Opinion No. 61-09

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BY: OPINION OF EARL E. HARTLEY, Attorney General H. Harlan Flint, Assistant Attorney General

TO: Robert D. Castner, State Auditor, State Capitol, Santa Fe, New Mexico

QUESTION

FACTS

The State of New Mexico provides an annual legislative appropriation entitled "Transportation and Extradition of Prisoners." This fund was in the amount of $ 50,000 each for the 48th and for the 49th fiscal years, Laws of 1959, Chapter 288, Section 4 B, p. 845. After stating the amount of the appropriation in the 1959 laws the legislature included the following provisio:

"Provided that the above appropriation shall be used only for reimbursement of mileage and personal travelling expenses incurred by officers and employees and that no part shall be used for reimbursement of mileage to any agency of State, County or municipal government; no reimbursement for mileage shall be made for use of privately owned vehicles if government - owned conveyances are available for this purpose."

Identical sums were also appropriated for the 46th and 47th fiscal years by Laws of 1957, Chapter 235, Section 1, p. 532. There was, however, no proviso in the 1957 law such as was included in the 1959 law, quoted above. All disbursements from the transportation and extradition fund are made through the Budget Division and Fiscal Division of the Department of Finance and Administration. The following procedure has been utilized in securing payment from this fund. When a defendant has been found guilty of a crime in the District Courts of the State the court has executed papers authorizing the Sheriff to transport the defendant to the State Penitentiary. The court also usually authorizes the Sheriff to use another person as guard during the period of such transportation. Furthermore, in cases where the Governor has signed extradition papers requesting the return to this State of prisoners charged with the commission of crimes in New Mexico, he has executed similar authorization for travel by the Sheriff and appointment of a guard. This guard authorization rarely, if ever, designated a particular party to serve as guard, usually leaving such designation to the discretion of the Sheriff. Upon committing the prisoner to the State Penitentiary or following the extraditing of the prisoner to the State, the transporting officer has taken the above-mentioned authorization papers to the Budget Division where an employee of the budget division has executed a "reimbursement voucher" in favor of the sheriff for mileage at the rate of 9 cents per mile for travel in privately owned vehicles, plus sheriff per diem at $ 8.00 per day, plus guard per diem at $ 8.00 per day, plus costs of prisoner's meals. In some instances this voucher has also included an item for guard

compensation at $ 10.00 per day. Upon completion of the reimbursement voucher the same has been signed by the sheriff and notarized. The voucher has then been delivered to the fiscal division for the issuance of a State Warrant in favor of the named sheriff in the amount specified in the voucher and for the purposes stated therein. Customarily all of the above-mentioned items have been included upon one voucher and one warrant covering the amount due to both the sheriff and the guard.

QUESTIONS

1. If the Court or the Governor authorizes the use of a guard without naming same, is it a prerequisite that the sheriff specify the name of the guard used on such authorization?

2. If the sheriff specifies the guard he will use, is it mandatory that this specific guard act as such?

3. If a person other than that named as guard serves as such, is it mandatory for the sheriff to make the change on the authorization?

4. Since the court or the Governor authorizes the use of a guard, and the person selected to render such service is specified by the sheriff and payment made from state funds, is there any conflict with Section 5-1-10, N.M.S.A., 1953 Compilation should the guard be related to the sheriff within the third degree of consanguinity or affinity?

5. If the guard is a full-time deputy sheriff, should payment be made for compensation in addition to per diem?

6. Since it is a common practice for the sheriff to pay for meals and lodging of the guard prior to the time the reimbursement voucher is executed and payment received, is it permissible for the sheriff to submit guard expense and per diem on his own reimbursement voucher and make such arrangements with the guard for payment over to the guard as he may deem proper?

7. Following the determination in Attorney General Opinion No. 58-183, issued on September 11, 1958, that counties are entitled to mileage reimbursement of 9 cents per mile when a county-owned vehicle is used, is not the sheriff liable for payment to the County if he has personally received such payment through execution of a reimbursement voucher and payment thereof by the fiscal division?

8. Is the State Auditor's office correct in establishing the propriety of payments from state funds made to sheriffs for transportation and extradition of prisoners and subsequently setting forth any and all accounts receivable from any sheriff when the findings are that he has caused payment to be improperly made to him?

9. Has the State Auditor's office fulfilled its responsibility when it sets forth its findings and subsequently makes a demand for restitution from a public official, officer or employee in case of an account receivable being found due from such party, and

provides written evidence of its finding and action to the proper District Attorney and to the Attorney General?

10. Should there be an individual reimbursement voucher executed by the sheriff and the guard for services and expenses incurred and consequently separate and individual state warrants issued in payment therefor?

