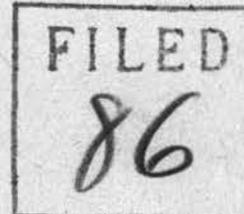


L. SHERIFF:) Deputy sheriff may be employed as a guard to
) assist sheriff to transport prisoners to the
FEEES FOR) State Penitentiary; fees received for the
TRANSPORTATION) performance of such services shall be col-
OF PRISONERS:) lected by the sheriff for the county and paid
) by him into the county treasury.

December 20, 1949

Hon. J. L. Sturgis
Asst. Prosecuting Attorney
Greene County
Springfield, Missouri



Dear Mr. Sturgis:

We have received your recent letter requesting an official opinion of this department. Your opinion request reads as follows:

"I desire to request an official opinion in behalf of my Sheriff Glenn Hendrix of Greene County relative to his duties.

"May the Circuit Judge appoint a deputy sheriff as a guard to assist the Sheriff of Greene County in taking a prisoner to the State Penitentiary, Jefferson City, Missouri?"

"Is the sheriff entitled to collect from the State the mileage and expenses for said guard?"

Two questions embodied in your opinion request will be numbered one and two, in the order presented and will be set out at the beginning of the discussion of their particular subject.

QUESTION NO. 1

"May the Circuit Judge appoint a deputy sheriff as a guard to assist the Sheriff of Greene County in taking a prisoner to the State Penitentiary, Jefferson City, Missouri?"

Section 13413, R. S. Mo. 1939, is the only statute relating to the transportation of prisoners to the State Penitentiary wherein the term "guard" is used. This is a general statute in that no specific distinctions are made as regards the

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manner of employment of such guard in counties of different classifications, thus the said statute would be applicable to the employment of the said guards in all counties. The provision for the employment of such guard is stated as follows:

" * * * * When three or more convicts are being taken to the penitentiary at one time, a guard may be employed, but no guard shall be employed for a less number of convicts except upon the order, entered of record, of the judge of the court in which the conviction was had, and any additional guards employed by order of the judge shall, in no event, exceed one for every three prisoners.

* * * * *

(Underscoring ours)

Applying the above quotation of the aforementioned statute to the question at hand it would seem to follow that the sheriff may, of his own accord, employ the said guard whenever the sheriff is required to transport three or more prisoners to the State Penitentiary at any one time; and if a lesser number of prisoners are being so transported the sheriff may then employ such guard only upon the order, entered of record, by the judge of the court in which the conviction was had. It must therefore follow that the authority of the Circuit Judge, insofar as regards the employment of such guard, would extend only so far as to provide authorization to the sheriff to employ such guard in the event that a guard is required to transport fewer than three prisoners to the State Penitentiary.

From the foregoing construction of the quoted provision of Section 13413, R. S. Mo. 1939, it will be noticed that the actual employment of the said guard is a matter which comes within the discretion of the sheriff. However, it is the opinion of this department that, an attempted appointment of a specific guard by the Circuit Judge would have the effect of being a mere suggestion and recommendation to the sheriff to employ such individual as a guard, which suggestion and recommendation the sheriff is free to accept or reject as he may see fit. If he accepts the same and allows said individual to assist in the transpor-

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tation of the prisoners to the State Penitentiary he would in effect be employing the said individual so recommended as a guard for such purpose.

After a careful and complete study of the entire section herein involved, we found no provision which provided for the disqualification of a deputy sheriff or other county officer to act as a guard in assisting the sheriff in the transportation of prisoners to the State Penitentiary. Hence, we are of the opinion that a deputy sheriff may be employed as a guard to assist the sheriff in transporting prisoners to the State Penitentiary.

QUESTION 2.

"Is the sheriff entitled to collect from the State the mileage and expense of said guard?"

