



Lynn Fitch
ATTORNEY GENERAL
OPINIONS AND POLICY

June 30, 2021

Elise B. Munn, Esq.
Attorney for Copiah County Board of Supervisors
Post Office Drawer 768
Hazlehurst, Mississippi 39083

Re: Board of Supervisors' Responsibilities Regarding Constables "State Fail Fees"

Dear Ms. Munn:

The Office of the Attorney General has received your request for an official opinion.

Background

You state that the Copiah County Board of Supervisors (the "Board") has made the determination that the county constables are not entitled to the "state fail fee" provided for in Mississippi Code Annotated Section 25-7-27(1)(f), but an employee with the Public Employees Retirement System ("PERS") has taken the position that it is mandatory for such fees to be reported to PERS yearly, and because they were not reported or paid to the constables, the Board is responsible for paying the employer and employee contributions and paying the fee to the constables.

Issues Presented

1. What is the Board's responsibility regarding the fee paid to constables for cases where the state fails in the prosecution—the fee for "state fail" cases?
2. Must the Board determine, prior to the end of the calendar year, whether the constable is or is not entitled to the fee?
3. In the absence of making a finding in the minutes that a constable is entitled to the fee, what is the Board's responsibility?

Brief Response

Your first question is too broad to address by opinion. However, for your guidance, and consistent with the facts and with this office's previous opinions, we note that if a constable performs all the

duties required by Section 25-7-27(1)(f), the Board must pay the “state fail fee” to the constable. A constable is ineligible to collect the fee where the Board determines, consistent with the facts, that the constable did not do the following in cases in which the state failed in the prosecution: (1) serve, or diligently attempt to serve, all warrants and other process presented to him or her for service; and (2) attend all trials, unless lawfully excused or otherwise unavailable for a legitimate reason.

In response to your second question, we find no requirement that the Board make a finding that the constables in question are *not* entitled to the fee. On an annual basis, if the Board determines, consistent with the facts, that the constables performed the required duties and are entitled to the fee, the Board should, prior to paying the fee, making an affirmative finding of such entitlement. Though the fee, if earned, must be paid on an annual basis, we find no requirement that such allowance be made prior to the end of a calendar year.

Your third question is too broad to address by opinion. However, for your guidance, as noted in response to your second question, before paying a constable the fee, the Board is responsible for making an affirmative finding, consistent with the facts, that the constable in question performed the required duties and is entitled to the fee.

Applicable Law and Discussion

Pursuant to Mississippi Code Annotated Section 7-5-25, this office can only issue official opinions on matters involving prospective actions. An official opinion can neither validate nor invalidate a past action. Accordingly, this opinion relates only to prospective actions taken by the Board.

You ask three questions related to the Board paying constables a fee under Section 25-7-27 for such constables performing certain duties in cases in which the state fails in its prosecution, or “state fail” cases. Your first question, which seeks guidance related to the “Board’s responsibility regarding the fee,” is too broad for this office to address by opinion. *See MS AG Op., Barrett at *1* (Aug. 29, 1984) (refusing to respond by official opinion on the basis that the question posed was overly broad). However, for your reference, we provide the following guidance.

Section 25-7-27(1)(f) governs the payment of the fee paid for state fail cases and provides, in part:

(1) Marshals and constables shall charge the following fees:

...

(f) For serving all warrants and other process and attending all trials in state cases in which the state fails in the prosecution, to be paid out of the county treasury on the allowance of the board of supervisors without itemization, subject, however, to the condition that the marshal or constable must not have overcharged in the collection of fees for costs, contrary to the provisions of this section, annually . . . \$2,500.00.

This office has previously analyzed a constable's job requirements in relation to collecting the fee:

[I]n order to collect the fee, the constable must serve or diligently attempt to serve all warrants and other process presented to him for service in state cases in which the state fails in the prosecution. He must attend all trials in state cases in which the state fails in the prosecution, unless lawfully excused or otherwise unavailable for a legitimate reason. Finally, he must not have overcharged in the collection of fees for costs, contrary to the provisions of Section 25-7-27.

MS AG Op., *Slover* at *3 (Nov. 10, 2020) (quoting MS AG Op., *Enlow* at *1 (Feb. 4, 2005)). As we opined in *Slover*, “[a] constable is ineligible to collect the annual statutory fee in its entirety if he fails to comply with any of the provisions set forth by Section 25-7-27(f).”¹ *Slover*, at *3. “Conversely, if the constable performs all duties set forth above, the board of supervisors has no discretion and must pay the full fee.” *Id.*

Turning to your second question, Section 25-7-27 specifically provides that the fee in question is to be paid “on the allowance of the board of supervisors.” If the constables did not request to be paid the “state fail fee,” the Board would have had no occasion to evaluate whether to pay the fee. Under those circumstances, we find no requirement that the Board make a finding that the constable is *not* entitled to the fee.² On an annual basis, if the Board determines, consistent with the facts, that the constables performed the required duties and are entitled to the fee, the Board should, prior to paying the fee, making an affirmative finding that the constable is entitled to such fee. Though the fee, if earned, must be paid on an annual basis,³ we find no requirement that such allowance be made prior to the end of a calendar year.

Your third question, which, like your first question, asks generally about the “Board’s responsibility” in relation to the fee, is too broad to address by opinion. However, for your guidance, as set forth above, prior to paying a constable the fee, the Board should make an affirmative finding, consistent with the facts, that such constable performed his or her required duties and is entitled to the fee.

¹ See also MS AG Op., *Shurden* at *1 (Mar. 23, 1994) (“Therefore, a board of supervisors could lawfully refuse to compensate a constable under this subsection, in the event the board of supervisors determined that a constable did not serve any warrants, or other process, or attend any criminal trials in which the state failed in its prosecution.”).

² This opinion should not be interpreted to mean that under no circumstance is a board of supervisors required to make a determination that a constable or other public officer is *not* entitled to a given fee. If, for example, a board was presented with a claim for the “state fail fee” by a constable and the board disputed and denied such claim, such denial, and the reasoning therefore, should be recorded in the minutes. *KPMG, LLP v. Singing River Health Sys.*, 283 So. 3d 662, 669 (Miss. 2018) (“For well over a century, this Court has consistently held that public boards speak only through their minutes and that their acts are evidenced solely by entries on their minutes.”).

³ *Slover*, at *3 (“Accordingly, it is the opinion of this office that the fee for ‘state-fail’ cases may only be paid to a constable on an annual basis and only if he/she has fully satisfied the provisions of Section 25-7-27.”).

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If this office may be of any further assistance to you, please do not hesitate to contact us.

Sincerely,

LYNN FITCH, ATTORNEY GENERAL

By: */s/ Phil Carter*

Phil Carter

Special Assistant Attorney General

OFFICIAL OPINION