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1. ARREST ACTUALLY MADE BY STATE HIGHWAY PATROLMAN—MAGISTRATE NOT AUTHORIZED TO ISSUE WARRANT TO CHIEF OF POLICE AND TAX FEES AND COSTS IN FAVOR OF CHIEF OF POLICE WHERE SERVICES NOT ACTUALLY PERFORMED—FEES AND COSTS WHEN COLLECTED “PUBLIC MONEY” AS DEFINED IN SECTION 286 G. C.
2. FEES AND COSTS TAXED FOR SERVICES NOT ACTUALLY PERFORMED—BUREAU OF INSPECTION AND SUPERVISION OF PUBLIC OFFICES MAY MAKE FINDINGS FOR RECOVERY OF SUCH FEES IN FAVOR OF “DEFENDANTS’ TRUST FUND”—MONEYS TO BE RETURNED TO RESPECTIVE PERSONS FROM WHOM THEY WERE ERRONEOUSLY COLLECTED—SECTION 274 ET SEQ., G. C.

SYLLABUS:

1. Where an arrest actually is made by a state highway patrolman, a magistrate is not authorized to issue a warrant to a chief of police and tax the fees and costs thereon in favor of such chief of police where such services were not actually performed. Fees and costs, when collected, are “public money” as defined in Section 286 of the General Code of Ohio.

2. Where fees and costs have been taxed for services not actually performed, the Bureau of Inspection and Supervision of Public Offices may make findings for recovery of such fees in favor of the “Defendants’ Trust Fund” to be returned to the respective persons from whom they were erroneously collected, under Section 274, et seq., General Code of Ohio.

Columbus, Ohio, May 17, 1949

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen:

Your recent request for my opinion reads as follows:

"It has come to the attention of the Bureau of Inspection and Supervision of Public Offices, through the examination of the records and files kept by mayors and police courts in various cities of Ohio, that costs are being taxed and collected in many state cases for services of the chief of police in serving warrants wherein the arrest was actually made and affidavit signed by a state highway patrolman.

"We enclose herewith copies of correspondence received from our State Examiner in charge of the examination of the City of New Philadelphia, together with a sample copy of the form of affidavit and warrant used in said mayor's court.

"Will you kindly examine the enclosures and give us your Opinion in answer to the following questions:

"1. When a State Highway Patrolman makes an arrest and takes the defendant before the Mayor, Judge of Police Court, or Judge of Municipal Court, and signs the affidavit setting forth the offense charged, and such defendant appears in court on the day appointed for hearing, is there any authority for the Mayor, Judge or other magistrate to issue the warrant to the Chief of Police and tax the fees and costs thereon for service in such case?

"2. Where fees and costs have been taxed (without authority of law) for service of the warrant in state cases wherein the arrest was made by a state Highway Patrolman, and said fees have been collected and paid to the Chief of Police, is the Bureau of Inspection authorized to render findings for recovery of such fees in favor of the 'Defendants' Trust Fund' to be returned to the respective persons from whom they were erroneously collected?"

Section 4556 of the General Code, reads as follows:

"The fees of the mayor, in all cases, shall be the same as those allowed justices of the peace, and the fees of the marshal, chief of police, and other police officer serving writs or process of the court, in all cases, shall be the same as those allowed constables."

Section 4581 of the General Code, provides:

“The fees of the police clerk and judge shall be the same as those allowed justices of the peace, and the fees of the marshal, chief of police, or other police officer of the municipality serving the writs or process of the court, shall be the same as those allowed constables. All fees, fines, forfeitures and expenses collected shall be disposed of and accounted for by the judge and clerk in the same manner as provided for a mayor under the provisions of section 4270 of the General Code.”