Section 13413, R. S. Mo. 1939, makes provision for the payment of the mileage allowance of such guard. The pertinent provision of Section 13413, R. S. Mo. 1939, in this regard reads as follows:

" * * * * For the services of taking convicts to the penitentiary, the sheriff, county marshal or other officer shall receive the sum of three dollars per day for the time actually and necessarily employed in traveling to and from the penitentiary, and each guard shall receive the sum of two dollars per day for the same, and the sheriff, county marshal or other officer and guard shall receive five cents per mile for the distance necessarily traveled in going to and returning from the penitentiary, the time and distance to be estimated by the most usually traveled route from the place of departure to the penitentiary;
* * * * *"

(Underscoring ours)

It will be noticed that the above quotation provides that the guard so employed shall receive \$2.00 per day as his fee and 5¢ per mile for the distance necessarily travelled, going to and returning from the penitentiary, as reimbursement for expenses incurred by said guard in assisting the sheriff in the said transportation of prisoners. This provision would, therefore, of necessity limit the liability of the State insofar as regards the expenses of said guard, to the mileage allowance alone, and does not therefore

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entitle the sheriff to collect from the State any amount in excess of the mileage allowance as expenses for said guard.

The procedure to be followed for the recovery of the fee and mileage allowance of said guard from the State is stated in Section 13413, R. S. Mo, 1939 as follows:

" * * * * before any claim for taking convicts to the penitentiary is allowed, the sheriff, or other officer conveying such convict, shall file with the state auditor an itemized statement of his account, in which he shall give the name of each convict conveyed and the name of each guard actually employed, with the number of miles necessarily traveled and the number of days required, which in no case shall exceed three days, and which account shall be signed and sworn to by such officer and accompanied by a certificate from the warden of the penitentiary, or his deputy, that such convicts have been delivered at the penitentiary and were accompanied by each of the officers and guards named in the account. * * * * *"

Section 13, Article 6, Missouri Constitution, 1945, provides for the compensation of State and County officers dealing with accused persons to be by salary only. Said section is as follows:

"All state and county officers, except constables and justices of the peace, charged with the investigation, arrest, prosecution, custody, care, feeding commitment, or transportation of persons accused of or convicted of a criminal offense shall be compensated for their official services only by salaries, and any fees and charges collected by any such officers in such cases shall be paid into the general revenue fund entitled to receive the same, as provided by law. Any fees earned by any such officers in civil matters may be retained by them as provided by law."

(Underscoring ours)

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The above quoted constitutional provision precludes all such designated officers from retaining said fees for their own use and benefit.

Provision for the collection and disposition of fees in criminal matters as pertaining to counties of the second class, the classification of Greene County, is made in Section 13547.203 as follows:

"It shall be the duty of the sheriff to charge, collect and receive, upon behalf of the county, every fee, penalty, charge, commission, and other money that accrue to him or his office in connection with criminal matters, and all such fees, penalties, charges, commissions, and money collected by him, shall at the end of each month, be paid by him to the county treasurer, as hereafter provided."

It will be noticed that the foregoing quoted section requires the collection of all such fees to be made by the sheriff for the benefit of the county and the same shall be paid by him to the county treasurer.

It is our opinion that the sheriff of a second class county is entitled to collect from the State the mileage allowance of 5¢ per mile necessarily travelled by said guard in going to and returning from the penitentiary and the \$2.00 fee provided for as payment to said guard and that the sheriff is then required to pay any sums so collected, into the county treasury; if the guard so employed is a deputy sheriff.

CONCLUSION

It is, therefore, the opinion of this department that a deputy sheriff may be employed by the sheriff as a guard to assist said sheriff in the transportation of prisoners to the State Penitentiary; that an attempted appointment by the Circuit Judge of a deputy sheriff to act as a guard to so assist the sheriff is of no more effect than to

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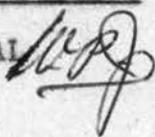
constitute a suggestion and recommendation to the sheriff to employ the said deputy as a guard, and it is further the opinion of this department that any fees and remuneration received by the said deputy sheriff for performance of the duties of a guard shall be collected from the State by the sheriff for the benefit of the county, and paid by said sheriff into the county treasury.

Respectfully submitted

PHILIP M. SESTRIC
Assistant Attorney General

APPROVED

J. E. TAYLOR
ATTORNEY GENERAL



PMS:A