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April 18, 2012

ATTORNEY GENERAL OPINION NO. 2012-10

Gary E. Thompson
Linn County Counselor
P.O. Box 184
Mound City, KS 66056

Re: Counties and County Officers–Sheriff–Budget; Charge and Custody of Jail

Counties and County Officers–County Treasurer–Duty to Receive and Disburse Moneys

Synopsis: A sheriff must pay over to the county treasurer fees collected by the sheriff's department for performing an inspection of vehicle identification numbers. A sheriff may charge cities for the costs of incarcerating prisoners jailed on municipal charges in an amount equal to that provided by the county for the incarceration of county prisoners. A sheriff may release a prisoner jailed on municipal charges upon the prisoner signing a valid notice to appear if the prisoner has neither posted bond nor been arraigned by the municipal court within 48 hours. A sheriff may not decline to incarcerate persons brought to a county jail by the authority of city law enforcement officers under any circumstances. Cited herein: K.S.A. 2011 Supp. 8-116a; 12-4209; 12-4212; 12-4213; K.S.A. 12-4302; 19-506; 19-811; 19-814; 19-1903; 19-1930; 28-175

* * *

Dear Mr. Thompson:

As County Counselor for Linn County, you ask for our opinion regarding whether a sheriff's department may maintain a bank account outside the county financial system and whether a sheriff may charge cities for use of the county jail and establish certain policies regarding when city prisoners may be released from or admitted into jail.

At issue are several policies and procedures that the sheriff has established. In your letter, you state that the sheriff's department maintains a bank account outside the county financial system. The sheriff's department collects fees for performing vehicle identification number (VIN) inspections and then deposits these fees into this account; such funds are disbursed as the sheriff sees fit. You ask whether the proper procedure is for the county treasurer to deposit such fees into county accounts.

You also note that the sheriff has established the following policies regarding persons held in the county jail at a city's request and ask our opinion as to the sheriff's authority to institute such policies:

1. The sheriff charges the city a fee for booking the prisoner, fingerprinting the prisoner, and providing daily housing for the prisoner.
2. If a prisoner held on municipal court charges does not post bond and the municipal court does not arraign the prisoner within 48 hours, the sheriff releases the prisoner after the prisoner signs a document entitled "notice to appear."
3. The jail will not incarcerate persons for failure to appear or for failure to satisfy judgment when the underlying charge is a traffic infraction.

We first address the issue of whether a county sheriff may hold fees for VIN inspections in a bank account outside the county financial system. The Kansas Highway Patrol (KHP) is responsible for performing VIN inspections on certain vehicles.¹ The KHP superintendent may designate a county law enforcement agency to perform such inspections.² If KHP designates a city or county law enforcement agency to perform VIN inspections, KHP retains ten percent of the inspection fee, and "the balance shall be paid to the law enforcement agency that conducted the inspection."³

Your question requires an examination of K.S.A. 28-175, which states in relevant part:

County officers and employees shall receive no compensation, tips, fees, mileage or salaries, which compensation, tips, fees, mileage or salaries are or shall be paid to such officer or employee directly or indirectly by reason of his or her performance of the duties or obligations of such county office or employment, unless such compensation, tips, fees, mileage or salaries are specifically allowed to them by law. All such compensation, tips, fees, mileage or salaries received, directly or indirectly by them or from their respective offices from any source whatsoever, *which compensation, tips, fees, mileage or salaries would not have been received except for such officer's or employee's performance of the duties or obligations of such county office or employment . . . not specifically*

¹ K.S.A. 2011 Supp. 8-116a.

² K.S.A. 2011 Supp. 8-116a(d)(1).

³ K.S.A. 2011 Supp. 8-116a(d)(2).

*authorized to be retained by them, shall be paid over . . . to the county treasurer All such compensation, tips, fees, mileage and salaries shall be placed by said treasurer to the credit of the county general fund.*⁴

As a threshold matter, we note that performing VIN inspections is not a statutory duty or obligation of a county sheriff.⁵ However, when the sheriff contracts with KPH to have the sheriff's department as the designee that performs VIN inspections, it is our opinion that such inspections become a duty or obligation of the sheriff for the purposes of K.S.A. 28-175.⁶

Several prior Attorney General Opinions have examined the application of K.S.A. 28-175 as it relates to the retention of fees collected by county officers. In two instances, we opined that in certain circumstances a county officer may *personally* retain fees paid for his or her services;⁷ however, those opinions were based upon factual situations not comparable to the situation you describe in your letter.

