

## RESPONSE PROCEDURE TO GRAND JURY REPORTS

The governance of responses to Grand Jury Final Report is contained in Penal Code § 933 and § 933.05. Responses must be submitted within 60 or 90 days. Appointed officials and governing bodies (e.g., school boards or the Board of Supervisors) must respond within ninety (90) days; elected officials must respond within 60 days.

**Please submit responses as e-mail attachments to:**

- **The Grand Jury Foreperson at:** grandjury@co.mendocino.ca.us
- **The Presiding Judge:** grandjury@mendocino.courts.ca.gov
- **The Chief Executive Officer:** milledkm@co.mendocino.ca.us

**Mail one signed hard copy to the Grand Jury at P.O. Box 629, Ukiah, CA 95482.**

*Report Title:*

**Revisiting the Board of Supervisors Travel Policy and Reimbursement Claims**

**Report Date:** April 17, 2008

**Response by:** Meredith Lintott, District Attorney  
2008

**Date Due:** June 17,

**Findings**

X I (we) agree with the Finding numbered:

19, 21

X I (we) disagree wholly or partially with the Findings numbered:

20, 21

*(attach a statement specifying any portions of the Findings that are disputed; include an explanation of the reasons therefore.)*

**Recommendations**

Recommendations numbered: \_\_\_\_\_  
have been implemented.

*(attach a summary describing the implemented actions.)*

Recommendation numbered: \_\_\_\_\_  
have not yet been implemented, but will be implemented in the future.

*(attach a time frame for implementation)*

Recommendations numbered: \_\_\_\_\_  
require further analysis.

*(attach an explanation and the scope and parameters of the planned analysis, and a time frame for the matter to be prepared, discussed and approved by the officer and/or director of the agency or department being*

*investigated or reviewed. This time frame shall not exceed six (6) months from the date of publication of the Grand Jury Report)*

- Recommendations numbered: \_\_\_\_\_ will not be implemented because they are not warranted and/or are not deemed reasonable. (*attach an explanation.*)

Date: June 18, 2008

Signed: Meredith

Lintott\_\_\_\_\_

Meredith Lintott,  
Mendocino County District Attorney

**Letter Re: Kendall Smith**

August 22, 2007

Dennis Scoles, Foreman  
Mendocino County Grand Jury  
Post Office Box 629  
Ukiah, California 95482

Re: Opinion of Criminal Charges – Supervisor Kendall Smith

Dear Foreman Scoles:

This letter is in response to the demand of the Mendocino County Grand Jury pursuant to *Penal Code* §932, that the District Attorney of Mendocino County “institute and maintain an action” to recover money due the county from Supervisor Kendall Smith. The basis of the Grand Jury’s recovery claim in the amount of \$3,087.81 is that the supervisor was reimbursed for expenses she did not incur or was not entitled to over a two-year period.

The District Attorney has formally responded to the Grand Jury, indicating a civil action cannot be brought by the District Attorney. For the reasons set forth below, the District Attorney submits the opinion that criminal charges against Supervisor Kendall Smith are not supported by the evidence.

**THE PRESENTATION OF TRAVEL CLAIMS BY SUPERVISOR KENDALL SMITH DO NOT CONSTITUTE A CRIMINAL VIOLATION OF THE LAW**

*Government Code* §83232.4 outlines the remedies available for misuse of public funds or falsifying expense claims as follows:

Penalties for misuse of public resources or falsifying expense reports in violation of expense reporting policies may include, but are not limited to, the following:

- (a) The loss of reimbursement privileges.
- (b) Restitution to the local agency.
- (c) Civil penalties for misuse of public resources pursuant to §8314.
- (d) Prosecution for misuse of public resources, pursuant to *Penal Code* §424.

As the District Attorney is charged with prosecution of crime within the County of Mendocino, this opinion will address solely criminal violations. *Penal Code* §424 applies to: "Each officer of this state, or of any county, city, town, or district of this state, and every other person charged with the receipt, safekeeping, transfer, or disbursement of public moneys," who misappropriates public funds.

In addition to *Penal Code* §424, *Penal Code* §72 "Presenting False Claim to Public Board or Officer" is applicable as a potential criminal charge. Section 72 provides in pertinent part:

Every person who, ***with intent to defraud***, presents for allowance or for payment . . . to any county, . . . authorized to allow or pay the same if genuine, any false or fraudulent claim . . . is punishable either by imprisonment in the county jail for a period of not more than one year, . . . or by imprisonment in the state prison . . . .

