

VOLUME NO. 37

OPINION NO. 55

APPROPRIATIONS - Necessity of legislative appropriation to reimburse counties for expenses; COUNTIES - Determining and paying mileage rates for travel of juvenile probation officers; no reimbursement by State; OFFICERS - Travel expenses of probation officers; determination of and county's responsibility for payment; REVISED CODES OF MONTANA, 1947 - Sections 10-1234 and 59-801; 1972 MONTANA CONSTITUTION, Article VIII, section 14.

HELD: A county is not entitled to a refund from the state for mileage payments to juvenile probation officers in excess of fifteen cents per mile.

18 August 1977

Jay Fluss, Chairman
Board of County Commissioners
Office of Clerk and Recorder
Terry, Montana 59349

Dear Mr. Fluss:

You have requested my opinion on the following question:

If a county paid juvenile probation officers nineteen cents per mile between January 1976 and February 1977 for use of their own automobiles on official business, is the county entitled to a refund from the state for payments in excess of fifteen cents per mile?

The last paragraph of section 10-1234, R.C.M. 1947, requires that juvenile probation officers be reimbursed for their "actual" travel expenses. In January of 1976 an official opinion of the Attorney General, 36 OP. ATT'Y GEN. NO. 50, held that the "actual expenses" standard of reimbursement of section 10-1234, rather than the IRS mileage allotment standard of section 59-801, R.C.M. 1947, is applicable to travel expenses incurred by juvenile probation officers in the performance of their duties. Apparently as a result of that opinion and an opinion of the Montana Supreme Court, In Re Actual Necessary Expenses of Judges, ___ Mont. ___, 541 P.2d 345 (1975), wherein the Court determined that "actual expenses" for miles traveled by judges using their personal automobiles be set at nineteen cents (\$.19) per mile, Prairie County began paying its juvenile probation officers

nineteen cents (\$.19) per mile for travel expenses. The county then reduced the travel expense allowance to fifteen cents (\$.15) per mile when the Montana Supreme Court in February, 1977, issued an order reducing the mileage rate for district court judge and Supreme Court justices from nineteen to fifteen cents per mile. In Re Actual Necessary Expenses of Judges, Mont. _____ (1977). The latter Supreme Court order had the effect of reversing the earlier order setting judges' mileage allowances at nineteen cents per mile. I understand the county's position is that since the Montana Supreme Court "changed its mind" about the amount of judges' mileage allowance, the state should reimburse the county for its reliance on the earlier order. The argument fails for several reasons.

First, neither Supreme Court order concerned travel expenses of probation officers. Both orders applied exclusively to judges and justices and were based on constitutional considerations limited to judges and justices. The first decision was based on a conflict between the Montana Constitution and the basic statute governing mileage for state and county employees. That statute, section 59-801, R.C.M. 1947, provides in relevant part:

(1) Automobiles: Members of the legislature, state officers, township officers, jurors, witnesses, county agents, and all other persons, except sheriffs, who may be entitled to mileage when using their own automobiles in the performance of official duties, are entitled to collect mileage for the distance actually traveled by automobile and no more unless otherwise specifically provided by law; provided, however, that nothing herein contained shall be construed as affecting the validity of section 43-310.

* * *

(3) Where a privately owned vehicle is used because a government owned or leased vehicle is not available for use or it is in the best interest of the governmental entity that a privately owned vehicle be used, a rate equal to the mileage allotment allowed by the United States internal revenue service for the next preceding year shall be paid for the first one thousand (1,000) miles and three cents (\$.03) per mile less for all miles thereafter traveled within a given calendar month.

The Court found that the effect of the statute was to reduce compensation of judges during periods of inflation, thus violating Article VII, section 7(1) of the Montana Constitution which provides that "justices and judges shall be paid as provided by law, but salaries shall not be diminished during terms of office." The constitutional provision applies only to justices and judges and the statute was declared unconstitutional "[a]s applied to district court judges and supreme court justices only" In Re Actual Necessary Expenses of Judges, supra, 541 P.2d at 347.

