

Opinion No. 57-234

September 20, 1957

BY: OPINION OF FRED M. STANDLEY, Attorney General Fred M. Calkins, Jr.,
Assistant Attorney General

TO: Honorable Paul W. Robinson, District Attorney, Second Judicial District, Second
Floor Court House, Albuquerque, New Mexico

QUESTION

QUESTIONS

1. Who is the proper party for the purpose of negotiating a contract with the Federal Government for keeping the Federal prisoners in the Bernalillo County jail?
2. Does the Sheriff have any control over the terms of the contract and the fulfillment of those terms?
3. May the contract include counties outside of Bernalillo County?

CONCLUSIONS

1. The Board of County Commissioners is subject to the known conditions as related by the Sheriff concerning population of said jail.
2. Yes.
3. Yes, in the event the terms of the contract will not impair cleanliness, health and discipline within the jail.

OPINION

ANALYSIS

It is our understanding that a controversy has arisen between the Sheriff of Bernalillo County and the Board of County Commissioners of Bernalillo County in regard to the housing of Federal prisoners. The facts, as we understand them, are as follows:

That it has been the practice in the past to provide facilities for the detention of Federal prisoners in the Bernalillo County jail from any of the other counties in the State in a jail which is vastly overcrowded due to an inadequate physical plant. Such overcrowding has resulted in prison escapes, and, in the opinion of the present Sheriff, made the jail almost unmanageable. We are informed that the Sheriff of Bernalillo County, at this time, now refuses to accept any Federal prisoners with the exception of those arrested

and detained in Bernalillo County. The Sheriff is charged with certain duties as contained in §§ 42-2-1, 42-2-3 and 42-2-4, N.M.S.A., 1953 Compilation, which statute specifically designates him as the custodial officer of all persons within the jail of his county and charges him with the duty of keeping the jail clean, maintaining a healthful condition and makes him responsible for the discipline within that jail. The County Commissioners of Bernalillo County, we are told, wish to enter into an agreement with a representative of the Federal System whereby Federal prisoners arrested in surrounding counties, including Sandoval, Valencia and Torrance, will be reposed in the Bernalillo County jail. It has been mentioned in connection with this matter that these surrounding counties do not have a jail approved by the Federal System.

The First Congress of the United States, by Resolution of September 23, 1789, asked permission to use the premises in jails of the several states. This permission has generally been granted. The right of the United States to commit prisoners to the jails or prisons of the State is purely a matter of comity extended by the states, and is subject to such demands for compensation as may be determined by contract with the proper authorities. See *Ex Parte Shores* (D.C.), 195 F. 627.

Turning to the New Mexico Statutes, § 15-37-16, N.M.S.A., 1953 Compilation, concerning the Board of County Commissioners, states:

"To represent the county and have the care of the county property and the management of the interest of the county in all cases where no other provision is made by law."

Our Supreme Court, in the case of *Agua Pura Company v. Mayor*, 10 N.M. 6, 60 P. 208, in discussing the authority of the County Commissioners, stated:

"The powers of a county are not only corporate, but administrative, and it is authorized to do the acts in the interest of the county, and to make necessary contracts, when not otherwise provided by law."

From the above, it is evident that management of county property is vested in the Board of County Commissioners, and we believe this also includes jail facilities.

Section 42-2-14, N.M.S.A., 1953 Compilation, relating to the incarceration of Federal prisoners, states:

"It shall be the duty of the sheriff of each county, his deputy or jailer, to whom any person shall be remitted in conformity with a legal process issued by or under the authority of the United States, and he is hereby required, to receive such person or persons into his custody and keep them safely until they shall be placed at liberty according to the laws of the United States: Provided, that the United States shall be responsible for the pay of their subsistence and jail fees of such persons, in the same manner as provided for the imprisonment and support of every person imprisoned by the order of any public magistrate of this state."

The above statute obviously does not mean that the Sheriff must accept Federal prisoners, even from his own county, in the event such acceptance of those prisoners would so overcrowd the jail as to exclude county prisoners. This statute is an accommodation to the Federal people and their interest is secondary to the interest of the county involved.

It should be noted that it is the duty of the sheriff in **each** county to receive Federal prisoners provided they have the properly approved facilities. Since the facts of this case indicate that there are counties which do not have the proper facilities, it is obvious that some provision should be made for custody and control of Federal prisoners from these counties. Thus, if the condition of the jail and the population of the jail is such that, in the opinion of the sheriff, it will not impair discipline, cleanliness and health, a contract may be negotiated for maintaining prisoners from other counties. The decision of the sheriff, of course, cannot be arbitrary. It must be based upon reasonable standards of cleanliness, health and discipline.

As indicated above, the County Commissioners are vested with the authority to manage the physical plants and facilities of the county. We think, in this particular case, that they are the proper party to negotiate a contract for the care of Federal prisoners, subject to the foregoing.

Section 42-2-8, N.M.S.A., 1953 Compilation, provides that the sheriff of each county shall furnish the jail in his county, but such furnishings shall be paid out of the county treasury; and, although § 42-2-5 states that food shall be supplied by the sheriff for prisoners, provisions are made to compensate him for such costs.

We have found only one case which appears to be in point with the instant problem, *Los Angeles County v. Cline, Sheriff*, 197 P. 67. The California Court, in that case, after discussing a number of statutes similar to the New Mexico statutes quoted above, stated:

"It is the function of the Board of Supervisors as the constituted business agents of the county and not of the sheriff to contract with the Federal authorities as to the compensation to be demanded for Federal prisoners while confined in the county jail."

See also *Holland, Jailer, v. Fayette County, et al.*, 41 S.W. 2d 651.

The above holding is in keeping with Attorney General Opinion No. 2034, found in Report of Attorney General, 1937-1938. In the Opinion, it is stated:

"It would seem that the keeping of prisoners for the Federal Government could and should be fixed by agreement between the County Commissioners and the Government at such sum as would fairly compensate the county for the services rendered."

By way of summary in regard to question 1, we are of the opinion that the County Commissioners are the proper and authorized agency to negotiate with the Federal

Prison System, subject to the conditions of cleanliness, health and discipline, concerning the reposing of Federal prisoners in the Bernalillo County jail.

We have found no case or statutory law authorizing the County Commissioners to accept Federal prisoners from counties not having facilities adequate to house Federal prisoners. On the other hand, however, we have found no authority denying such right except § 42-2-14, supra, and that statute merely states that it is the duty of the sheriff of **each** county to accept Federal prisoners, provided adequate facilities are available.

We have authority of law which allows counties without jails to make proper arrangements with some other county for the incarceration and care of its prisoners. Such negotiations are carried out by the Board of County Commissioners of the respective counties under § 14-2-16. It is also possible for the Board of County Commissioners in the several counties to enter into a contract with the trustees of any town or village for the feeding and guarding of prisoners confined in its jail. See also Attorney General Opinion No. 5608, Report of Attorney General, New Mexico, 1951-1952.

In view of the above, we believe that the Board of County Commissioners can lodge Federal prisoners from surrounding counties if adequate facilities for their care and custody are not available in that particular county, however, the sheriff of the county wherein the jail is situated has, even in the case of a contract between two counties within the State of New Mexico the right to maintain the standards of cleanliness, health and discipline, and such a contract cannot work to the exclusion of the prisoners of the county wherein the jail is situated.