At issue in this matter is the interpretation of the Mendocino County Board of Supervisors' Travel & Meal Policy, specifically §2(d) which states: "Supervisors with meetings 'back-to-back' may elect to stay over night rather than drive back and forth and will be reimbursed not to exceed the mileage rate that would have been charged for travel."

It is alleged that Supervisor Smith submitted claims for round trip mileage reimbursement on occasions she stayed overnight in Ukiah rather than returning to her home in Fort Bragg.

#### **A. Misappropriation of Public Funds (*Penal Code* §424)**

It is the position of the Grand Jury that Supervisor Smith submitted improper travel claims for a period of over two years. There is nothing in the Order to Initiate Action and the accompanying documents which indicate Supervisor Smith was "charged with the receipt, safekeeping, transfer, or disbursement of public moneys." The gist of this crime is that the public official in question *controls public funds*, and misuses the funds for nonpublic purposes. *Webb v. Superior Court of Tulare County* (1988) 202 Cal.App.3d 872.

The Court of Appeal, in *Webb* at page 866, outlined the type of cases typically charged pursuant to *Penal Code* §424:

That section is more often used in situations where a public employee or official, in the course and scope of his or her employment, receives money and converts the money to his or her own use rather than turning it over to the public entity. (See, for example, *People v. Best* (1959) 172 Cal.App.2d 692 [342 P.2d 314] [bail money accepted by police officer who never turned money over to city]; *People v. Griffin* (1959) 170 Cal.App.2d 358 [338 P.2d 949] [deputy municipal court clerk accepted bail money but failed to deliver it to court].) Another typical scenario is where the employee in his or her official capacity, having access to public moneys and having the authority to disburse the public moneys for certain purposes, embezzles the money to his or her own purpose.

Supervisor Smith at no time had access to public moneys, nor did she embezzle money to her own purpose, consequently a prosecution pursuant to §424 cannot be legally instituted by the District Attorney's Office.

#### **B. Presenting False Claims (Penal Code § 72)**

In order to be convicted of a violation of *Penal Code* §72, the defendant must have the *specific intent* to defraud a public entity. *People v. Battin* (1978) 77 Cal.App.3d 635. The facts surrounding the submission of the disputed travel claims by Supervisor Smith fail to indicate an intent to defraud the County.

On February 15, 2007, well after the disputed claims were submitted and paid without question, County Auditor-Controller Meredith Ford presented her interpretation of the travel reimbursement policy. According to her interpretation, the policy regarding back-to-back meetings allowed, "either the motel bill or mileage will be reimbursed, whichever is less. If the overnight stay is not substantiated with a motel receipt, the claim will not be

honored." The travel policy has been updated recently to reflect this interpretation.

Supervisor Smith expressed her view to Meredith Ford in a letter dated May 22, 2007, as follows: "Thank you for your Memorandum of February 15, 2007 setting forth your interpretation of the current Board of Supervisors travel reimbursement policy, specifically section 2(d). To my knowledge there was not an earlier interpretation of this Section." She further stated that she had "interpreted the provision to provide for a flat, per diem if you will, mileage rate for expenses . . . ."

Kirsty Furman, Clerk of the Board, provided a letter (attached as Exhibit A) outlining her understanding of the travel policy. She states she has been processing the Supervisor requests for reimbursement since 1999. During that time she has worked with 9 different elected officials. She states her "interpretation and application of the Board's Travel Policy has been consistent, and appropriate, throughout the years that I've been charged with this responsibility." She goes on to state the attention of the Grand Jury and its interpretation of the Travel Policy has caused great concern: "It is irresponsible to knowingly allow a flawed policy to remain in place, and to then punish those who believe they are abiding by such a policy."

As stated by James L. Larson, attorney for Supervisor Smith: "Her method [of submitting claims] is the same as the Supervisors over the years and in consistent use for at least nine years. Ms. Smith's travel claims were always reviewed and approved before they were paid." He further states her claims were submitted in good faith. The facts and circumstances of Supervisor Smith's practice of submitting claims do not indicate a specific intent to defraud the county, but rather a practice of submitting claims pursuant to a policy which is subject to an interpretation at odds with the understood and accepted practice.

Furthermore, in the Order to Initiate Action, the Grand Jury acknowledges, "it was not possible to determine with absolute certainty the number of claimed round trips for which no travel occurred." Not only did Supervisor Smith originally submit claims in good faith based on her understanding of the travel policy, the Grand Jury is not able to retroactively calculate the sum they believed was owed to the county. Ms. Ford, in a memo dated June 26, 2007, further acknowledges her, "original calculation was based entirely on estimates."