Since the statute was held unconstitutional as applied to judges' travel expenses, the Court determined for itself how to compute judges' travel expenses. The Court first held that judges must be reimbursed for "actual travel expenses." It then found that actual expenses for food and lodging can be precisely calculated, and ordered that judges be paid those actual expenses rather than a fixed per diem rate. Id. On the other hand, it found that automobile mileage expenses cannot be precisely calculated, but must be estimated. The Supreme Court fixed nineteen cents per mile as a "fair and necessary figure, subject to periodic adjustment to meet changing conditions." Id. at 348.

The 1976 Attorney General's Opinion, 36 OP. ATT'Y GEN. NO. 50, hereinbefore referred to, held that juvenile probation officers were similarly entitled to "actual travel expenses," not because of a constitutional conflict, but because of the specific requirement of section 10-1234, R.C.M. 1947, which provides in relevant part:

For all necessary travel incident to his official duties in connection with the investigation, supervision, and transportation of children, the probation officer shall, in addition to his official salary, be reimbursed for actual expenses incurred.

The opinion did not specify a method for calculating actual mileage expenses, except to enumerate several of the costs included in fixing a mileage formula (gasoline, insurance, tires, depreciation and general upkeep). In effect, the opinion left the determination of what rate will reflect "actual" expenses to the counties. Neither the opinion nor the first Supreme Court decision required counties to calculate mileage rates for probation officers at nineteen cents (\$.19) per mile.

The Montana Supreme Court, in making the nineteen cents (\$.19) per mile determination, was acting in a purely administrative capacity, as it recognized in the second order:

In its order and opinion of August 11, 1975, the Supreme Court, by virtue of its constitutional and statutory supervisory authority over all courts, assumed the administrative duty of determining the validity of expense claims on the part of the judiciary and of auditing the same. In re Actual Necessary Expenses of Judges, _____ Mont. _____ (1977).

As an administrative decision it had no binding effect on the parallel decision which county commissioners must make concerning the calculation of probation officers' actual mileage expenses. Counties were not foreclosed from making their own independent, reasonable determination of what mileage rate will reimburse probation officers for the "actual" expense of operating their cars. In fixing a mileage rate, counties' actions are not reviewable unless the rate set is arbitrary or not reasonably calculated to reimburse probation officers for their actual expenses. See State ex rel. Bowler v. Board of Commissioners of Daniels County, 106 Mont. 251, 76 P.2d 1048 (1938). If any county chooses to give weight to and adopt the mileage standard of section 59-801, R.C.M. 1947 (presently \$.15 a mile), which is the announced, general public policy of the Legislature as to mileage reimbursement, it may do so absent a clear and manifest showing that such rate is not commensurate with actual expenses. Cf. In re Actual Necessary Expenses of Judges, _____ Mont. _____ (1977). If on the other hand a county chooses to adopt the Supreme Court's formula for actual mileage expenses, it is free to do so. But it can not then claim a refund from the State because the Supreme Court changes its formula.

Even assuming that the first Supreme Court order mandated payment of juvenile probation officers' travel expenses at nineteen cents per mile, the later reversal of the order would not entitle the counties to a refund of the difference between \$.19 and \$.15. The state may direct a county to expend its revenues for a particular purpose or to a particular party, State ex rel. Wilson v. Weir, 106 Mont. 526, 532, 79 P.2d 305 (1938), and has done so with regard to paying juvenile probation officers. If the \$.19 rate had been applicable to juvenile probation officers the county

would have been bound by that first mileage rate while it was in effect.

When a case is decided it is expected that people will make their behavior conform to the rule it lays down and also to the principle expressed in so far as it can be determined.... If, at last, the first decision is overruled, then there is new law, better evidence, or an enlightened basis for prediction. Those transactions which occurred between the two decisions, are, for the most part, accepted history.... The Supreme Court has found no constitutional limitation on state courts proceeding in this manner. Warring v. Colpoys, 122 F.2d 642, 645 (D.C. Cir. 1941).

Finally, no refund can be made in any event unless money has been appropriated by the Legislature for such purposes. "Except for interest on the public debt, no money shall be paid out of the treasury unless upon an appropriation made by law...." 1972 Montana Constitution, Art. VIII, § 14.

THEREFORE, IT IS MY OPINION:

A county is not entitled to a refund from the state for mileage payments to juvenile probation officers in excess of fifteen cents per mile.

Very truly yours,

MIKE GREELY
Attorney General