

Opinion No. 43-4400

October 28, 1943

BY: EDWARD P. CHASE, Attorney General

TO: Honorable C. R. Sebastian, State Comptroller, Santa Fe, New Mexico

We have your letter of October 22, 1943, wherein you state that a question has been raised by one of the District Judges with reference to the mileage allowance for travel. The question is whether the District Judges should be allowed six or eight cents per mile.

Article VI, Section 21 of the Constitution of New Mexico provides:

"Justices of the Supreme Court in the State, District Judges in their respective districts and justices of the peace in their respective counties, shall be conservators of the peace. * * *"

Section 16-325 of the New Mexico 1941 Compilation provides that the District Judges shall be reimbursed their actual and necessary traveling expenses. However, the statute does not provide what the maximum rate of mileage shall be. In determining this question it is necessary to refer to the general statute concerning mileage, which is Section 10-408 of the 1941 Compilation, 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 six (\$.06) per mile; provided, however, that this act (section) shall not apply to school busses; provided, further, that the sheriffs, deputy sheriffs and other peace officers of the several counties of this state shall be paid mileage at the rate of eight cents (\$.08) 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: * * *"

The question arises whether or not the District Judges are peace officers of the various counties of their districts and therefore entitled to eight cents per mile, or whether they come within the group limited by the six cents per mile provision.

The case of *Jones v. State (Tex.)*, 65 S. W. 92, held that a peace officer is practically synonymous with conservator of the peace, it being held that an exemption of the peace officers from a statutory prohibition against carrying concealed weapons included one who was by law made a conservator of the peace.

The case of *U.S. v. Viess*, D. C. Wash. 273 Fed. 279 at 281, held that a sheriff or his deputy, a constable, marshal or policeman of a city, **or conservator of the peace**, are

"peace officers" to whom a search warrant to search premises for intoxicating liquors may be issued, under Rem. Code, Wash. 1915, Sec. 6262-11.

The case of Patton v. State, 129 Tex. Cr. R. 269, 86 S. W. 2d, 744, 776, held, under a somewhat similar provision to the one in the New Mexico Constitution, that a Justice of the Peace was a peace officer and, as such, was legally carrying a pistol at the time he shot a dance hall patron in altercation arising while Justice was maintaining peace at a dance hall.

The case of Tippet v. State, 80 Tex. Cr. R. 373, 189 S. W. 485, at 486, held that Constitution, Art. 5, Sec. 12, makes all Judges of the Courts of the State **not only judicial and civil officers but also peace officers**. The Court further held that a Judge was a peace officer and authorized to carry a pistol even when not in the actual discharge of the duties of his office.

In view of the foregoing cases it is my opinion that the constitutional provision making a District Judge a conservator of the peace in effect provides that a District Judge shall be a peace officer, in view of the authority that the phrase "conservator of the peace" is synonymous with "peace officer."

We now refer again to the provisions of Sec. 10-408 of the New Mexico 1941 Compilation, which provides that all peace officers shall be paid mileage at the rate of eight cents a mile. Article VI, Sec. 21 of the New Mexico Constitution provides that District Judges are conservators of the peace **in their respective districts**, while Justices of the Peace are made conservators of the peace in their respective counties. We then have the question whether or not District Judges, while being peace officers, are officers of a county.

The case of Ward v. Romero, 17 N.M. 88, 125 P. 617 held that a District Attorney was a State officer rather than a District or County officer, since the word "district" merely pertains to the geographical limits within which such official performed the duties of his office, and did not refer to the nature and grade of the office. The Court indicated that a District Judge would, of course, be a State officer the same as a District Attorney.

In view of the above, it is my opinion that a District Judge is a State officer, and that Sec. 10-408 of the New Mexico 1941 Compilation pertains to County Peace Officers. It is further my opinion that it pertains to peace officers whose duties are similar to those of Sheriffs, and whose functions consist of serving warrants, process, order, citation, summons, jury venire, or decree now provided by law, and that the phrase "or in the performance of any official business" pertains under the rule of ejusdem generis to similar duties as those specifically enumerated.

Therefore, it is my opinion that a District Judge, for the above two reasons, is not entitled to eight cents a mile under the provisions of this statute.

Hoping that the above fully answers your questions, I am

By ROBERT W. WARD,
Assistant Attorney General