

1060.

SHERIFF—COUNTY COMMISSIONERS MAY MAKE ALLOWANCE FOR USE OF HIS PRIVATE AUTOMOBILE, BASED ON FLAT RATE PER MILE, WHILE BEING USED IN PERFORMANCE OF OFFICIAL DUTIES—GOOD FAITH IN FIXING MILEAGE RATE.

SYLLABUS:

Under section 2997, General Code, the county commissioners are authorized to make an allowance to the sheriff in reimbursement of his actual and necessary expenses incurred in the use of his private automobile, based on a flat rate per mile, for the mileage covered while such automobile is being used by the sheriff in the performance of his official duties. However, this will authorize nothing but reimbursement and good faith must be used in fixing the mileage rate.

COLUMBUS, OHIO, July 22, 1933.

HON. RUSSELL M. WILHELM, *Prosecuting Attorney, Marion, Ohio.*

DEAR SIR:—Your recent request for my opinion reads:

“All mileage made by the Sheriff of this County is set up on his expense account at the rate of 12½c per mile, which has been customary for many years past. On all papers served by the Sheriff of the County, the mileage is allowed at the rate of 8c per mile, which is returned into the General Fund.

It is the contention of the State Examiner that the County Commissioners have no authority to set the mileage rate for the Sheriff and pay it at the rate of 12½c per mile in view of the fact that the State allows 8c per mile on all papers served. The County Commissioners contend that they have the right to fix the rate on all mileage of the Sheriff.

Will you kindly advise which contention is correct?”

Section 2412-1, General Code, authorizes the county commissioners, whenever they deem it necessary, to purchase a motor vehicle for the sheriff in carrying on his official duties. They are also authorized by section 2412-2, General Code, to purchase such supplies as are necessary for such motor vehicle. This would include oil and gas and other necessary expenses for maintaining such automobile.

It is assumed for the purpose of this opinion that the county commissioners have thought it more economical for the county to pay the sheriff a flat mileage fee for the use of his own automobile rather than to purchase a car for the use of the sheriff. Mileage fees could not be allowed the sheriff for the use of a county owned car. But my opinion is confined to the legality of an allowance by the county commissioners to the sheriff of a flat rate per mile for the use of the sheriff's privately owned motor vehicle used by the sheriff in performing his official duties. Sections 2412-1 and 2412-2, General Code, were in full force and effect July 21, 1925, before the rendition of the opinion of this office found in the Opinions of the Attorney General for 1927, Volume 1, page 438. The third branch of the syllabus contains the following language:

"County commissioners are authorized to make allowance to a sheriff for necessary expenses incurred in the use of his private automobile, *based on the mileage* covered while such automobile is being used by the sheriff in the performance of his official duties." (Italics the writer's.)

Consequently, it is my opinion that sections 2412-1 and 2412-2, General Code, providing for the purchase of an automobile for the sheriff, do not preclude the commissioners from making an allowance to the sheriff for the use of his privately owned car in performance of his official duties.

Section 2997, General Code, provides for additional allowances to be made quarterly by the county commissioners to the sheriff for his "actual and necessary expenses" in enumerated instances "and all expenses for maintaining horses and vehicles necessary to the proper administration of the duties of his office."

The pertinent part of section 2997 of the General Code reads as follows:

"In addition to the compensation and salary herein provided, the county commissioners shall make allowances quarterly to each sheriff for keeping and feeding prisoners, as provided by law, *for his actual and necessary expenses incurred and expended in pursuing or transporting persons accused or convicted of crimes and offenses, in conveying and transferring persons to and from any state hospital for the insane, etc. * * * and all expenses of maintaining horses and vehicles necessary to the proper administration of the duties of his office.* The county commissioners shall allow the sheriff his actual railroad and street car fare and telephone tolls expended in serving civil processes and subpoenaing witnesses in civil and criminal cases and before the grand jury, and may allow his necessary *livery hire for the proper administration of the duties of his office. * * **" (Italics the writer's.)

Prior to 1911 Section 2997 did not authorize the sheriff to expend money for livery hire, allowing him only expenses for maintaining horses and vehicles. If he did not own his own vehicle he was not authorized to hire means of conveyance. To correct this situation, the legislature amended section 2997, General Code, and gave the county commissioners authority to make allowances to sheriffs necessary "livery hire" for the proper administration of their official duties. In *State ex rel. Sartain, Sheriff, vs. Sayre, Auditor*, 12 O. N. P. (N. S.) 61, it was contended that the phrase "livery hire" as used in the statute did not include hire of automobiles but the court decided that the word "vehicle" as used in the statute included motor driven, as well as horse drawn, vehicles.

This office has rendered a number of opinions with reference to how, if at all, the sheriff was to be compensated for expenses incident to the use of vehicles in the performance of his official duties, in the event that he used his private automobile in the performance of such duties.

