

Opinion No. 51-5458

November 14, 1951

BY: JOE L. MARTINEZ, Attorney General

TO: Honorable Alfred W. Kaune State Bank Examiner Santa Fe, New Mexico

{*167} This is in reply to your letter of November 2, 1951, in which you ask an interpretation of the requirements of Section 9 of Chapter 174, Laws of 1947, as to payment by small loan licensees of per diem and mileage to the examiners of your department.

The pertinent language of the statute is:

"Such licensee hereunder shall pay to the Examiner the actual cost of every examination, not to exceed Fifty (\$ 50.00) Dollars, at the rate of Ten (\$ 10.00) Dollars per diem to such Examiner, or Representative, plus transportation charge or mileage at the rate of six (6c) per mile actually travelled by said Examiner or deputy to and from his office in Santa Fe, New Mexico, to the place of business of the licensee."

It is my opinion that the inspection fee so charged is intended to be no more than the simple reimbursement of the expenses of the Banking Department's examiners.

The words "actual cost" and "per mile actually travelled" are the keys to the intention of the Legislature in its enactment of the quoted provisions. The requirement is that the licensee must pay "actual cost" of inspection up to a limit of \$ 50. per inspection. The words "actual cost" have been the subject of judicial construction on several occasions.

"Actual cost' means the cost actually incurred." Boston Molasses Distributors' Corporation, 175, N.E. 150, 152, 274 Mass 589; Fillmore v. Johnson, 109 N.E. 153, 156, 221 Mass 406.

"Actual cost' . . . was held . . . to mean money actually paid out." Mayor and Aldermen of City of Newton v. Boston & A.R. Co., 51 N.E. 183, 185, 172 Mass. 5.

"Actual cost' held to refer to sum actually paid for necessary labor and material in doing particular job." Mailander v. Continental State Bank of Beckville, (Tex. Civ. App.) 11 S.W. (2d) 615, 617.

It is my opinion that the only interpretation that can be given to the words "actual cost" is such as would preclude the collection from each licensee of the full maximum cost based on the per diem and mileage rate set out in the statute when more than one licensee is examined on one trip. It {*168} is my opinion that the rate established for the amount of per diem and the maximum rate allowable for mileage of the Department's examiners were intended merely as standards for the determination of the actual costs

of the examinations. It is my opinion that you cannot charge each licensee mileage for the total distance to and from Santa Fe but that each licensee may be charged only the actual cost of the examination. This, of course, will require some proration of mileage.

In your request you ask that if it be determined that mileage should be prorated we suggest some manner of carrying out this proration. You state specifically that the fees and mileage are collected at the time of examination rather than later. There is no requirement in the law that the examiners collect the costs of examination at the time of making such examination.

The manner of collection of these costs is something which is within the discretion of the State Bank Examiner. As a matter of law I could not tell you what procedure you must follow in this regard. I will suggest that one method which might be practical would be to have the examiner keep a record of time spent in each licensee's place of business and to keep an accurate record of his total mileage on any one field trip and upon his return therefrom to prorate the mileage to the licensees in a direct proportion to the distance from Santa Fe to the city in which they are located and to charge them for the per diem in accordance with the time spent in their place of business.

I trust that this will answer your inquiry fully.