

Opinion No. 19-2264

May 16, 1919

BY: N. D. MEYER, Assistant Attorney General

TO: Mr. Thomas P. Gable, State Game Warden, Santa Fe, New Mexico.

Sentence by Justice of the Peace of Less Than Minimum Prescribed By Law Not Void.

Deputy Game Wardens May Retain 25c Fee for Issuing Game License.

OPINION

Complying with your oral request for the opinion of this office as to the propriety of a justice of the peace imposing a sentence of less than the minimum prescribed by law; and also whether or not the deputies in your office may retain a commission of twenty-five cents per license issued by them the same as a license collector, we beg to state:

First. The authorities hold that a sentence for less than the statute prescribes is not void, but merely erroneous. Therefore, it would follow that upon appeal, if no other irregularities obtained, the appellate court would remand the case with instructions to the lower court to enter proper judgment. However, if a judicial officer should persist in knowingly passing sentence otherwise than as prescribed by law for each particular offense, we are of the opinion that it would be grounds for his removal.

Second. The law prescribes a fixed salary or compensation to be paid your office deputies, and also a fixed commission to be paid to the license collectors. I do not think that the office deputies would be precluded from collecting the commission allowed to license collectors, provided they have been appointed and have qualified as license collectors as provided by law.

I do not conceive where there could be any conflict of duty between acting as an office deputy and as a license collector at the same time and if there is no such conflict, then it would be permissible for the same person to act in both capacities.

It has been called to the writer's attention that the prior administration in your office engaged in the practice of allowing the members of the office administration to retain a license collector's fee for writing out licenses that were applied for direct to your office.

I do not understand that this procedure has been attacked, and I do not wish to seem disposed to interfere with the discharge of your duties as you see them. However, as above suggested it would seem to me the better way to have those who issue licenses designated as license collectors, and then, I believe, there would be no question whatsoever.

If you should want this last matter looked into more thoroughly, we will gladly do so at your request, but as you wish to have our views expressed immediately, we have not the time to devote in making a more extended search at this time.