

Opinion No. 69-34

April 22, 1969

BY: OPINION OF JAMES A. MALONEY, Attorney General Ray H Shollenbarger,
Assistant Attorney General

TO: Nelson Worley, Sheriff, Curry County, Curry County Courthouse, Clovis, New
Mexico 88101

QUESTIONS

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Who is responsible for the payment of milage and per diem expenses incurred in carrying out an order of the district court to transport a prisoner from the State Penitentiary to the court so that he may be a witness in a pending matter?

CONCLUSION

See Analysis.

OPINION

{*52} ANALYSIS

Section 15-43-16, N.M.S.A., 1953 Compilation, imposes a duty on all county officers to charge and collect mileage and per diem authorized by law to be charged and collected for official services and to account to the county treasurer for such sums.

Section 15-43-11.1, N.M.S.A., 1953 Compilation, requires the payment of per diem expenses of sheriffs and their deputies by the county on behalf of which they are incurred 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 the district court; and
- (4) Attempting to discover or arrest a person charged with a felony if written authorization is obtained from the district judge. . . ."

We are of the opinion that an order of the district court directing the sheriff to bring back a person from the penitentiary so that he can be a witness cannot be classified as the

service of criminal or civil process and clearly this not an attempt to discover or arrest a person charged with a felony.

Part C of Section 15-43.11.1, supra, requires the payment of per diem expenses by the state to the sheriff for transporting prisoners to the penitentiary, it provides:

"C. Sheriffs, their deputies and guards shall be paid per diem expenses, at the same 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."

However, since Part C is limited to per diem expenses incurred in transporting prisoners **to the penitentiary**, we do not feel it is applicable to this situation. We are not unmindful of the opinion we rendered in 1966 (66-115) indicating it was the intent of the Legislature in Part C of Section 15-43-11.1, supra, to pay the costs of transporting prisoners to and from the penitentiary irrespective of the use of the limiting language "to the penitentiary." The opinion was based on the fact that the General Appropriation Act did not limit expenditures to the transportation of prisoners to the penitentiary. However, since that time the Legislature has limited {*53} these funds in the General Appropriation Act to strict terms of the statute and our prior opinion is no longer applicable.

Section 11-1-9, N.M.S.A., 1953 Compilation, allows the Department of Finance and Administration to pay the travel expenses of public officers and employees while away from their designated post of duty on official business. Since sheriffs are listed as public officers and employees exempt from prior written authorization for out of state travel in Part E of Section 11-1-9, supra, it is apparent that they are public officials or employees within the meaning of the section. However, we are informed by the Department of Finance and Administration that there is no budgetary provision to pay the travel expenses of sheriffs except for out of state travel in connection with the transportation and extradition of prisoners and for travel in connection with Section 15-43-11.1, supra.

Inasmuch as there is no budgetary provision for the payment of per diem for transporting prisoners to and from the penitentiary to be used as witnesses, it is our opinion that the court fund of each county is a proper source for the payment of such expenses. The court fund is under the jurisdiction of the district court and it has wide discretion in the use of such fund for any purpose connected with the administration of justice. However, we wish to make it clear that neither the Office of the Attorney General nor the sheriff's office can dictate what expenditures must be made from the court fund. If the court desires to pay such expenses it can do so but it is not required to do so.