This office has consistently opined that county officers who collect fees for the performance of official duties or obligations must pay such fees to the county treasurer pursuant to K.S.A. 28-175 in the absence of clear, express statutory authorization to retain such fees.⁸ Because the legislature has not amended K.S.A. 28-175 since those opinions were issued,⁹ we believe the reasoning therein continues to be persuasive. K.S.A. 2011 Supp. 8-116a authorizes VIN inspection fees to be paid to a county law enforcement agency for the performance of such inspections, but the statute does not specifically authorize the county law enforcement agency to *retain* such fees. As such, we find that K.S.A. 28-175 is dispositive, and we opine that a sheriff may not retain VIN inspection fees in an account outside the county financial system. The sheriff must pay such fees to the county treasurer and the Board of County Commissioners may later appropriate such fees to the sheriff's department.¹⁰

We next address the sheriff's policies regarding prisoners being held on municipal charges, beginning with a sheriff's authority to charge cities for the costs of incarcerating city prisoners. The sheriff has the charge and custody of the county jail and is responsible for the manner in which it is kept.¹¹ The sheriff has statutory authority

⁴ Emphasis added.

⁵ K.S.A. 19-811 through 19-814. See also K.S.A. 2011 Supp. 8-116a.

⁶ We have been advised by the KHP that such designations are formalized by a contract between the KHP and the designee in which the designee agrees to perform VIN inspections in exchange for receiving a portion of inspection fees pursuant to K.S.A. 2011 Supp. 8-116a(d)(2).

⁷ Attorney General Opinion No. 79-121 (a sheriff may personally retain compensation for service as a volunteer firefighter because such service is not a statutory duty or obligation of the sheriff), 98-23 (legislative history of K.S.A. 32-1053 indicated an intent to authorize a county or district attorney to personally retain fees for prosecuting violations of wildlife and parks laws).

⁸ Attorney General Opinion Nos. 79-117; 80-69; 81-122; 89-105; 90-7; 97-34.

⁹ K.S.A. 28-175 was last amended by L. 1977, Ch. 112, § 14.

¹⁰ K.S.A. 19-506.

¹¹ K.S.A. 19-811, 19-1903.

to charge cities for maintenance of city prisoners in an amount equal to that provided by the county for the maintenance of county prisoners.¹² K.S.A. 19-1930(a) states:

The sheriff shall receive all prisoners committed to the sheriff's or jailer's custody by the authority of the United States or by the authority of any city located in such county and shall keep them safely in the same manner as prisoners of the county until discharged in accordance with law. The county maintaining such prisoners shall receive from the United States or such city compensation for the maintenance of such prisoners in an amount equal to that provided by the county for maintenance of county prisoners and provision shall be made for the maintenance of such prisoners in the same manner as prisoners of the county. The governing body of any city committing prisoners to the county jail shall provide for the payment of such compensation upon receipt of a statement from the sheriff of such county as to the amount due therefor from such city.

Your letter does not suggest that the amount charged by the sheriff to cities in Linn County for the maintenance of city prisoners exceeds the amount allowed by law. However, we note that in determining the daily amount that a county may charge for the maintenance of city prisoners, a county may include "overhead" expenses such as personnel, administration, facility operation and maintenance, in addition to direct expenses such as food and clothing.¹³ Thus, so long as the booking fee, fingerprinting fee and daily housing fee charged by the Linn County Jail are of an amount equal to the cost incurred by the county for the booking, fingerprinting and housing of county prisoners, we opine that such fees are allowable under K.S.A. 19-1930(a).

Next, we consider a sheriff's authority to release prisoners who do not post bond on their municipal offenses and the municipal court does not arraign such prisoners within 48 hours. The Kansas Code for Municipal Courts ("the Code") states in relevant part:

(a) Any person arrested by a law enforcement officer shall be taken immediately by the law enforcement officer to the police station of the city or the office in the city designated by the municipal judge. At that time, the person shall have the right to post bond for the person's appearance . . . except as hereinafter provided.

