

## **Opinion No. 63-111**

August 26, 1963

**BY:** OPINION of EARL E. HARTLEY, Attorney General

**TO:** Mr. Victor C. Breen District Attorney Tenth Judicial District Tucumcari, New Mexico

### **QUESTION**

#### QUESTIONS

1. When a sheriff of a county submits a claim for travel, meals and lodging expenses incurred by him on official business as sheriff, is the approval of the claim by the County Commissioners sufficient to make legal payment from county funds, or is the approval by the District Judge and District Attorney also necessary?
2. When a sheriff is traveling on official business from one town to another, how should his mileage be computed, from city limits to city limits, or should he be reimbursed for the actual mileage traveled?
3. How should mileage amounts allowable to district attorneys or district judges be computed?

#### CONCLUSIONS

1. See analysis.
2. See analysis.
3. See analysis.

### **OPINION**

#### **{\*243} ANALYSIS**

The question as to which authorities are necessary to approve claims for travel, meals and lodging expenses incurred by sheriffs or their deputies may be answered dependent upon the precise nature and purpose of the particular travel. Section 15-43-11.1, N.M.S.A., 1953 Compilation, authorizes the payment of per diem expenses to sheriffs, their deputies and guards for the following purposes:

- "(1) Service of criminal process issued out of the Supreme Court or District Court;
- (2) Service of criminal process issued out of a Justice of the Peace court when the issuance is approved in writing by the District Attorney or his assistants;

(3) Service of civil process issued by a district court; and,

(4) Attempting to discover or arrest a person charged with a felony if written authorization is obtained from the District Judge. . ."

Per diem expenses authorized for the above purposes as specified in Section 15-43-11.1, supra, may be paid only from county funds "on the rendition of sworn accounts filed in the county clerk's office **and approved by the county commissioners and the district judge.**"

Where the purpose of the trip is to transport prisoners to the State Penitentiary or to extradite individuals, Section 15-43-11.1, Subsection C, provides:

{\*244} "C. Sheriffs, their deputies and guards shall be paid per diem expenses, at the same rate as state employees, for transporting prisoners to the penitentiary and extraditing prisoners from without the state. These per diem expenses **shall be paid by the state upon sworn accounts filed with the department of finance and administration.**" (Emphasis supplied)

The amounts payable by the State to sheriffs or their deputies are controlled by the State Board of Finance under authority of Laws 1963, Chapter 115, and Section 18 of the 1963 General Appropriation Act (Laws 1963, Chapter 287).

All other compensable expenses incurred in connection with official travel by the sheriff or his deputies are payable pursuant to Section 15-43-24, N.M.S.A., 1953 Compilation. This Section sets out in part:

"Except as hereinbefore and hereinafter otherwise provided, the salaries of all county officers and the salaries of deputies, as fixed by law, **and the expenses**, as fixed by law, shall be paid monthly out of the county salary fund, **upon warrants drawn by the county commissioners**, and shall be paid from the respective dates upon which the several county officers qualified. . ." (Emphasis supplied).

Thus, as pointed out above, payment for per diem and travel expenses of sheriffs, their deputies or guards, is subject to approval of either (1) the county commissioners and district judge, (2) the state department of Finance and Administration; or (3) the Board of County Commissioners, dependent upon the nature and express purpose of the trip. See also, Attorney General's Opinions Nos. 62-84, July 10, 1962, and 62-86, July 11, 1962.

In your second question, inquiry is made as to how mileage should be computed when a sheriff is traveling on official business from one town to another. The answer to this question depends upon the type of transportation utilized.

Section 15-40-21.1, N.M. S. A., 1953 Compilation (Amended by Laws 1963, Chapter 9, Section 1) sets out the method of payment when the sheriff or his deputies use a private conveyance:

"County Peace Officers and Constables -- Mileage -- Conditions. -- A. Peace Officers and constables **shall be allowed mileage or the distance actually and necessarily traveled by privately-owned conveyance in serving any judicial process.** B. In serving any jury venire, a sheriff, deputy sheriff, constables or other county **peace officer shall charge for the actual mileage traveled and necessary** in providing service of jury venire. C. If more than one peace officer or constable travels in one privately-owned conveyance in the performance of official business, only the officer owning the conveyance shall be reimbursed." (Emphasis supplied)

Section 15-40-21.2, N.M. S. A., 1953 Compilation (enacted in 1961) is applicable where **public transportation** is utilized. This Section provides:

"Sheriffs, Deputy Sheriffs, and {\*245} other County Peace Officers. -- Whenever a sheriff, deputy sheriff or other county peace officer **utilizes public transportation in the performance of any official business within or without the state he shall be reimbursed for the actual cost of the fare and shall not be paid mileage.** The mode of public transportation used shall be the most economical possible, considering all the expenses and circumstances." (Emphasis supplied)

In instances where the sheriff or his deputies use county owned cars on public business the **actual** expense of maintaining such means of transportation is payable by the county and is subject to approval and budgetary controls of the Board of County Commissioners. The sheriff or his deputies are not personally entitled to collect **from the county or state** any mileage fees for the performance of their public duties when county or state conveyances are utilized, and in such cases such peace officers are entitled only to their salaries.