Section 3347 of the General Code, reads as follows:

“For services actually rendered and expenses incurred, regularly elected and qualified constables shall be entitled to receive the following fees and expenses, to be taxed as costs and collected from the judgment debtor, except as otherwise provided by law: Serving and making return of each of the following orders or writs, for each defendant named therein including copies to complete service, if required by law, one dollar; viz., search warrant, warrant to arrest, order to commit to jail, order on jailer for prisoner or prisoners, order of attachment, order of ejection, order of restitution, and writ of replevin; serving and making return of each of the following notices and writs, for each person named therein, including copies to complete service, if required by law, eighty cents; viz., summons, subpoena, venire and notice to garnishee; serving and making return of execution against property or person, eighty cents, and six per cent. of all money thus collected; serving and making return of any other writ, order or notice, required by law, not mentioned above, for each person named therein including copies to complete service, if required by law, eighty cents; mileage for the distance actually and necessarily traveled in serving and returning any of the preceding writs, orders and notices, first mile fifty cents and each additional mile, fifteen cents; attending criminal case during trial or hearing and including having charge of prisoner or prisoners, each case, two dollars and fifty cents, but when so acting, shall not be entitled to a witness fee if called upon to testify; attending civil court during jury trial, each case, two dollars; attending civil court during trial, without jury, each case, one dollar and fifty cents; actual amount paid solely for the transportation, meals and lodging of prisoners, and the moving and storage of goods and the care of animals taken on any legal process, the same to be specifically itemized on the back of the writs and sworn to; summoning and swearing appraisers, each case, two dollars; advertising property for sale, by posting, taken on any legal process, one dollar; taking and making return of any bond required by law, eighty cents.” (Emphasis mine.)

From a reading of the above quoted statutes it will be seen that the fees permitted a chief of police are limited to those for services actually rendered. It follows that since the services mentioned in your request were never actually rendered, the fees may not lawfully be collected.

It is a familiar principle of law that fees cannot be collected or recovered by a public officer unless they are specifically allowed by statute. See *Gebolt v. Trustees*, 7 O. S. 237. There is no provision of Ohio law which permits the collection of fees by a chief of police for services he has not rendered, in fact, so far as mayor's and police courts go, the chief of police is specifically limited to fees for services actually rendered. Because each municipal court in Ohio is set up in a special section there is no general section on fees which covers this particular situation. Section 3005, General Code, relates to criminal proceedings. However, it still follows, as a general principle, that fees not provided for by statute may not lawfully be collected. Therefore, your first question must be answered in the negative.

The answer to your second question depends on a construction of the term "public money" in Section 286 of the General Code. Said section reads in part as follows:

"The term 'public money' as used herein shall include all money received or collected under color of office, whether in accordance with or under authority of any law, ordinance or order, or otherwise, and all public officials shall be liable therefor. All money received under color of office and not otherwise paid out according to law, shall be due to the political subdivision or taxing district with which the officer is connected and shall be by him paid into the treasury thereof to the credit of a trust fund, there to be retained until claimed by the lawful owner; if not claimed within a period of five years after having been so credited to said special trust fund, such money shall revert to the general fund of the political subdivision where collected."

In a former opinion rendered to your office, being Opinion No. 496 and reported in Opinions of the Attorney General for 1937, Volume I, page 797, there is a discussion of the term "public money" as used in Section 286, General Code. The second branch of the syllabus of that opinion reads as follows:

"Sections 3041, 3042 and 3043 and Section 286, General Code, are not repugnant. Section 286, General Code, is a substantial replica of Sections 3041, 3042 and 3043 and is supple-

mented thereto to the extent that all moneys received or collected under color of office, regardless of their source, are public moneys, shall be paid into the proper treasury, credited to a trust fund and if not claimed in five years, shall be passed to the general fund."

In view of the foregoing and in specific answer to your questions, it is my opinion that when a state highway patrolman makes an arrest and takes the defendant before the mayor, the judge of the police court, or the judge of the municipal court, and signs the affidavit setting forth the offense charged, and such defendant appears in court on the day appointed for hearing, there is no authority for the mayor, judge or other magistrate to issue the warrant to the chief of police and tax the fees and costs therein for services in such case. Where fees and costs have been taxed (without authority of law) for service of warrant in state cases wherein the arrest was made by a state highway patrolman, and said fees have been collected and paid to the chief of police, the Bureau of Inspection and Supervision of Public Offices is given authority under Section 274 et seq., setting out the organization and function of said Bureau, to render findings for recovery of such fees in favor of the "Defendants' Trust Fund" to be returned when claimed by the respective persons from whom they were erroneously collected.

Respectfully,

HERBERT S. DUFFY,
Attorney General.