

**OPINION
74-146**

January 21, 1974 (OPINION)

Mr. Thomas Kelsch
State's Attorney
Burleigh County
Bismarck, ND 58501

Dear Mr. Kelsch:

This is in response to your letter in which you state the following:

"Due to the energy crisis, the average cost of gasoline in Burleigh County has increased from an average of 36.9 cents in January, 1973, to 50.9 cents as of the past week, with indications that it will be raised even higher.

"Burleigh County requires each of the patrol officers in the Sheriff's Department to purchase, maintain and service their own vehicles. The only reimbursement they receive for the use of their vehicles is the 'mileage allowance' provided in chapter 11-15-12, N.D.C.C., which reads,

A sheriff or his deputy for each mile actually and necessarily traveled within this state in the performance of official duties, shall be allowed and paid only the following amounts:

1. The sum of twelve cents per mile when travel is by motor vehicle;
2. When travel is by rail or other common carrier the amount actually and necessarily expended therefor.

"Prior to this 1971 amendment, the sum of only 10 cents per mile was authorized in 1957 by the Legislature.

"The continued amount of patrolling which the sheriff believes is the minimum required in the performance of his statutory duties will result in an intolerable financial burden on these officers, and we understand some Sheriff's Departments have already been forced to significantly reduce their road patrols.

"Further, section 44-08-03, Traveling Expenses - What Allowed, prohibits any elective or appointive officer or employee of the state or 'any of its subdivisions' from making claims for 'any public funds for travel expenses while engaged upon public business in the amount in excess of that allowed by law for such travel.'

"This office requests your opinion to the following questions:

1. May the board of County Commissioners authorize a payment of a special 'patrol allowance' in addition to the 12 cents mileage allowance allowed by statute.

2. If the board has the authority, can one of the factors that's used in determining the amount to be paid be the size of the geographic area the patrolman is assigned, a necessary consideration thereto begin given to some type of payment based on mileage such as a predetermined increment of mileage which such geographical area would requires such as a certain amount a month based on, for example, 3,000 miles traveled, 3,500 miles traveled, 4,000 miles traveled, etc.
3. Finally, if this type of allowance could be authorized, could it be applied retroactively to January 1, 1974.

"In conclusion, if this type of relief would be prohibited by law generally, is there a basis under this emergency situation, which we feel exists, for allowing the county board or possibly the Governor to declare an emergency and subsequent exemption to the limiting statutory provisions in order the peace and order may be maintained in the county through the legitimate exercising of the general police power of the state in its furtherance of the public health, safety, and welfare of its people."

As to the proposals set out in 1 and 2, we must take into consideration the provisions of section 11-15-12 and section 44-08-03. The former contains the provision that "only the following amounts" shall be allowed and the latter contains the provisions that no claim shall be made for travel expenses "in any amount in excess of that allowed by law for such travel". These provisions clearly provide that the statutory mileage is the only amount that may be applied and is the only amount for which a claim for reimbursement may be made.

In addition to this, section 44-08-05 makes it unlawful and makes it a crime to violate the provisions of section 44-08-03. Also, the amount charged in excess of the statutory schedule is subject to recovery by civil action. From this, it appears that any reimbursement based upon mileage in excess of the statutory amount would not be permissible.

While it is a fact of life that in numerous instances private individuals are called upon to perform a public service without adequate compensation, the expenditure of funds by private individuals for a public purpose is something of a different nature. The general public cannot and should not demand private individuals to expend funds for the benefit of the public. The expenses incurred in performing a public service are a matter which should rightfully be borne by the public.

The county commissioners constitute the superintending body of the county and the affairs of the county. Under section 11-15-03.1 the county commissioners may, by resolution, increase the salary of the sheriff by an amount not to exceed ten percent above the statutory salary, if, in the judgment of the board, by reason of the duties performed, the official merits the increase. This provisions apparently was enacted so as to give the county commissioners some latitude and leeway in compensating officials over and above the amount allowed by statute where the need arises or the circumstances

so dictate. We are also aware that the legislature enacted a provision whereby salaries may be adjusted within limits in accordance with the index of the national consumer price and other related material as published by the U. S. Department of Labor. This provision, however, does not become effective until July 1, 1974.

The foregoing provision clearly indicates that the legislature was aware that there may be circumstances which would require or which would justify an increase in salary above the statutory amount. We believe the current situation is one which would authorize the county commissioners to employ the ten percent increase to offset the additional expenses incurred by the sheriff.

It is our opinion that under these circumstances, the county commissioners may by resolution, pursuant to the provisions of section 11-15-03.1, increase the salary of the sheriff in an amount not to exceed ten percent above the salary set by law. The increase can be made retroactive. As to proposals 1 and 2, it is doubtful that mileage per se could be the sole factor in determining whether or not an increase should be given. The increased cost of fuel and particularly the additional time devoted to duties would be legitimate factors in determining and justifying the increase. The financial burdens incurred as a result of additional work and effort should not be borne by the individual officers, but should be charged to the public for whose benefit the services are performed. In arriving at this conclusion, we are well aware that the patrolling and other related activities have, out of necessity, increased substantially in the last several years which naturally results in additional duties to be performed.

As to deputies, the law does not set a maximum salary and consequently the county commissioners can make adequate adjustment to properly compensate those deputies that perform additional services whereby expenses are incurred which are normally not reimbursable under the statutory limitations.

The county commissioners might also wish to consider furnishing the fuel and adjust mileage accordingly, or to furnish the cars and fuel.

Sincerely yours,

ALLEN I. OLSON

Attorney General