

MAGISTRATES:

The judge of the magistrate court does not have the power to make a retroactive order directing the sheriff to be present and attend the court for the days that he was present thereby entitling him to a fee.

April 12, 1951

4-12- FILED  
7

Judge Joe Berry  
Judge of the Magistrate Court  
Benton County  
Warsaw, Missouri

Dear Sir:

Reference is made to your letter of March 27, 1951, requesting an opinion of this office which reads as follows:

"In this County, for some time, the Sheriff has been directed to be present in Magistrate Court on every Wednesday, and on this basis he has been paid. Actually, however, during this period, Court has been held on more days than the Sheriff has been paid for, court being held usually several days each week and the Sheriff drawing his \$3.00 per day only for the Wednesdays.

"Is the Magistrate empowered to now make a retroactive order, effective at the beginning of the period, ordering the Sheriff to be present on every day that the court was in session, thereby enabling the Sheriff to collect back pay for the days of the Magistrate Court in the past, that he has not been paid for, but was present and for which no order had been made at that time?"

I am enclosing a copy of our opinion to the Honorable John A. Eversole, Prosecuting Attorney of Washington County, dated January 3, 1947, which may be taken as authority for allowing sheriffs fees for

Judge Joe Berry

attending magistrate court if his attendance has been requested by the judge of said court.

We are assuming from your letter, and for the purposes of this opinion, that there has been no order either oral or written directing the sheriff to attend the magistrate court on the days that he was present and has not been paid.

We direct your attention to Section 2034, R. S. Mo. 1939, which made it the duty of the sheriff to attend court under the general law. Subsequently, in 1945, said section was amended to read as follows:

Section 57.090, RSMo 1949:

"Sheriffs to attend courts - when. - The several sheriffs shall attend each court held in their counties, when so directed by the court; and it shall be the duty of the officer attending any court to furnish stationery, fuel, and other things necessary for the use of the court whenever ordered by the court."

This amendment of said section relieves the sheriff of the duty to attend court unless specifically directed by the court to so attend.

This department has on several occasions ruled that the sheriff is not entitled to a fee for attending court unless he is actually present and by direction of the court.

You have stated that you wish to enter an order which is in its nature "nunc pro tunc." We believe that such an order has no application here. The following is found in 28 Words and Phrases at page 981, citing the case of Kertzinger v. Lewis, Ill. App., 45:

"A 'nunc pro tunc' order cannot be made to supply an omission to make an order but only an omission in the record of the order."

(Emphasis ours.)

Looking now to the statutes regulating magistrate courts, we find nothing to indicate that the court was intended to have the power to enter such an order either expressly or as a necessary incident to some specific power. On the contrary we believe that the intention of the legislature was that such an order is to be

Judge Joe Berry

a prerequisite to the right of the sheriff to collect a fee and the magistrate is without the power to provide a sheriff's fee in any other manner except by strict compliance with the statute.

CONCLUSION

Therefore it is the opinion of this department that a judge of the magistrate court is without the power to enter a retroactive order ordering the sheriff to be present on every day that the court was in session, thereby enabling the sheriff to collect back pay for the days that he was present and attended the court but for which no order had been made at that time.

Respectfully submitted,

D. D. GUFFEY  
Assistant Attorney General

APPROVED:



---

J. E. TAYLOR  
Attorney General

DDG:hr  
encl.