

Opinion No. 58-183

September 11, 1958

BY: OPINION OF FRED M. STANDLEY, Attorney General Robert F Pyatt, Assistant Attorney General

TO: Honorable Walter R. Kegel, District Attorney, First Judicial District, Santa Fe, New Mexico

QUESTION

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Are counties entitled to mileage when the county sheriff employs a county owned automobile to transport prisoners to the penitentiary, or for extradition purposes?

CONCLUSION

Yes.

OPINION

ANALYSIS

This problem seems to stem from a misinterpretation of law by the Department of Finance and Administration. That department has apparently construed Opinion of the Attorney General No. 1786, rendered October 18, 1937, as preventing the payment in question. Such was not involved therein, as revealed by the first paragraph reading:

"With respect to your general request for an opinion as to what fees the various sheriffs are entitled to collect from the county under the present state of our laws, and as to what fees they are entitled to collect from litigants and the manner of handling and disposition of such fees from litigants, I understand the law to be as follows:"

In the instant case, mileage would not be paid to the sheriff, but instead to the county itself.

We are in entire accord with you that Laws 1957, Chapter 235, § 9A, p. 573, does not control. It does not cover payments to counties. Rather, it applies to transportation, lodging or subsistence payable to **state officers or employees.**

On the other hand, Laws 1957, Chapter 235, § 1, p. 532, contains line item appropriations for the transportation of prisoners and extradition of prisoners. In addition, § 15-43-11 provides:

"All traveling expenses actually and necessarily incurred by sheriffs and their deputies while engaged in the service of criminal process issued out of the Supreme Court or a district court, or when issued by a justice of the peace in the state, if the issuance thereof is approved in writing by the district attorney or his assistants, including the employment and necessary traveling expenses of guards authorized by law to be employed, and the necessary traveling expenses of prisoners, shall be paid by the respective counties in behalf of which the same may be incurred. The actual expenses incurred in or about the service of civil process shall likewise be paid. Such expenses shall be paid only upon the rendition of itemized, sworn accounts filed in the county clerk's office, approved by the county commissioners and district judge. In the discretion of the district judge such expenses may also be paid when incurred in the attempt to discover or arrest any person charged with a felony, but only upon the rendition of like sworn accounts filed as aforesaid and approved in writing by the district judge. Upon approval of all such expense accounts warrants covering same shall be drawn by the county commissioners upon the county treasurer, payable from the county salary fund, hereinafter created.

"Provided: **all actual and necessary expenses incident to the transportation of prisoners to the penitentiary shall be paid by the state out of such funds as are or may be appropriated for such purpose, upon itemized, sworn accounts filed with the state auditor and warrants drawn by the latter upon the state treasurer.**"
(Emphasis supplied)

Taken together the two provisions, in our opinion, constitute sufficient statutory authority for the payment in question.

Admittedly, the two provisions of law do not say, expressly, that the county may be reimbursed. However, the somewhat broad language did not trouble our Court in **State ex rel Peck v. Velarde**, 39 N.M. 179, 43 P. 2d 377, in construing similar statutory language. Otherwise the case is of little assistance, being concerned with the mileage rate which **the sheriff**, in transporting prisoners from Roswell to the penitentiary, was entitled to receive.

We do not believe the last cited appropriations and § 15-43-11 are restricted to instances of use of privately owned vehicles, **but cover transportation of prisoners in county vehicles, and further, authorize reimbursement of the county, for such transportation.**

Now, we have not overlooked § 5-4-8 (p.s.) which provides:

"The maximum rate of mileage allowed and paid from public funds for the use of privately owned conveyances on official business chargeable against the state of New Mexico or any county, school district, or municipality thereof shall be nine cents (9c) per mile: Provided, however, that this act shall not apply to school busses; Provided further, that the sheriffs, deputy sheriffs and other peace officer of the several counties of this state shall be paid mileage at the rate of nine cents (9c) per mile, for the distance

actually and necessarily traveled in serving any warrants, process, order, citation, summons, jury venire, or decree of any courts now provided by law, or in the performance of any official business whether inside or outside the state: Provided that in serving any jury venire mileage shall only be charged once to the farthest point actually traveled in serving venire; and Provided further that this section shall not apply to nurses engaged in public health work in the state of New Mexico who shall be paid mileage at the rate of not to exceed nine cents (9c) per mile for the distance actually and necessarily traveled in the performance of their duties."

We think it contemplates use of individually owned vehicles in certain cases. In arriving at this view, we have consulted the title to the Act, being Laws 1957, Chapter 96, § 1, as an aid in its construction, **Harriett v. Lusk**, 63 N.M. 383, 320 P. 2d 738. The title clearly substantiates this position. However, we do not believe it conflicts in any manner, insofar as your problem is concerned, with § 15-43-11 or with Laws 1957, Chapter 235, § 1, p. 532 and it requires no citation of authority to establish that repeals by implication are not favored.

We express no opinion on a payment to the sheriff himself, but have assumed throughout payment to the county was contemplated.