

The answer to your third question makes it unnecessary to consider or discuss your fourth question.

Respectfully,
EDWARD C. TURNER,
Attorney General.

515.

COUNTY COMMISSIONERS — SHOULD MAKE ALLOWANCES TO SHERIFF FOR ACTUAL AND NECESSARY EXPENSE INCURRED WHILE TRANSPORTING PRISONER TO PENITENTIARY.

SYLLABUS:

County commissioners should make allowances to the sheriff for his actual and necessary expenses incurred and expended in transporting prisoners to the penitentiary or a reformatory and the reasonable cost of a chauffeur for the sheriff's automobile in conveying such prisoner is a proper charge and one of the actual and necessary expenses incurred in transporting such prisoner.

COLUMBUS, OHIO, May 20, 1927.

HON. ALBERT T. STROUP, *Prosecuting Attorney, Van Wert County, Van Wert, Ohio.*

DEAR SIR:—This will acknowledge receipt of your communication which is as follows:

“Is it proper for the County Commissioners to allow a bill presented to them by the Sheriff, demanding pay for a chauffeur for the Sheriff's automobile in conveying a prisoner to the Mansfield Reformatory on a felony charge?

The Sheriff has in the office a Deputy and also a Traffic Cop. He picked up an acquaintance on the street and asked him to do the driving and is now asking \$3.50 for the driver's services.”

By the terms of Section 13725, General Code, provision is made for the sheriff, in transporting convicts to the penitentiary or reformatory, to take one guard for every two convicts transported if he deems it necessary. This section further provides that if the sheriff so desires he may make written application to the trial judge and the trial judge may authorize a larger number of guards if he thinks it necessary. Provision is also made therein for the payment of these guards. However, when there is but one prisoner to be taken this section would not apply and the sheriff would be required to transport the prisoners and look to the county commissioners for the expenses incurred in such transportation. Section 2997, General Code, provides in part 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” * * *

It is apparent that the \$3.50 to be paid the man who drove the sheriff's car in conveying a prisoner to the Mansfield Reformatory is an expense incurred in conveying such prisoner unless the man drove the car for nothing, and it would therefore seem clear that it would be a proper charge for which the commissioners might make allowances to the sheriff under the provisions of Section 2997, *supra*.

You infer in your communication that inasmuch as the sheriff had in his office a deputy and also a traffic cop he had no right to employ someone else to drive his automobile but should have used one of these men. In this connection it is well to bear in mind the provisions of Section 2833, General Code, which reads as follows:

"Each sheriff shall preserve the public peace and cause all persons guilty of breach thereof, within his knowledge or view, to enter into recognizance with sureties to keep the peace and to appear at the succeeding term of the common pleas court of the proper county and commit them to jail in case of refusal. He shall return a transcript of all his proceedings with the recognizance so taken to such court and shall execute all warrants, writs and other process to him directed by proper and lawful authority. He shall attend upon the common pleas court and the court of appeals during their sessions, and, when required, upon the probate court. In the execution of the duties required of him by law, the sheriff may call to his aid such person or persons or power of the county as may be necessary. Under the direction and control of the county commissioners, he shall have charge of the court house."

It will be noted from the provisions of the section of law last above quoted that the sheriff is charged with the duty of preserving the public peace within his county as well as a number of other duties therein enumerated and it is very possible that it would not have been advisable at this particular time to have used his deputies for the purpose of driving to Mansfield and thus have left the county without the services of these officers during the time they were gone. I am of the opinion that it is within the province of the sheriff himself to decide whether it would be proper and safe at any particular time to take his deputies out of the county or whether they should be left within the county to perform whatever services may be necessary in the performance of the duties required by law and that neither the commissioners nor anyone else may say that, merely because the sheriff has a deputy or several deputies, he has no right to employ a chauffeur for his automobile when conveying prisoners to the penitentiary or reformatory.

Specifically answering your question, I am of the opinion that the reasonable cost of a chauffeur for the sheriff's automobile in conveying the prisoner to the Mansfield Reformatory is a proper charge for which allowance should be made to the sheriff by the county commissioners as provided by Section 2997, General Code.

Respectfully,

EDWARD C. TURNER,

Attorney General.

516.

FOREIGN CORPORATION OPERATING PUBLIC UTILITY—WHEN EXEMPT FROM FRANCHISE TAX.

SYLLABUS:

A foreign corporation operating a public utility in Ohio, whose annual report filed in accordance with the provisions of law pertaining to the excise tax, shows that there is no amount due for such tax, is by the terms of Section 5503 of the General Code of Ohio exempt from the provisions of law relative to the franchise tax.

COLUMBUS, OHIO, May 20, 1927.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your recent communication as follows:

“The Commission has been studying your opinion Nos. 206 and 379. One further question suggests itself.

In opinion No. 206 it is held that a corporation organized in another state but operating a public utility in Ohio is exempt from excise tax in this state unless its report shows intrastate earnings.

How then shall we apply Section 5503 of the General Code which provides that:

‘An incorporated company, whether foreign or domestic, owning and operating a public utility in this state, and as such required by law to file reports to the tax commission *and* to pay an excise tax * * * shall not be subject * * *’.

to the Dempsey act.

In the case therefore of a foreign utility company operating in this state which by reason of its method of operations is required to report only but is not required to report *and* pay an excise tax, is it the duty of this commission to require it to report and pay a franchise fee under the Dempsey act the same as other foreign corporations which own property and do business in Ohio?”

The portion of Section 5503 of the General Code which you have not quoted has some bearing upon your question. The section in full is as follows:

“An incorporated company, whether foreign or domestic, owning and operating a public utility in this state, and as such required by law to file reports to the tax commission and to pay an excise tax upon its gross receipts or gross earnings as provided in this act, and insurance, fraternal, beneficial, building and loan, bond investment and other corporations, required by law to file annual reports with the superintendent of insurance, shall not be subject to the provisions of Sections one to five inclusive of this act.”

You will note that the exemption from the franchise tax is made contingent upon the fact that the utility company is required by law to file reports to the Tax Commission and to pay an excise tax upon its gross receipts or gross earnings *as provided in this act*.

In my former opinion No. 206, rendered March 19, 1927, it was held, as you state, that a corporation organized in another state but operating a public utility in Ohio