It is not possible or ethical to criminally prosecute Supervisor Smith when the travel policy in place is subject to various interpretations and the actual claimed overpayment cannot be calculated to a certainty. There is no evidence that Supervisor Smith had a specific intent to defraud the county.

It is respectfully submitted that the District Attorney of the County of Mendocino is unable to proceed in a criminal action against Supervisor Smith due to a lack of evidence to support criminal charges.

Sincerely,  
Meredith Lintott  
District Attorney

ML/cb  
Enclosure

**See Response to Findings Below**

Revisiting the Board of Supervisors Travel Policy  
And Reimbursement Claims

**Response to Finding No. 22**

The Grand Jury has standing to sue in small claims court. **The Small Claims Court**, A Guide to Its Practical Use (California Dept. of Consumer Affairs) at 9. A legal entity “can be represented by a regular employee, an officer, or a director . . .” *Id.* Legal Intern Nicola Gladitz confirmed this information on June 12, 2008, in a conversation with small claims advisor Dennis O’Brien (866) 820-8663.

Precedent also confirms that a county grand jury does, in fact, have standing in the California small claims court. *Board of Retirement of the Santa Barbara County Employees’ Retirement System v. Santa Barbara County Grand Jury* (1997) 58 Cal. App. 4<sup>th</sup> 1185. Further, small claims courts have broad jurisdiction and complexity of issues does not affect their jurisdiction *City and County of San Francisco v. Small Claims Court* (1983) 141 Cal. App.3d 470.

## **Response to Finding No. 20**

Penal Code § 932 is not the only remedy available to the Grand Jury. The grand jury may use the Small Claims Court to collect the \$3,087 they claim is owned to the County by Supervisor Smith. See response to Finding No. 22 (above).

Additional remedies available for misuse of public funds or falsifying expense claims are outlined in Government Code § 83232.4 as follows:

Penalties for misuse of public resources or falsifying expense reports in violation of expense reporting policies may include, but are not limited to, the following:

- (a) The loss of reimbursement privileges.
- (b) Restitution to the local agency.
- (c) Civil penalties for misuse of public resources pursuant to §8314.
- (d) Prosecution for misuse of public resources, pursuant to Penal Code §424.

My analysis of the available remedies is outlined in further detail in correspondence to the Grand Jury dated August 22, 2007. A copy is attached hereto and incorporated herein by reference as Exhibit A.

The Mendocino County Grand Jury Manual [Manual] provided to guide jurors makes no mention of Penal Code § 932 as a remedy available to the Grand Jury. Rather, the manual directs the Grand Jury as follows:

The primary duty of the regular Grand Jury is to investigate the functions of city and county government agencies, schools, and districts. . . . At the end of its term, the Grand Jury publishes recommendations in a report that is distributed to public officials, libraries, and the news media, and listed on the Grand Jury's website . . .

See also *Board of Retirement of the Santa Barbara County Employees' Retirement System v. Santa Barbara County Grand Jury* (1997) 58 Cal. App. 4<sup>th</sup> 1185, 1191. Investigation Reports and recommendations are the purview of the Grand Jury; not prosecutions. It should be further observed



that only 3 cases have referenced Penal Code § 932: they occurred in 1901, 1903 and 1941.

I was informed that grand jury members attended a California Grand Jurors Association training seminar and learned that the members were not familiar with the use of Penal Code § 932. A history of Mendocino County Grand Jury Investigations since 1982 is included with the Grand Jury Manual. There have been no instances of the Grand Jury ordering the District Attorney to institute an action pursuant to Penal Code § 932.

The District Attorney is the legal advisor to the Grand Jury. Government Code § 26501; Manual at 39. While the mandatory language of Penal Code § 932 appears to dictate that the District Attorney must carry out the directives of the Grand Jury, other factors indicate that a body of citizens, acting as a quasi-judicial entity, cannot overrule the crime charging discretion and ethical duties of the District Attorney.

The public prosecutor is vested with discretion in deciding whether to prosecute. Govt C §§ 26500, 26501, *People v. Gephart* (1979 Cal.App.3d Dist) 93 Cal. App. 3d 989, **California Criminal Law Procedure and Practice** (CEB 2008) § 7.11. No one may institute criminal proceedings without the concurrence, approval, or authorization of the district attorney. *Hicks v. Board of Supervisors* (2977, Cal App 4<sup>th</sup> dist) 69 Cal. App. 3d 228.

A district attorney is ethically bound only to bring charges supported by probable cause. California Rules of Professional Conduct, rule 5-110, Criminal Law, *supra* at § 7.11.