CONCLUSIONS

1. No.

2. No.

3. No.

4. There may be a conflict.

5. No.

6. See analysis.

7. See analysis.

8. Yes.

9. Yes.

10. See analysis.

OPINION

ANALYSIS

Many of the questions phrased above involve common problems and it will be possible to answer the questions in groups. In several instances the conclusion and analysis to one question will control the answers to other questions. We shall take the questions in their stated order as much as possible.

Questions 1 through 3 can be answered together. Our research has disclosed no statute specifying the form and content of a guard authorization. It is apparent that it is within the necessary powers of the Court and the Governor to authorize the use of guards and to authorize the expenditure of state funds to return extradited prisoners to the State and to commit convicted criminals to the State Penitentiary. For the reason that there is no positive law on the details of such authorization we must reach our conclusions on the basis of the powers and responsibilities of the agency of state government controlling the disbursement of state monies. The responsibility for

determining that funds to be disbursed from the State Treasurer are paid for a proper and legal purpose falls upon the Department of Finance and Administration and more specifically upon the Division of Financial Control. See Section 11-2-68, N.M.S.A., 1953 Compilation (PS), wherein this obligation is specifically stated. Furthermore, Section 11-2-70, N.M.S.A., 1953 Compilation (PS), provides that all vouchers used by State agencies or local public bodies shall be in the form and contain the information designated by the Director of the Department of Finance and Administration. That same section provides other required safeguards which it is not necessary to quote in detail at this time. In substance, we conclude that within its broad powers to make certain that state monies are spent for authorized purposes the Department of Finance and Administration may establish such rules and regulations as may be necessary to accomplish this purpose. However, as far as statutory and case laws are concerned, there is nothing that requires the name of the guard to be specified, and therefore, it would not violate the law to substitute one guard for another without changing the court authorization. Of course the answers given here are directed towards problems of fiscal accounting. However, it appears that even under the provisions of the "Uniform Criminal Extradition Act", Sections 41-19-1 to 41-19-30, N.M.S.A., 1953 Compilation, there is no requirement that guards, as such, be designated by name. It is certain, however, that the sheriff or other designated officer who represents the executive authority of the requisitioning state and is the agent of that state for receipt of prisoners, has to be named and duly accredited as the demanding state's agent before prisoners will be delivered to him.

Turning to question 4, we conclude that a guard might in some instances fall within the prohibition of the Nepotism Statute, Section 5-1-10, N.M.S.A., 1953 Compilation, which reads as follows:

"It shall hereafter be unlawful for any person elected or appointed to any public office or position under the laws of this state or by virtue of any ordinance of any municipality thereof, to employ as clerk, deputy or assistant, in such office or position, whose compensation is to be paid out of public funds, any person related by consanguinity or affinity within the third degree to the person giving such employment, unless such employment shall first be approved by the officer, board, council or commission, whose duty it is to approve the bond of the person giving such employment: Provided, that this act (5-1-10, 5-1-11) shall not apply where the compensation of such clerk, deputy or assistant shall be at the rate of $ 600.00 or less a year, nor shall it apply to persons employed as teachers in the public schools."

Certainly the Statute would come into play should the sheriff employ as his guard the regularly employed Deputy Sheriff since a deputy sheriff would fall within the statutory definition of "Deputy or Assistant". If such a deputy were related to the sheriff within the prohibited degree it would be a violation of the law. It further appears to us that a person temporarily employed as a guard might still be considered an assistant as defined by the Statute. However, in the event of temporary employment, it is almost certain that the compensation paid to each assistant would be less than $ 600.00 a year, in which case, the prohibition would not apply. Compensation as used here is synonymous with salary

and does not include traveling or other incidental expenses usually called per diem. See 8 Words & Phrases 300. This Statute has been considered frequently in previous Attorney General's opinions. Attorney General Opinion No. 5040, issued June 16, 1947, concluded that the civil law rule for computing degrees of relationship was contemplated by the legislature. Several other opinions have been written regarding the definition "clerk, deputy or assistant" used by the Statute. They are: Attorney General Opinion No. 5448, issued October 23, 1951, No. 5484, issued January 31, 1952, and No. 57-201, issued October 14, 1957.

The answer to question No. 5 must clearly be in the negative. It is obvious that if the guard is a fulltime deputy sheriff he is entitled to no more than per diem when traveling with the sheriff for the purpose of delivering or returning a prisoner. It requires no recitation of authority to conclude that he is not entitled to double compensation for such duties.