In an opinion of a former Attorney General (1913), found in volume 2, page 1155, it was held that if a sheriff was the owner of a buggy or an automobile which he used in the service of the county in connection with the duties of his office, bills for repairs to the automobile or buggy should be allowed. In this opinion it was also ruled that section 2997, General Code, contemplated only recompense to the sheriff for expenditures made by him, and did not contemplate payments to such sheriff for labor performed by him in the care of

his horse. In the Opinions of the Attorney General for 1913, Volume 2, page 1198, is an opinion to the same effect. See also Opinions of the Attorney General for 1915, Volume 1, page 295.

In Opinions of the Attorney General for 1915, Volume 2, page 1276, the opinion of the then Attorney General reads as follows:

"While section 2997 contains the word 'maintaining' and does not contain the word 'operating,' it would undoubtedly follow that said section authorizes the allowance of all expenses incident to the use of the automobile in public business, and would include oil and gasoline, as well as necessary repair to tires and parts. The county commissioners may, therefore, make an allowance to the sheriff for the expenses of maintaining and operating his automobile when used in the proper administration of the duties of his office.

Just what proportion of the expenses may be charged against public funds will depend upon the facts in each particular case and is more a matter of policy than of law."

In Opinions of the Attorney General for 1917, Volume 3, page 2397, the question asked arose in another form, that is, whether or not the county commissioners could *hire* the sheriff's car for the use of the sheriff, and it was held as disclosed by the syllabus:

"County commissioners have no authority to hire the sheriff's machine for the use of the sheriff in the performance of his official duties."

But by the opinions of this office it is well established that allowances may be made to the sheriff for actual and necessary expenses incurred by him in the use of his own automobile when used in the performance of his official duties, due allowance being made for such private use as the sheriff may make of his machine.

In Opinions of the Attorney General for 1927, Volume 1, 438, at page 442, it is said:

"I think that the cost per mile for the operation of the various makes of automobiles can now be readily ascertained. Therefore, I am of the opinion that the county commissioners are authorized to make an allowance to the sheriff in reimbursement for his necessary expenses incurred in the use of his private automobile based on a *flat rate*, per mile for the mileage covered while such automobile is being used by the sheriff in the performance of his official duties. *This will authorize nothing but reimbursement and good faith must be used in fixing the mileage rate.*" (Italics the writer's.)

Your attention is also directed to the Opinions of the Attorney General for 1931, Volume 3, page 1535, where it is disclosed by the syllabus:

"A board of county commissioners may rescind a resolution relative to an administrative function, such as setting a flat mileage rate for automobiles furnished and used by the sheriff."

Your attention should also be called to sections 2845 and 2852, General Code, where the mileage fees for certain enumerated services are specified by statute, and to sections 2847 and 346, General Code. Section 2997, General Code, *supra*, is not in conflict with any of these sections. The sheriff is entitled to his necessary and actual expenses under all these sections.

My opinion is not in conflict with Opinion No. 63 of the Attorney General's Opinions for 1933, construing section 2412-1, General Code, which provides for the purchase of vehicles for use of the county commissioners and other county officers. The inquiry there was whether or not they could purchase gas and oil for their own private automobiles to go to and from their meetings, and to inspect roads, and have such items of expense charged to the county. The second and third branches of the syllabus read:

"2. Section 2412-1, General Code, does not authorize the substitution of a privately owned vehicle in lieu of the purchase of a public vehicle to be publicly owned and operated in the regular discharge of county business.

3. A county commissioner may operate his private automobile in the transaction of public business, on gasoline and oil purchased with public funds only where the statute authorizes his expenses, as in section 1183-1, General Code."

This was based on the reasoning that the legislative intent from construction of sections 2412-1, 2412-2, and 12880-1 of the General Code together, was to prevent fraud, and that statutes prescribing definite duties and compensation to the county commissioners (see sections 1183-1 and 6502, General Code) led to the conclusion that a county commissioner is entitled to additional compensation for transportation only where the statutory authority for such is clear. Since no compensation or expense allowance to county commissioners in addition to their regular salaries is provided by the statute except in specific instances, this negated their right to secure payment with respect to these matters.

Specifically answering your inquiry, I am of the opinion that, under section 2997, General Code, the county commissioners are authorized to make an allowance to the sheriff in reimbursement of his actual and necessary expenses incurred in the use of his private automobile, based on a flat rate per mile, for the mileage covered while such automobile is being used by the sheriff in the performance of his official duties. However, this will authorize nothing but reimbursement and good faith must be used in fixing the mileage rate.

Respectfully,

JOHN W. BRICKER,
Attorney General.

1061.

APPROVAL, NOTES OF MAGNOLIA RURAL SCHOOL DISTRICT, CARROLL COUNTY, OHIO, \$4,778.00.

COLUMBUS, OHIO, July 22, 1933.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.