

VOLUME NO. 33

Opinion No. 7

**SHERIFFS, EXPENSES — Board of Prisoners, COUNTY COMMISSIONERS, Powers, — Prisoners, board of — PRISONERS, Board in county jails. Sections 25-227, 25-229, and 16-3801, R.C.M. 1947.**

- HELD:** 1. A board of county commissioners may not require the sheriff of its county to submit itemized statements showing the purchase of food and supplies for the board of prisoners imprisoned in the county jail as a condition precedent to the payment of the fees claimed under section 25-227, Revised Codes of Montana, 1947.
2. The board of county commissioners may require the sheriff of its county to submit itemized statements showing the purchase of food and supplies for the board of prisoners imprisoned in the county jail so as to determine if there is compliance with section 25-229, R.C.M. 1947, and to insure that the prisoners are receiving an amount of food in compliance with the dictates and intentions of the legislature as provided in section 25-227, R.C.M. 1947. The board may further require this accounting of actual expenses for the board of prisoners under the powers granted the board of county commissioners under chapter 10, Title 16, R.C.M. 1947, and section 16-3801, R.C.M. 1947.

September 24, 1969

Armand J. Lucier, Chairman  
Board of County Commissioners  
Missoula County  
Missoula, Montana 59801

Dear Chairman Lucier:

You have requested my opinion concerning reimbursement of fees to the sheriff for the board of prisoners imprisoned in the county jails. Your questions can be stated and answered as follows:

1. Whether the board of county commissioners has the legal authority to require an accounting by the sheriff as a condition precedent to the payment to the sheriff of fees for the board of prisoners pursuant to section 25-227, R.C.M. 1947?

Early statutes in Montana's history have provided for the care and feeding of prisoners. The Revised Statutes of the Territory of Montana, 1879, section 585, stated in part:

“The dieting of prioners per day shall not hereafter exceed two dollars (\$2.00) per day, and it shall not in any sum exceed what the county commissioners believe to be the actual value thereof.”

This statutte allowed discretion in the board of county commissioners to pay up to a certain amount but no more than what they believed to be the actual value of the board furnished. In 1885 the legislature amended the above act to read:

“The fees allowed sheriffs of the several counties of this Territory for the board of prisoners confined in jail under their charge shall be such as the county commissioners may deem a reasonable compensation therefor, not to exceed seventy-five cents (75c) per day for each prisoner where there is less than five (5), when there are five (5) or over that number, sixty cents (60c) per day.”

Again the board of county commissioners were allowed a certain discretion as to the amount of board not to exceed a certain statutory maximum.

Montana adopted section 1075 of the Compiled Statutes of Montana in 1887 which repealed all other acts in conflict. This statute was the first one to use command language rather than discretionary language, and it read in part:

“The fees allowed the sheriffs of the several counties of this Territory for the board of prisoners confined in jail under their charge **shall be**, for five (5) or under, one dollar (\$1.00) per day for each prisoner, and for over five (5), eighty cents (80c) per day each.” (Emphasis supplied.)

In Montana the court has stated that in construing statutes, the synonymous terms “must” and “shall” are generally interpreted as mandatory, and the term “may” is generally construed as permissive or directory only. *State ex rel McCabe v. District Court*, 106 Mont. 272 (1938).

*Modern Coach Corp. v. Faver*, Ga. App., 73 S.E.2d 497, 499, stated:

“There is a difference between the use of the verb ‘shall be’ and the use of the verb ‘may be’ in a statute, since the former is mandatory and admits of no choice, and the latter is permissive.”

It would seem then that the words “shall be” in section 1075 are in the form of a command. The Montana Supreme Court in *Lloyd v. Board of Commissioners*, 7 Mont. 562, 19 Pac. 217, dealt with the construction of section 1075 and although they did not directly answer the question of the meaning of the words “shall be” there is dictum in the case that indicates that these words are construed to be mandatory rather than permissive.

“The legislature meant that the sheriff **should receive** one dollar a day for each of five prisoners, if he had that many in his charge; but when the number exceeded five, he **should only receive** eighty cents per day for such excess.” at page 565. (Emphasis supplied.)

Thus the court has indicated that the sheriff must receive the statutory allotment for the board of prisoners.

Ever since the adoption of section 1075 of the Compiled Statutes of Montana, the legislature has used the words “shall be” or “shall receive” in referring to the board of prisoners. Section 25-227, R.C.M. 1947, the present statute, uses these same words, “The fees allowed sheriffs of the several counties for the board of prisoners confined in jail under their charge **shall be** at the rate . . .” (Emphasis supplied.)

It is my opinion that section 25-227, Revised Codes of Montana, 1947, is a command statute requiring the board of county commissioners to pay a statutory sum to the sheriff for the board of prisoners. The county commissioners are not authorized to establish a condition precedent to the payment of this amount but must pay it on receipt of the sheriff’s claim.

This opinion thus overrules the conclusion reached in Opinion No. 37, Volume 25 of the Report and Official Opinions of the Attorney General.

2. Whether the board of county commissioners has the legal authority to require an accounting of the sheriff for funds expended for board of prisoners to determine if there is violation of section 25-229, R.C.M. 1947, dealing with false representation by the sheriff of actual expenses for the boarding of prisoners?