By law, however, the sheriff and his deputies are required to collect certain fees (§ 15-40-18, N.M.S.A.) from private individuals for performing prescribed services, and in connection with the performance of such duties a mileage fee may be imposed. These mileage fees, computed at the rate of nine cents per mile, are required under Section 15-43-16, N.M.S.A., 1953 Compilation, to be deposited into the county treasury and pursuant to Section 15-43-20, N.M.S.A., 1953 Compilation, credited to the County Salary Fund. See Attorney General's Opinion No. 62-86, supra, a copy of which is included herewith.

When computing the method of measuring mileage chargeable by a sheriff or his deputies engaged in performing their duties for which they are entitled to charge a fee and to recover their mileage, it is our opinion that such officers are entitled to recover for their actual mileage traveled at the rate of nine cents per mile. See Section 15-40-21.1, N.M.S.A., 1953 Compilation.

In reply to your third question, it is our opinion that the provisions of Section 17-1-3, N.M.S.A., 1953 Compilation are applicable and govern the method of computing mileage amounts allowable to district attorneys. This Section sets out in part:

"A. **The actual traveling expenses, by common carrier or personal automobile, shall be paid for on the basis of transportation costs by common carrier and at the rate of nine cents (\$ .09) per mile for travel by personally owned vehicle,** and subsistence in lieu of actual expenses shall be paid to the district attorneys and other personnel at the rate of eight dollars (\$ 8.00) per diem, or actual expenses, while in the discharge of their duties, provided that per diem in lieu of subsistence shall not be allowed while such district attorneys and their assistants and other personnel are performing duties within a radius of twenty (20) miles of their respective official duty stations. Such expenses incurred while in the discharge of their duties shall be paid by the counties in behalf of which the same are incurred, out of the court fund of each county when supported by sworn statements of such expenses, and approved by order of the court." (Emphasis supplied).

{\*246} Under the above statute, it is our opinion that the "actual" mileage traveled by a district attorney in connection with his official duties are reimbursable at the rate of nine cents per mile.

In the case of District Judges, this office by Attorney General's Opinion No. 63-96, dated August 9, 1963, held that District Judges, as well as their reporters and interpreters, may, under the specific provisions of Section 16-3-33 and 16-3-47, N.M.S.A., 1953 Compilation, continue to be reimbursed for their **actual** and necessary travel expenses. However, under the rationale of that opinion, standard per diem rates may be used in lieu of actual and necessary travel expenses by district judges. See also Attorney General's Opinion No. 208, dated October 27, 1953.

The 1963 Legislature enacted several comprehensive enactments pertaining to mileage and per diem: Chapter 31, Laws 1963; Chapter 115, Laws 1963; and Section 18 of the 1963 General Appropriation Act, Chapter 287, Laws 1963.

Laws 1963, Chapter 115 enacts a new Section 11-1-9, N.M.S.A., to provide that claims by public officers and employees for reimbursement out of public funds for expenses of transportation, lodging or subsistence shall be paid only in accordance with rules and regulations of the Department of Finance and Administration. Subsection C of the Act, sets out in part:

"C. Public officers and employees may be allowed actual expenses for transportation, lodging and subsistence **upon approval of the Department of Finance and Administration.** In lieu of actual expenses of lodging and subsistence, public officers and employees may be allowed a per diem allowance at a rate established by the State Board of Finance within the maximum authorized by the legislature in the general appropriations act. In lieu of actual transportation expense in privately owned cars, public officers and employees may be allowed a mileage rate established by the State

Board of Finance within the maximum authorized by the legislature in the general appropriations act. . ." (Emphasis supplied).

Laws 1963, Chapter 287, Section 18 (1963 General Appropriations Act) specifies:

**"The State board of finance** shall allow in lieu of actual expenses of subsistence and lodging for official travel of public officers and employees an amount not to exceed \$ 10.00 per diem for travel within the state. The rate of per diem or expense allowance for out-of-state travel shall be at the discretion of the governor but not to exceed \$ 20.00 per diem. The State board of finance shall allow a mileage rate for travel by privately owned automobiles in an amount not to exceed (\$.10) per mile." (Emphasis supplied)

Laws 1963, Chapter 31, which is the "mileage and per diem Act" does not apply to sheriffs, district judges or district attorneys. The term "public officer" is defined in Section 1-2-2.1, N.M.S.A., 1953 Compilation (Laws 1963, Chapter 197).

At first examination, the provisions of the above quoted 1963 enactments would appear to contravene the specific statutes applicable {247} to per diem and mileage payments to county sheriffs, district judges and district attorneys. However, no express repeals are made by the latter statutes of the earlier legislation, and as stated in **Levers v. Houston**, 49 N.M. 169, 159 P.2d 761; an **d State v. Rue**, Docket No. 7146, filed June 28, 1963, repeals by implication are not favored.

As pointed out in our recent Attorney General's Opinion No. 63-96, August 9, 1963, there being no express repeal of earlier specific statutes and there lacking a strong showing of a legislative intention that the general statute supersedes the specific statute, the earlier statutes must be held to still have validity and effect.

Careful consideration of the recent enactments, together with the earlier specific statutes pertaining to mileage and per diem of sheriffs, district judges and district attorneys, in our opinion, indicates that such officer **s may, in their discretion** elect to seek **either** reimbursement (1) for their **actual and necessary** mileage and per diem as outlined above, **or** (2) may elect to collect **standard per diem rates** as set by the State Board of Finance and where such mileage and per diem expenses have been in fact approved by the Department of Finance and Administration in addition to approval obtained from any other approving authority hereinabove stated to be required.

By: Thomas A. Donnelly

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