. . .

(c) Any person held in custody pursuant to the provisions of this section, and who has not made bond for such person's appearance, may be held in custody until the earliest practical time for such person's appearance in municipal court upon a warrant being issued by the municipal court in accordance with K.S.A. 12-4209, and amendments thereto.

¹² *Id.*

¹³ Attorney General Opinion No. 2001-42.

- (d) Any person who remains in custody for 48 hours pursuant to the provisions of this section after arrest, and who is awaiting a first appearance before a municipal judge in the absence of a warrant being issued, shall be released on the person's personal recognizance. Bond shall be set within 18 hours of the person being placed in custody.¹⁴

You state that the Linn County Sheriff has adopted a policy whereby the sheriff releases a prisoner held on municipal court charges who has neither posted bond nor been arraigned by the municipal court upon the prisoner signing a document entitled "notice to appear.". Assuming that such policy *only* applies to those persons for whom no warrant has been issued, and that the "notice to appear" signed by persons released from jail pursuant to this policy is consistent with the Code's personal recognizance provisions,¹⁵ we opine that such policy is consistent with K.S.A. 2011 Supp. 12-4213(d) and therefore lawful.

We next consider a sheriff's authority to decline to incarcerate persons brought to the jail by city law enforcement officers for failure to appear or for failure to satisfy judgment when the underlying charge is a traffic infraction. K.S.A. 19-1930(a) states that the sheriff *shall* receive all prisoners committed to the sheriff's custody. We previously examined this statute in Attorney General Opinion No. 2007-039, in which we opined that the duties imposed upon a sheriff under K.S.A. 19-1930(a) are mandatory rather than discretionary:

This statute obviously requires the county sheriff or jailer to receive and take custody of all prisoners committed to the sheriff or jail by a city law enforcement officer. After consideration of all the legal authority cited herein, we have not located any authority supporting a county sheriff's outright blanket refusal to take custody of persons arrested by city law enforcement officers and presented to the sheriff or jailer at a county jail, no matter the circumstances.

It has been suggested that Attorney General Opinion No. 2007-039 concluded that a sheriff is only required to accept into custody persons who are arrested on state charges or persons who are arrested on municipal charges and for whom a warrant has been issued. Having reviewed Attorney General Opinion No. 2007-039, we find no support for this suggestion. Rather, as noted above, that opinion clearly states that the sheriff must take into custody all prisoners committed to the jail by a city law enforcement officer, no matter the circumstances.

¹⁴ K.S.A. 2011 Supp. 12-4213.

¹⁵ K.S.A. 12-4302: "Notwithstanding the provisions of K.S.A. 12-4301, a law enforcement officer may release an accused person from custody without requiring security for his or her appearance, and shall release such accused person from custody without requiring security for the appearance, pursuant to any rule or order of the municipal judge."

It also has been suggested that, if a warrant is erroneously issued for a traffic infraction, when in fact the warrant was intended to be issued for *failure to appear* for a traffic infraction, then the sheriff may decline to incarcerate the person because no warrants may be issued for traffic infractions.¹⁶ We believe this suggestion is without merit. A law enforcement officer has the authority to arrest a person if the officer has a warrant commanding that the person be arrested.¹⁷ A sheriff is required by law to receive all prisoners committed to the sheriff's or jailer's custody by the authority of any city.¹⁸ A sheriff has no statutory authority to decline to incarcerate a person based upon the sheriff's finding that an arrest warrant is inadequate.

Having reviewed de novo the authorities cited in Attorney General Opinion No. 2007-039, we opine that the reasoning therein continues to be sound as it relates to the duty of sheriffs to receive all persons committed to the sheriff's custody.

Sincerely,

Derek Schmidt
Kansas Attorney General

Sarah Fertig
Assistant Attorney General

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¹⁶ K.S.A. 2011 Supp. 12-4209(e).

¹⁷ K.S.A. 12-4212(a)(1).

¹⁸ K.S.A. 19-1930(a).