

Opinion No. 37-1786

October 18, 1937

BY: FRANK H. PATTON, Attorney General

TO: Mr. J. O. Gallegos State Comptroller Santa Fe, New Mexico

{*167} 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:

Sheriffs are entitled to reimbursement in both civil and criminal cases, to be paid by the county, for actual traveling expenses which means meals and lodging, plus fare, when traveling by public conveyance, and meals and lodging, plus mileage, when traveling in personally owned car. Sec. 33-3203, 1929 Comp.; Ch. 82, L. 1937. This, of course, includes meals and lodging of prisoners and guards. Such expenses must be itemized, sworn to, filed with the clerk, and approved by the county commissioners and the district judge.

Section 33-4422, 1929 Compilation, passed before statehood, providing for the allowance of certain fees to sheriffs is still in force, but is now limited by Article X, Section 1, of the Constitution, and by statutes, so that the county pays none of the fees therein listed. Such of the fees there listed as are still collected by the sheriffs must be paid to the county treasurer, and a copy of verified account of such collections filed with him. Secs. 33-3206 and 33-3208, 1929 Comp. Some of the fees listed are not collectable at all under the present state of the law. The fees listed in that section are as follows:

"The several sheriffs of this state shall be allowed the following fees and compensations, to-wit:

"For serving every writ, citation, order, subpoena or summons, \$ 1.00; for every writ of *capias* or attachment for each defendant, \$ 1.00.

"For taking and returning every bond required by law, \$ 1.50.

"For levying every execution and return of same, \$ 1.50.

"For making, executing and delivering every sheriff's deed, to be paid by the purchaser, \$ 3.00.

"For every return of *non est inventus*, 50c.

"For making every return of any processes, order, summons, citation or decree of any court, 50c.

"For calling each party, action or jury, 15c.

"For calling each witness, 5c.

"For serving each writ in a criminal case for each defendant, \$ 1.00; for committing any person to jail in any case, \$ 1.00.

"For attendance on district court,, \$ 4.00 per day.

"For attendance on probate court and sessions of boards of county commissioners, \$ 2.00 per day.

"For attendance in justice of the peace court at the trial of preliminary hearings of felony court, \$ 4.00 per day.

The first six items providing fees for the service and return of process, are to be collected by the sheriff from litigants in all civil cases, and are to be paid to the treasurer as above stated.

{*168} The next two items providing fees for calling of parties, actions, jury and witnesses at the trial, are now superseded by the law providing for a docket fee and trial fee. Sec 34-343, 1929 Comp. The trial fee is collected by the clerk.

As to the fees in criminal cases provided by the next item, they are collected if at all as a part of the costs on conviction, and the sheriff is not paid those fees by the county. They go to the court fund.

The last three items dealt solely with fees payable by the county to the sheriff under the old fee system of paying officers for their services to the county, and are no longer collectible. Art. X, Sec. 1, Constitution; Sec. 33-3206, 1929 Comp. The same thing is true of the ten dollar fee for serving venire provided by Sec. 33-4425, 1929 Comp.

The above conclusions I think are thoroughly established by the case of State v. Velarde, 39 N.M. 179, copy of the pertinent portions of which is hereto attached.

Since the decision in the Velarde case, the legislature enacted Chapter 82, L. 1937, fixing mileage at 8c per mile for sheriffs. This is, of course, limited to mileage for the use of personally owned conveyance, and when traveling by public conveyance, reimbursement is limited to actual traveling expenses. It is further my opinion that this statute supersedes Section 33-4428, 1929 Comp., and that litigants are chargeable only 8c per mile for the service of process.

There are other statutes providing fees or expenses, such as commissions and for feeding prisoners and guards, but the same principle applies to all: the fee provided for services is collectable for the benefit of the county; the expenses are collected for the sheriff and may be retained by him or, more properly, paid to the Treasurer and recovered from the county by the itemized expense account filed with the clerk.

Hence it will be observed that the auditors should examine two different accounts filed by the sheriff: his sworn copy of account of fees and mileage collected and filed with the treasurer, and his sworn account of expenses payable to him by the county filed with the county clerk.

TO SUMMARIZE

These two accounts should reflect the following:

Reimbursement paid by the county for mileage at 8c, plus meals and lodging, under Ch. 82, L. 1937, or for actual traveling expenses under Sec. 33-3203, 1929 Comp.

Reimbursement for feeding prisoners and guards, actual cost only, such cost in no event to exceed 75c per day for each prisoner and guard. Sec. 33-3205. This section supersedes the proviso in Sec. 33-4426, 1929 Comp.

