

No. 163

**SHERIFF—MILEAGE—STATE INSTITUTIONS—
PRISONERS, Delivery of**

Held: 1. A sheriff, when delivering prisoners to state's prison or reform school, or insane persons to insane asylum, whether by rail or automobile, is entitled to actual expenses necessarily incurred, without regard to rate of mileage, including the personal expenses of the sheriff in going and returning. Expenses allowed a sheriff for delivering prisoners to state's prison are paid from state funds, and the sheriff is not entitled to charge like expenses to the county for the same service. In addition to the ordinary expenses, the sheriff—when using his own automobile—is entitled to receive a sum for maintenance and depreciation based on a reasonable rate per mile.

July 9, 1941.

State Board of Examiners
State Capitol
Helena, Montana

Gentlemen:

A question has arisen as to the rate of mileage and the expenses to which sheriffs are entitled in transporting prisoners to the state prison. For your information, I advise as follows:

Section 12464, Revised Codes of Montana, 1935, provides:

"Compensation of sheriffs. Sheriffs delivering prisoners at the state prison must receive actual expenses necessarily incurred in their transportation, the amount of the expenses in each case to be audited and allowed by the board of examiners, and paid out of any moneys in the state treasury appropriated for that purpose, and no further or other compensation must be received by sheriffs for such transportation or services."

It may be noted that this section deals only with the delivery of prisoners at the state prison, and provides the sheriff shall receive "all actual expenses necessarily incurred," . . . to be paid out of state funds. This section further provides "no further or other compensation must be received by sheriffs for such transportation or services." There is nothing said in said section about mileage.

Section 4884, Revised Codes of Montana, 1935, as amended by Section 1 of Chapter 121, Laws of 1941, provides the rate of mileage for certain officers, excluding sheriffs, and therefore has no application here.

Section 4885, Revised Codes of Montana, 1935, as amended by Section 3 of Chapter 121, Laws of 1941, is as follows:

"Mileage and Expense of Sheriff. Sheriffs delivering prisoners at the state prison or at the state reform school, or insane persons at the state insane asylum, shall receive actual expenses necessarily incurred in their transportation, which shall include the expenses of the sheriff in going and returning from such institution. They shall take vouchers for every item of expenses incurred by them in such transportation, the amount of which expenses, as shown by the said vouchers when served by said sheriff, shall be audited and allowed by the state board of examiners or by the board of county commissioners, as the case may be, and paid out of the same money and in the same manner as are other expense claims against the State or counties, and no other or further compensation shall be received by sheriffs for such expenses. While in the discharge of his duties, both civil and criminal, except as hereinbefore provided, the sheriff shall receive seven cents (7¢) per mile for each and every mile actually and necessarily traveled;

and for transporting any person by order of court, **except as hereinbefore provided**, he shall receive seven cents (7¢) additional per mile, the same to be in full for transporting and dieting of such person during such transportation; provided that where more than one or more persons are transported by the sheriff or when one or more papers are served on the same trip made for the transportation of one or more prisoners, but one mileage shall be charged. The county shall not be liable for nor shall the board of county commissioners pay for any claim of the sheriff or other officer, for team or horse hire, or any other expense incurred in travel or for subsistence, in cases where mileage is allowed under this section; the fees for mileage named in this section being in full for all such traveling expenses in both civil and criminal work." (Emphasis mine.)

It will be seen from this section, insofar as applicable to the question here, sheriffs delivering prisoners to the state prison are entitled to "actual expenses necessarily incurred" in their transportation, which shall include the expenses of the sheriff in going and returning from such institution. Here again there is no mention of mileage for this service.

It is therefore clear—from a reading of these statutes—sheriffs are not entitled to mileage in transporting prisoners to the state prison or state reform school, or insane persons to the insane asylum. This is further evidenced by the following provisions of Section 4885, supra:

"While in the discharge of his duties, both civil and criminal, **except as hereinbefore provided**, the sheriff shall receive seven cents (7¢) per mile . . .

"And for transporting any person by order of court, **except as hereinbefore provided**, he shall receive seven cents (7¢) additional per mile . . ."

Section 4916, Revised Codes of Montana, 1935, as amended by Chapter 121, Laws of 1941, provides for fees for sheriffs and, among other things, provides the sheriff shall receive only actual expenses for serving writs, processes, orders and other papers, or in conveying a person under arrest before a magistrate or to jail, where travel is by railroad, and 7¢ when such travel is other than by railroad. This statute then specifically provides:

"Provided further, that this act shall not apply to the delivery of prisoners at the state prison, or at the reform school, or insane persons to the state insane asylum, for which he shall receive the actual expenses incurred, as provided by Section 4885 of this Code."

Although Section 4916 was amended at the same session as was Section 4885, this language was not changed.

