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COUNTY COMMISSIONERS—CANNOT MAKE APPROPRIATIONS FOR ALLOWANCES TO COUNTY OFFICERS FOR PREVIOUS FISCAL YEAR—HAVE POWER TO REGULATE AGGREGATE AMOUNT TO BE EXPENDED BY PROSECUTING ATTORNEY—COURT MUST LOOK TO APPROPRIATION MADE BY COUNTY COMMISSIONERS.

*SYLLABUS:*

1. *County commissioners cannot make appropriations to cover allowances made to county officers for the previous fiscal year.*
2. *County commissioners by virtue of the authority vested in them by the provisions of General Code 5649-3g and 5649-3h to fix the amount of the appropriations, have the power to regulate the aggregate amount, to be expended by the prosecuting attorney in any one year, of the allowances made to him by virtue of Section 3004-1 of the General Code.*
3. *The court in fixing an allowance under Section 3004-1 of the General Code must look to the appropriation made by the county commissioners for that purpose. If the court makes an allowance in excess of the amount appropriated and the county commissioners do not within the fiscal year amend their appropriation measure so as to include the amount of such allowance, then although such allowance is not illegal, it is ineffective.*

COLUMBUS, OHIO, February 12, 1927.

HON. HOWARD J. SEYMOUR, *Prosecuting Attorney, Ravenna, Ohio.*

DEAR SIR:—I have your communication of recent date in which you request an opinion from this department on a statement of facts substantially as follows:

You state that your predecessor, whose term expired on the third day of January, 1927, on the thirtieth day of December, 1926, filed his application in the Common Pleas Court of Portage county, setting up the fact that an emergency existed, and that by reason of the unusual prevalence of crime it was necessary for him to have additional funds in order to pay obligations incurred during the year 1926 for necessary investigation of crimes and prosecution of criminals. This additional allowance was sought by virtue of the terms of Section 3004-1 of the General Code.

The court upon presentation of this application made an allowance of additional funds in the sum of twenty-five hundred dollars (\$2,500.00) to said prosecuting attorney for the year 1926 to be expended for the purposes and under the provisions of Section 3004-1 of the General Code. No action was taken by the county commissioners during the year 1926 on this matter, and they now desire to know if mandamus would lie to compel the payment of this money, as there never was an appropriation made for the same, nor has there yet been.

You also inquire whether or not Section 3004-1 of the General Code governs, or whether Sections 5660, 5660-1 and 5661 place the final authority in regulating funds to be expended by the prosecuting attorneys in the hands of the commissioners.

Section 3004 of the General Code, provides for certain allowances to be made to the prosecuting attorney for the purpose of investigating and prosecuting crime. The amount to be allowed the prosecuting attorney under this section is limited to one-half of his official salary. This section was supplemented in 1921 by the enactment of Section 3004-1, which provided for additional allowances by the Court of Common Pleas in certain cases.

It is provided that these moneys shall be paid out of the general fund of the county, and this department has in former opinions, ruled that the prosecuting attorney has full authority to expend this fund at such times and in such ways as he sees

fit, limited only by the fact that it must be in the performance of his official duties and in the furtherance of justice. See Opinions of the Attorney General, 1915, page 16; Id. 1920, page 977. He may, if he desires, withdraw the entire allowance from the county treasury at one time and expend it for the purpose authorized as he sees fit. He must, however, file an itemized statement of his stewardship annually before the first Monday of January, and if he does not do so it has been decided that he may be compelled to do so in an action in mandamus. Opinions of the Attorney General, 1924, page 466.

However, the statement of facts as outlined above presents a further question, and that is whether under this particular state of facts the county commissioners might by mandamus be required at this time to appropriate the money for the payment of this allowance as made by the Common Pleas Court.

Section 260-1 of the General Code provides that beginning with January 1, 1926, the fiscal year of every county, municipal corporation, school district, township and other taxing districts shall begin at the opening of the first day of January of each calendar year and end at the close of the succeeding thirty-first day of December.

It is provided by Section 5649-3g that at the beginning of each fiscal year the county commissioners and other boards and governing bodies of political subdivisions shall make appropriations classified for the several purposes for which expenditures are to be made for and during the said fiscal year.