Collection of fees for service of process and making of returns as provided by the first six items of the statute above quoted, Sec. 33-4422, and payment of the same to the county treasurer by the 10th of the following month. Sec. 33-3208. 1929 Comp.

Collection of fees as commissions and collection of expenses under Section 33-4423, 1929 Comp. for executions and attachments. The commissions are to be paid to the treasurer for the county, and the expenses may be retained by or repaid to the Sheriff. Also fees for collection of taxes under the Social Security Act, Sec. 14 (d), Ch. 1, Sp. Ses. Laws of 1936, in the same manner.

State v. Velarde, 39 N.M. 179;

"Before the adoption of our Constitution, compensation received by sheriffs and other {*169} county officers was derived from fees collected by them as provided by law. In the case of sheriffs this was made up from fees to be by them charged for the performance of certain official duties. Section 33-4422, Comp. St. 1929 (Laws 1909, C. 16, Sec. 1). The sheriff was also authorized to charge litigants 12 1/2 cents per mile for the distance actually traveled in serving process. Section 33-4426, Comp. St. 1929. Baca et al. v. Board of Commissioners of Torrance County, 28 N.M. 458, 214 P. 757. We assume that they retained such mileage when collected as a part of the emoluments of office.

"Then came the Constitution which abolished the fee system as a means of compensation to county officers, and substituted the salary system. Const. art. 10, Sec.

1; Delgado v. Romero, 17 N.M. 81, 124 P. 649, Ann. Cas. 1914C, 1114; Ward v. Romero, 17 N.M. 88, 125 P. 617; Herbert v Board of County Commissioners, 18 N.M. 129, 134 P. 204. Such constitutional provision is in part as follows:

""* * * And no county officer shall receive to his own use any fees or emoluments other than the annual salary provided by law, and all fees earned by any officer shall be by him collected and paid into the treasury of the county.'

"The first state Legislature got into a disagreement with the Governor, and failed to pass a salary law for county officials as required by this constitutional provision. The second state Legislature, by chapter 12, Laws 1915, enacted what is called the 'County Officers' Salary Bill.' It was provided by section 3 thereof:

" '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.'

"Sections 6 (section 33-3260) and 8 (section 33-3208) are as follows:

" 'No county officer shall accept or receive to his own use, or for or on account of any deputy or deputies, clerk or clerks appointed by him or employed in his office, or for or on account of expenses incurred by him or by any such deputy or deputies, clerk or clerks, or for or on account of his office, any salary, compensation, allowance, fees or emoluments in any form whatsoever, other than as by this act allowed.'

" 'All county officers shall respectively charge and collect all fees, commissions, mileage and per diem heretofore and now, or which hereafter may be authorized by law to be charged and collected for official services rendered by them, and shall keep an accurate and itemized account thereof, and on or before the tenth day of each month pay the same over to the county treasurer of their respective counties, accompanying {*170} each remittance by a verified copy of the itemized account covered thereby, which verified copy shall be retained on file by said treasurer. All such county officers shall in like manner account for and pay over to the county treasurer of their respective counties, all such fees, commissions, mileage and per diem heretofore earned and hereafter collected for official services rendered by them from the respective dates when they qualified as such officers.'

"So it appears that section 33-4426 provides for the rate of mileage the sheriff may charge litigants, and when he collects said mileage he must pay the same into the county treasury. County officers, under the county officers' salary bill, were not to discontinue charging and collecting 'fees, commissions, mileage and per diem,' but such

collections were not to be a part of his emoluments, but were to go into the county treasury presumably to replenish the salary fund.

"The Legislature apparently realized that it would be unfair to the officers to require them to incur traveling expenses in order to serve process which it was their duty to serve and turn the fees and mileage incident to such service into the county treasury without reimbursing them for the expense they had actually and necessarily incurred in thus building up the salary fund. In fact, to require of officers the performance of duties requiring the expenditure of expense money in such performance out of the officer's own pocket without reimbursement would probably run afoul of the constitutional provision against enacting a law diminishing the compensation of officers during their term of office. Article 4, Sec. 27. We have heretofore referred to what the sheriff is required to collect from litigants incident to the service of process. And we discover in the 1915 act (section 33-3203) for the first time what the county is to pay the sheriff as incident to the service of process, i.e., 'all traveling expenses actually and necessarily incurred * * * while engaged in the service of criminal process issued out of the supreme court or a district court. * * * The actual expenses incurred in or about the service of civil process shall likewise be paid.'"

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