The compensation provided by statute for delivering persons to these institutions is manifestly the **actual** expenses incurred, such as railroad or bus fare and meals and lodging en route.

Our Supreme Court passed upon the meaning of the clause "except as hereinbefore provided," as found in Section 4885, supra, in the case of *Brannin v. Sweet Grass County*, 88 Mont. 412, 416, 293 Pac. 970, where it said:

"Thus, the sheriff is by general statute specifically authorized to be paid by the county 'ten cents per mile for each and every mile actually and necessarily traveled, 'while in the discharge of his duties, both civil and criminal, **except as hereinbefore provided**.' The exception manifestly relates solely and entirely to the instances enumerated in this section of the statute whereby provision is made that he shall be paid only 'his actual expenses necessarily incurred in transportation.' Such specific instances within the exception arise only in connection with the delivering of prisoners at the state's prison or state reform school, or insane persons to the insane asylum.

"In our opinion the phrase 'while in the discharge of his duties, both civil and criminal' as employed in Section 4885, does not mean that the sheriff shall receive ten cents per mile in the performance of every duty imposed upon him; but rather that in the performance of duties for which by other provisions of the statute, he is authorized to charge mileage, it is to be fixed at ten cents per mile. The clause in the section above mentioned does not authorize the sheriff to charge mileage for other traveling than that which is expressly mentioned in other statutes; it simply fixes the rate which may be charged when mileage is authorized to be paid . . ."

It was evidently contemplated by the legislature, when it enacted Section 4885 in 1905 (See Chapter 86, Laws of 1905) and reenacted the same section without change in 1907 (Sec. 3137, Revised Codes of 1907) and in 1921 (Sec. 4885, Revised Codes of Montana, 1921), sheriffs in delivering persons to these institutions should use the railroad. However, in 1923, the legislature enacted Chapter 80, and therein provided that, whenever it was necessary for any state or county officer to use his own automobile on official duty where traveling expenses were allowed by law, he was entitled to receive mileage at the rate of 12½ cents per mile. This act further provided that in no case could an automobile be used where suitable transportation could be had by railroad. The act was amended by Chapter 16, Laws of 1933, reducing the mileage rate from 12½ cents to 7 cents. The rate of mileage applied to all state and county officers. In this form it was copied into the 1935 Codes as Section 4884.1. In 1941 this Section was amended by changing the rate from 7 cents to 5 cents and used the following language: "Such officer, **except sheriffs**, shall receive five cents (5¢) per mile . . ."

It is evident then the legislature, in 1923, recognized the fact that in some cases it would be necessary for an official to use an automobile instead of the railroad, and therefore authorized such use and fixed the rate of mileage to be paid in such cases "where traveling expense is allowed by law." Thus, a sheriff, if necessity is shown therefor, may use his own automobile in transporting persons to the institutions mentioned in Section 4885, supra. And here it may be noted the legislature, in amending 4884.1 in 1941, fixed the rate of mileage at five cents for all officers—except sheriffs. We must therefore look to Section 4885 to determine what compensation the sheriff is entitled to in such instance.

It is clear that, regardless of Section 4885, by virtue of Section 4884.1, a later enactment, a sheriff in delivering persons to the institutions mentioned, may, when necessity therefor is shown, use his own automobile.

It is therefore my opinion sheriffs, in delivering prisoners by rail or bus to the state's prison or reform school, or insane persons to the insane asylum, are entitled to actual expenses necessarily incurred which include rail or bus fare, meals and lodging. When using their own automobile, as provided in Section 4884.1, they are entitled to actual expenses necessarily incurred which include gas and oil, meals and lodging.

Section 4885, as pointed out, specifically limits the sheriff in delivering prisoners to the state's prison or reform school, or insane persons to the insane asylum, to "actual expenses necessarily incurred," whether such delivery be made by rail, bus or automobile. It has also been pointed out the sheriff may use his automobile when necessity is shown; and, in such instance, he is entitled to actual expenses. In addition to the ordinary expenses above mentioned, there is a well-recognized expense in the use of an automobile which is commonly called "maintenance" and "depreciation." This, we think, is a legitimate expense to be allowed the sheriff. As common usage figures such expense on the basis of mileage, we think the board of examiners or county commissioners could allow the sheriff this item of expense figure on a reasonable rate per mile.

It is therefore my opinion a sheriff, when delivering prisoners to the state's prison or reform school, or insane persons to the insane asylum, is entitled to actual expenses necessarily incurred, including, when using

his own automobile, as provided by Section 4884.1, an amount for maintenance and depreciation based upon a reasonable rate per mile.

I am mindful of the holding in Opinion 6, Volume 18, Official Opinions of the Attorney General, but with that opinion I cannot agree, in view of the decision of the Supreme Court in the Brannin case, *supra*.

Sincerely yours,

JOHN W. BONNER
Attorney General
