankins, Jr., Ph.D.

July 21, 2021

Page 4

Sincerely,

LYNN FITCH, ATTORNEY GENERAL

By: */s/ Beebe Garrard*

Beebe Garrard

Special Assistant Attorney General

OFFICIAL OPINION