

**LETTER OPINION
2002-L-16**

March 1, 2002

Mr. James P. Wang
Benson County State's Attorney
PO Box 211
Minnewaukan, ND 58351-0211

RE: Receipt of Witness Fees by a Sheriff

Dear Mr. Wang:

Thank you for your January 8, 2002, letter asking whether an elected county sheriff may receive witness compensation pursuant to N.D.C.C. §31-01-16 to appear in a criminal case in district court. You also asked whether a distinction may be made when the elected sheriff is on duty or off duty and required to appear pursuant to a subpoena.

Section 31-01-16, N.D.C.C., entitles a witness in a civil or criminal case to receive a witness fee of \$25 and mileage and travel expense reimbursement. It does not, however, specify whether a sheriff may receive a witness fee. Section 31-01-16.1, N.D.C.C., authorizes off duty municipal police officers to receive witness fees and expenses allowed by law for other witnesses. When appearing as a witness while on duty, police officers are compensated by their employer at the regular rate for their position. Id. Both N.D.C.C. §§ 5-02-12 and 39-01-16, however, specifically prohibit any peace officer while on duty from receiving a witness fee and mileage when appearing as a witness in proceedings under either of those North Dakota Century Code chapters.

A sheriff is a public officer. A person who assumes the duties of a public office is obligated "to perform the duties incident to the office for the compensation fixed for the office. He cannot seek additional compensation for what the law requires him to do." State ex rel. Peterson v. Olson, 307 N.W.2d 528, 535 (N.D. 1981). This is true even though performance of some of the duties occur outside of the officer's regular work hours. State v. Stockwell, 134 N.W. 767, 773-774 (N.D. 1911). The public officer's "time and the result of his energies belonged to the state, so far at least as the state's necessity required." Id. at 774. Even if extra duties are required to be performed, if

they are germane to the official duties of the office, the officer must perform them without extra compensation. Id. at 773.

The primary question is whether the appearance of the sheriff in the court proceeding is in the performance of that sheriff's official duty. Section 11-15-03, N.D.C.C., sets forth the duties of a sheriff. One of the duties is to arrest and take offenders before magistrates. Id. Implied in the duty to arrest is the duty to testify against the offender. Miller v. Pollution Control Bd., 642 N.E.2d 475, 485 (Ill. App. 4 Dist. 1994) (the duty to testify against the arrested person is an implied duty of a police officer).¹ In Miller, the Court said that a person accepting a public office, with a fixed salary, is bound to perform the duties of the office for the salary and cannot claim additional compensation for the discharge of those duties. Id. Because the officer had a duty to testify, he was not entitled to witness fees. Id.²

It is therefore my opinion that because the salary provided by N.D.C.C. ch. 11-10 is "full compensation" for the performance of all of the sheriff's official duties, the sheriff is not entitled to additional witness fee compensation.

You ask whether a distinction may be made when the elected sheriff is on duty or off duty and required to appear pursuant to a subpoena. Certain statutory provisions allow peace officers to receive a witness fee while off duty. N.D.C.C. §§ 31-01-16.1, 5-02-12, and 39-01-16. These provisions, however, do not apply to an elected sheriff because it is the sheriff's duty to testify and, as explained below, an elected sheriff is not "off duty" when it is necessary to meet the statutory responsibilities of the office.

As a general rule, a person accepting public office undertakes to perform all the duties of the office and while that person remains in office, the public has the right to demand that he or she perform the duties of the office. 63C Am. Jur. 2d, Public Officers and Employees § 247 (1997). In fact, a knowing failure to perform the duties of the office is a Class A misdemeanor. N.D.C.C. § 12.1-11-06.

¹ See also 1978 Ill. Att'y Gen. Op. 102 (without the implied duty to testify, a policeman's express duty to arrest would accomplish little).

² Prior Attorney General opinions have also concluded that law enforcement officials are not entitled to witness fees for testifying in criminal cases because they are simply performing the duties of the office for which they are paid a salary. 1946-48 N.D. Op. Att'y Gen. 195, 196; 1954-56 N.D. Op. Att'y Gen. 137 (extending the conclusion in 1946-48 N.D. Op. Att'y Gen. 195 to all peace officers including policemen, sheriffs, and deputy sheriffs).

Because of the status of the sheriff as a public officer it would be difficult to conclude that a sheriff could assume an "off duty" status. At the time a public officeholder takes the oath of office, the officeholder assumes basic responsibilities and duties that will continue unabated and uninterrupted during the officeholder's entire term of office. One of the burdens that may be borne by elected officeholders, whether on the national, state, or local level, is that such officeholders are not "off duty" when it is necessary to meet the statutory or constitutional responsibilities of their elected office. Therefore, it is my opinion that, although an elected sheriff may take personal time away from his office that may consist of vacation or sick leave time, a sheriff may not declare that he or she is off duty and not obligated to perform that sheriff's legal responsibilities and duties as an elected official.

Sincerely,

Wayne Stenehjem
Attorney General

rpb/vkk