The statutes of Montana explicitly state the powers of the county commissioners over other county officers. Section 16-1001, R.C.M. 1947, states:

“The board of county commissioners has jurisdiction and power under such limitations and restrictions as are prescribed by law:

“To supervise the official conduct of all county officers and officers of all districts and other subdivisions of the county, charged with assessing, collecting, safe-keeping management or disbursement of public revenues; see that they faithfully perform their duties, direct prosecutions for delinquencies, and when necessary require them to renew their official bonds; to make reports and to present their books and accounts for inspection . . .”

Section 16-1013, R.C.M. 1947, further states the duties of the county commissioners:

“The board of county commissioners has jurisdiction and power under such limitations and restrictions as are prescribed by law: At the regular monthly meeting of the board, to examine and allow the accounts of all officers having the care, management, collection or disbursements of moneys belonging to the county, or appropriated by law or otherwise for its use and benefit.”

As to the county charges to be audited by the county commissioners, the codes once again provide an explicit answer. Section 16-3801, R.C.M. 1947, states:

“Accounts for county charges of every description must be presented to the board of county commissioners to be audited as prescribed in sections 16-1013 and 16-1014 and in section 16-1802.”

Section 16-3802, R.C.M. 1947, defines what are county charges and includes in subsection (3):

“The salary and actual expenses for traveling when on official duty, and for the board of prisoners allowed by law to sheriffs, and the compensation allowed by law to constables for executing process on persons charged with criminal offenses.”

It is patently obvious from these sections that the legislature placed the control of county officers in the hands of the county commissioners and that these county officers should be answerable to the county commissioners. From these statutes alone it would be justifiable to conclude that the county commissioners are authorized to require an accounting of the sheriff for moneys expended for the board of prisoners.

The need for the accounting by the sheriff is emphasized in section 25-229, R.C.M. 1947, which states:

“Every sheriff who falsely represents to the board of county commissioners the actual expenses of boarding prisoners, or for furnishing food and supplies thereof, or for any service rendered in connection therewith, or presents to said board false items in a claim or false vouchers, **or makes any profit whatever** out of the board or keeping of prisoners in his custody, and every person who gives a false item or false voucher to be used by such sheriff in any claim against the county before such board, is punishable as provided in section 94-115 and 94-1517.” (Emphasis supplied)

The fact that this statute exists implies a power in the board of county commissioners to determine if such law is being violated. Since there are specific provisions allowing the county commissioners to demand an audit or accounting of the receipts and expenditures of county officials, it would be reasonable to assume that the legislature meant for the commissioners to demand that an audit or accounting of the receipts and expenditures of county officials to determine if there has been malfeasance in office. The enactment of section 25-229, R.C.M. 1947, indicates that the legislature intended the sheriff to be held strictly accountable for the disbursement of these funds.

The Supreme Court of Montana in *Scharrenbroich v. Lewis and Clark County*, 33 Mont. 250, 83 Pac. 482 (1905), held that sheriffs should not be allowed to make extra money under law providing mileage, and stated at page 258:

“The same reasoning would apply to the feeding of prisoners in the county jail. If the statute allows fifty cents per day for feeding a prisoner, there is no understanding that the sheriff may make any gain or profit for his private use out of this stipend. The direction of the legislature is to give the prisoner fifty cents worth of food every day and not to feed him perhaps on bread and water at an expense of five cents, thus making forty-five cents for the sheriff. The object of the law is to put food into the stomach of the prisoner, and not money into the pocket of the sheriff.”

Further section 25-229, R.C.M. 1947, states specifically:

“Every sheriff who . . . makes any profit whatever out of the board or keeping of prisoners . . . is punishable as provided in section 94-115 and 94-1517.”

The *Scharrenbroich* case, *supra*, read in conjunction with the prohibitive language of section 25-229, R.C.M. 1947, leaves no doubt

that the legislature and the courts demand that the sheriff make no profit from the board of prisoners.

The courts and the legislature, in fact, have indicated that the amount allotted for the board of prisoners should be used *in toto* for the feeding of such prisoners. The Scharrenbroich case, *supra*, states that the legislature intended to give the prisoner the statutory allocation's worth of food every day and not that the prisoner be fed at a lesser sum to the benefit of the sheriff's purse. Further, the mere fact that a statute such as section 25-227, R.C.M. 1947, which sets a mandatory allotment for the board of prisoners, exists in conjunction with a statute explicitly forbidding the sheriff from making a profit from the board of prisoners indicates that that mandatory allotment is to be spent solely for the board of prisoners.

THEREFORE, it is my opinion that:

1. The board of county commissioners may not require the sheriff of its county to submit itemized statements showing the purchase of food and supplies for the board of prisoners imprisoned in the county, as a condition precedent to the payment of the fees claimed under section 25-227, R.C.M. 1947.
2. The board of county commissioners may require the sheriff of its county to submit itemized statements showing the purchase of food and supplies for the board of prisoners imprisoned in the county jail so as to determine if there is compliance with section 25-229, R.C.M. 1947, and to insure that the prisoners are receiving an amount of food in compliance with the dictates and intentions of the legislature as provided in section 25-227, R.C.M. 1947. The board may further require this accounting of actual expenses for the board of prisoners under the powers granted the board of county commissioners under chapter 10, Title 16, R.C.M. 1947, and section 16-3801, R.C.M. 1947.

Very truly yours,

ROBERT L. WOODAHL  
Attorney General