The conclusion to the problem expressed in question No. 6 must be influenced to some extent by the reasoning expressed in the answer to questions 1, 2 and 3. Here again, the positive law is silent on the subject of the necessity of separate vouchers. Also, as was the case in the previously mentioned questions, it is the duty of the Department of Finance and Administration to determine that the warrant issued is for a legitimate expense. It would appear to us that if the sheriff has expended his own money in payment for the guard's authorized expenses that those expenses would therefore be legal expenses of the sheriff for which he could properly be reimbursed. As regards the responsibility of the State Auditor in determining whether this payment was proper, we conclude that his responsibility would be fulfilled by determining that a guard actually accompanied the sheriff on the subject trip and that expenses submitted by the sheriff were properly substantiated.

In question No. 7 you refer to the treatment of this problem by Attorney General Opinion No. 58-183, and request our interpretation of the proper means of construing that opinion with the 1959 Appropriation Act (see Laws 1959, Chapter 288, Section 4 B). The subject Attorney General Opinion concluded that counties were entitled to mileage when the County Sheriff employed a county-owned automobile to transport prisoners to the penitentiary or for extradition purposes. In reaching that conclusion the Attorney General read together the 1957 Appropriation Act, enacted as Laws 1957, Chapter 235, Section 1, p. 532, and Section 15-43-11, N.M.S.A., 1953 Comp., which deals with travel expenses of sheriffs and their deputies. There is one notable difference between the law as stated when the opinion was written and the present law. The 1957 Appropriation Act provided the same amount of money for transportation of prisoners; however, it did not contain the limiting proviso found in the corresponding section of the 1959 Appropriation Act. That proviso is quoted in full in the statement of facts above, and it will be noted that no portion of the subject funds are permitted to be used for reimbursement to any agency of state, county or municipal government. We conclude that the result reached in the above-mentioned Attorney General Opinion must be modified when applied to the 48th and 49th fiscal years. We conclude that the subject proviso clearly prohibits the use of these funds to reimburse counties even though county vehicles were used.

However, this conclusion is applicable only as to expenses incurred during the 48th and 49th fiscal years. Prior to that the Attorney General's Opinion did apply and counties were entitled to such reimbursement. In either case, and during any given period of time, the sheriff is liable for mileage reimbursement paid to him if in fact a county vehicle was used. It is abundantly clear from Section 15-43-11 supra, and Section 5-4-8, N.M.S.A., 1953 Compilation (PS) that the sheriff is entitled to the mileage allowance only when private vehicles have been used.

Question No. 8 is directed to the issue of the State Auditor's duties in regard to the establishing of the propriety of such payments made to sheriffs. We conclude that the State Auditor's office is correct in investigating the propriety of such payments and setting forth such accounts receivable as are found to be due from the sheriff. Section 4-4-2.10, N.M.S.A., 1953 Compilation (PS) requires the State Auditor to make a complete written report of all audits and examinations. Furthermore, under the rule making power given the auditor by Section 4-4-2.6, N.M.S.A., 1953 Compilation (PS) the auditor is granted the power to establish all reasonable procedural and administrative rules as he may feel are necessary in the conduct of audits. In answering this question in the affirmative, we certainly do not wish to give the impression that the state auditor must or may determine whether violations of the law have occurred. We merely conclude that he may be sufficiently advised of the state of the law so as to make an educated analysis of public records, and report discovered facts to enforcement authorities in understandable form.

An affirmative answer to question 9 is clearly demanded by the Statutes. Section 4-4-2.11, N.M.S.A., 1953 Compilation (PS) grants the Auditor the power of suit to force repayment to the public body concerned. Such suit would of course be conducted by the auditor's statutory legal advisor, the Attorney General. The state auditor is also under an obligation to report discovered violations of the penal laws of the state (see Section 4-4-2.13, N.M.S.A., 1953 Compilation (PS). In this regard we also draw attention to the requirement of Section 4-4-2.14, N.M.S.A., 1953 Compilation (PS) that securities upon the official bond of any state official should be immediately notified if an audit discloses a shortage in accounts under such official's control and jurisdiction.

Finally, we turn to question No. 10 dealing with the necessity of separate and individual vouchers and warrants for the expenses of a sheriff and guards in the performance of the services here under consideration. The conclusion of this office on this point is governed by the same considerations discussed in the analysis under questions 1 through 3. As was the case there, there is no statutory law specifically answering this question. We therefore conclude that the Department of Finance and Administration may incorporate such measures as it deems necessary to insure the payment of authorized expenses only.

In conclusion, we emphasize that the answers contained herein are based upon specific considerations of fact which will vary in every individual case. It is apparent considering the paucity of legislation governing fiscal and accounting details in this area, that considerable discretion is given the Department of Finance and Administration as to the

means used to assure proper payment of expense. It is clear that said department has the obligation of determining that warrants upon the state treasury are drawn for a purpose authorized by law and the Department may adopt such administrative procedures as are reasonably calculated to secure that end.