

**Fees—County Commissioners—Employment.**

County commissioners cannot collect fees and mileage for valuing and selling county lands obtained through tax title nor employ one of their members to do this work, but have authority to employ a special agent to do this work.

F. F. Haynes, Esq.,  
County Attorney,  
Forsyth, Montana.

July 8, 1929.

My dear Mr. Haynes:

You have requested my opinion as to whether a member of the board of county commissioners, or members thereof, may legally charge per diem and expenses against the county for services in viewing, for the purpose of determining the market value thereof, lands belonging to the county acquired by tax deed, and also for services performed in procuring leases and sales for this land and in making said leases and sales.

The general rule of law is well settled that an officer is not entitled

to fees unless he can point to some statute specifically authorizing it, and our court has held that "a county commissioner can lawfully collect for services performed by virtue of his office, only such fees or other compensation as the law specifically authorizes."

State ex rel. Payne vs. District Court, et al., 53 Mont. 350,  
165 Pac. 294;

State vs. Story, 53 Mont. 573, 165 Pac. 748.

I find no specific statutory authorization for the collection of fees for the services in question and in line with the holding of the court this office has always held that no fees could be collected by a county commissioner unless specifically authorized.

Vol. 11, Opinions of Attorney General, page 299; page 257;

Vol. 12, Opinions of Attorney General, page 136.

In the opinion submitted by you it is contended that the viewing of county lands for the purpose of determining the market value thereof is part of the duties imposed upon the county commissioners under the provisions of subdivision 22 of Section 4465 R.C.M. 1921, as amended by Chapter 38, Laws of 1929, and that since this particular duty is not imposed upon any other county officer the same can be performed by the county commissioners and per diem and expenses charged for the same.

This office has held that where the legislature imposes specific duties upon an officer it is presumed that such officer would be compensated for the performance thereof. (Vol. 11, Opinions of Attorney General, page 281).

This refers to a specific personal duty, and there is a great difference between performing a service required by statute as part of an officer's official duty and the performance of services in the nature of special employment in the carrying out of said county work. In other words, the question is not whether the county commissioners are authorized to incur an expense on the part of the county in valuing and selling the lands, but whether the board or any of its members can personally perform this service and make a charge against the county for the same, and, as above stated, inasmuch as there is no specific statutory authority authorizing the commissioners themselves, or one of their members, to perform these services and to charge for the same, neither the board nor a member thereof can do so.

The reason for this rule is well stated in the case of State vs. Borstead, 147 N.W. 380, as follows:

"As to the right of the defendant to fees or for the charge made for receiving application for seed grain, which is explained to have really been made for time spent in purchasing seed for the county and distributing it by orders to the needy, the better rule is against the legality of a charge therefor. If the board of county commissioners as the fiscal, superintending and administrative board of the county desires such work done, it should authorize the proper officer or engage an agent or em-

ployee to do the same, or else, if done by one of their number, make or allow no charge for such services rendered or time spent. When a county commissioner is not acting with the board and as a member thereof, he acts as an individual, or, if in behalf of the county, as an agent for the county. Public policy condemns employment by the board of their individual members as county agents, or agents of the board, as to do so is to mingle private interests of the individual commissioner with the performance of his duties in office. There may be presented an inducement to so act officially as to create or perpetuate employment for the individual commissioner, and official duties become apportioned as private jobs. When the point is reached that a member of a board has a private interest in the performance of the board's official business, that moment that individual is disqualified to, with propriety, act officially."

As far as a leasing of the lands in question is concerned this office has held that lands to which the county had taken tax title cannot legally be leased by the board of county commissioners. (Vol. 12, Opinions of Attorney General, page 292).

It is therefore my opinion that a member of the board of county commissioners, or members of said board, cannot legally charge per diem and expenses for the services in question, but that as far as services in connection with the sale of said lands are concerned, the board may under the authority of *Arnold et al. vs. Custer County et al.* 83 Mont. 130, employ someone to do this work.

Very truly yours,

L. A. FOOT,  
Attorney General.