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ATTORNEY GENERAL OPINION NO. 80-227

Mr. Patrick McManus
Secretary of Corrections
535 Kansas Avenue
Topeka, Kansas 66603

Re: Department of Corrections -- Parole -- Detention of Suspected Parole Violators

Synopsis: There is no statutory duty imposed upon county officials to receive and detain suspected parole violators pending their preliminary revocation hearing. But such authority may reasonably be implied in light of Morrissey v. Brewer, 408 U.S. 471, 33 L.Ed.2d 487 (1972). Furthermore, there does not appear to be any statutory duty for the respective counties to cover expenses for keeping such a prisoner, and the same most properly must be born by the Department of Corrections. Cited herein: K.S.A. 19-811, 19-1910, 19-1930, 22-3427 (as amended by L. 1980, ch. 104, §7), 22-3716, K.S.A. 1979 Supp. 22-3717, 75-5217.

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Dear Mr. McManus:

You request our opinion as to whether the state law imposes a duty upon local officials, normally sheriffs, to receive and detain suspected parole violators pending their preliminary revocation hearing, and if

such a duty exists, who is liable for the expenses of the care of such a prisoner during such time.

In regard to your first question, we must consider several statutes relating to the duties and responsibility of a county sheriff in relationship to a county jail. K.S.A. 19-811 relates in relevant part: "The sheriff shall have the charge and custody of the jail of his county and all the prisoners in the same. . . . "

Sheriffs are specifically authorized to confine prisoners pursuant to K.S.A. 22-3427, as amended by L. 1980, ch. 104 §7 (upon a valid judgment of sentence), K.S.A. 22-3716 (arrest of probationer) and other similar statutes. The duty of the sheriff to detain prisoners has been upheld by the Kansas Supreme Court in State, ex rel., v. Robinson, 193 Kan. 480, 394 P.2d 48 (1964) and the Kansas Court of Appeals in Mt. Carmel Medical Center v. Board of County Commissioners, 1 Kan. App.2d 374, 566 P.2d 384 (1977). Both cases, however, involved prisoners that had been committed by the court to serve their sentence in a county jail, and our research has failed to reveal specific state statutory authority to detain parolees suspected of parole violations. The need for legislative clarification of this matter is further demonstrated by K.S.A. 1979 Supp. 75-5217, which states in relevant part:

> "The [secretary's] warrant shall authorize all officers named therein to deliver the released inmate to a place designated by the secretary. . . . The [parole officer's] written statement delivered with the released inmate by the arresting officer to the official in charge of the institution or place to which the released inmate is brought shall be sufficient warrant for detaining said inmate." [Emphasis supplied.]

Thus, we must ask where or what is this "place" to which a suspected parole violater is to be taken?

Morrissey v. Brewer, 408 U.S. 471, 33 L.Ed.2d 487 (1972), which established very specific parole revocation procedures is of assistance, in that the Court relates at 33 L.Ed.2d 496:

> "The . . . hearing should be held at or reasonably near the place of the alleged parole violation or arrest and as promptly as possible after the arrest while the information is fresh and sources available."

We also note the parolee in Morrissey, supra was detained in a county jail. It thus appears most logical to detain a possible parole violator at the county jail reasonably near the alleged violation or arrest, and in our judgment, such would be an appropriate institution in light of K.S.A. 1979 Supp. 75-5217.

The relevant statute which provides for the county to pay the expenses of caring for prisoners is K.S.A. 19-1910, which provides in relevant part:

> "When a prisoner is committed in a criminal action, the county board shall allow the sheriff his reasonable charges for supplying such prisoner." (Emphasis added.)

K.S.A. 19-1910 does not apply, however, to suspected parole violators as a parole revocation hearing is not a "criminal action." Although there is no current statute defining "criminal action," at the time of K.S.A. 19-1910's original enactment, G.S. 1868, ch. 50, §10, and the later transfer to R.S. 1923, 19-1910, "criminal action" was defined in R.S. 1923, 60-107 as an action "prosecuted by the state as a party, against a person charged with a public offense, for the punishment thereof." Such a rule of construction may be utilized, as the court in construing the legislative intent behind a statute may look at other statutes in existence when the statute in question was enacted. State, ex rel., v. Shawnee County Commissioners, 159 Kan. 87, 90, 151 P.2d 700 (1941). See also Moore Equipment Co. v. Winters, 146 Kan. 127, 69 P.2d 23 (1937). Therefore, as R.S. 1923, 60-107 defined "criminal action" at the time of K.S.A. 19-1910's enactment, the legislative intent should be construed as excluding those awaiting a parole revocation hearing.

In addition, while our research fails to reveal discussion by the courts in Kansas relating to the classification of a parole revocation hearing as a "criminal action," other courts have held that a parole revocation hearing is not a criminal action, but is more akin to an administrative hearing. People, ex rel., Little v. Monroe, 38 A.D.2d 398, 330 N.Y.S.2d 221, 223 (1972), Morrisey v. Brewer, 408 U.S. 471, 33 L.Ed. 484, 494 (1972).

Therefore, as K.S.A. 19-1910 does not apply to prisoners held pending a preliminary revocation hearing, it does not appear that there is any statutory requirement for the respective counties to cover the expenses for detaining such a prisoner.

K.S.A. 1979 Supp. 22-3717(4) provides in part:

> "Every inmate while on parole shall remain in the legal custody of the secretary of corrections and is subject to the orders of the secretary."

Again we note a dearth of state statutory authority regarding this situation. However, guidance may be provided by K.S.A. 19-1930 which provides a county shall receive from the United States or a city, reimbursement for keeping an inmate incarcerated under the authority of the foreign jurisdiction. In our judgment, therefore, it is appropriate that the Department of Corrections reimburse the county for such expenses.

Thus, it is our opinion that a county jail is an appropriate place to be designated by the Secretary of Corrections for the detention of a suspected parole violator, and the Department of Corrections must bear the expense of incarceration. We recognize, however, that due to the lack of specific legislative guidelines and the absence of definitive case law, the foregoing opinions must be regarded as somewhat pragmatic and conclusory.

Very truly yours,

Robert T. Stephan

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RTS:TDH:may