Section 5649-3h of the General Code provides that any appropriation measure made by county commissioners and other boards and governing bodies of political subdivisions may be amended with certain limitations. This section also provides that any appropriation shall cease to have force or effect after the termination of the fiscal year in which it was made.

Section 5660 of the General Code, provides in part as follows:

"No expenditure excepting from the proceeds of bonds, shall be made unless authorized by appropriation both as regards purpose and amount, nor shall any expenditure be made from the proceeds of bonds unless duly authorized or directed.

No contract, agreement or other obligation calling for or requiring for its performance the expenditure of public funds from whatsoever source derived, shall be made or assumed by any authority, officer, or employe of any county or political subdivision or taxing district, nor shall any order for the payment or expenditure of money be approved by the county commissioners, council or by any body, board, officer or employe of any such subdivision or taxing district, unless the auditor or chief fiscal officer thereof first certifies that the money required to meet such contract, agreement or other obligation, or to make such payment or expenditure has been lawfully appropriated or authorized or directed for such purpose and is in the treasury or in process of collection to the credit of appropriate funds free from any previous and then outstanding obligation or certification, which certificate shall be filed with such authority, officer, employe, commissioners, council, body or board, or the chief clerk thereof. \* \* \*"

It is apparent that by the terms of Section 5660 the payment of the amount of the allowance made by the Common Pleas Court in this matter could not lawfully be made until the same had been appropriated.

A similar question was before the Court of Appeals in Noble county in the case of *State of Ohio, ex rel. U. H. Buckley, Prosecuting Attorney of Noble County, vs. Board of County Commissioners of Noble County, and L. H. Tarleton, Auditor of Noble County*. This case was decided November 17, 1926, and is as yet unreported.

This was an action in mandamus brought against the county commissioners and the county auditor of Noble county seeking to compel them to pay the salary of a clerk in the prosecutor's office when there was no appropriation therefor.

It appears in this case that the common pleas judge under and by virtue of Section 2914 of the General Code, fixed an aggregate sum of six hundred dollars (\$600.00) to be expended during the year 1926, for the compensation of assistants, clerks and stenographers in the office of the prosecuting attorney, but that the county commissioners only made an appropriation of three hundred dollars (\$300.00). The clerk, however, drew fifty dollars (\$50.00) per month for the first six months, and consequently drew out the entire amount of the appropriation, and action was brought against the county commissioners and the auditor to compel them to provide an additional three hundred dollars (\$300.00) for the last six months' salary.

It is not clear from the opinion what the appropriation, if any, had been in the first place or whether the appropriation had been reduced.

The court in its opinion cited Sections 5649-3g and 5660 and said:

"The latter section is controlling here and to the effect that the county auditor may not issue his warrant for the payment of any obligation until there is money in the county treasury to the credit of the fund out of which such payment must be made,"

and then quotes the provisions of General Code 5660, which I have quoted above.

It is true it is provided in Section 5649-3h that the appropriation measure may be amended from time to time within the limits of the budget, but I know of no way that the county commissioners could after the first day of January of any year make an appropriation that would be retroactive. That is, after the end of any fiscal year the appropriating board could not amend an appropriation measure for the previous fiscal year so as to make funds available for use in accordance with the attempted amendment, nor could such board include in the appropriation made in any fiscal year allowances for expenditures in the previous fiscal year because the statute says that at the beginning of each fiscal year they shall make appropriations for expenditures for such fiscal year. To hold otherwise, would have the effect of completely nullifying the sections in question.

It is my opinion that under the circumstances outlined in your letter, which have been summarized in this communication, an action in mandamus could not be successfully prosecuted against the county commissioners to compel them to make an appropriation for this money allowed by the court, or against the auditor to compel him to pay such money.

In arriving at my conclusions in this matter, I am not unmindful of the fact that this department, in Opinions 3429 and 3299 rendered in 1926, considered the question of the application of Sections 5649-3g, 5660 and 5660-1 to the question of the salaries of deputies and clerks in county offices. In these opinions it was sought to make a classification of the county offices and to distinguish between them in applying Sections 5649-3g, 5660 and 5660-1, and while your question does not involve the salaries of officers and employes the reasoning of these opinions might be applied to your situation.

As I view the situation, however, it is not necessary to refer further to the classification made, as set out in these opinions above referred to, as I am of the opinion that Sections 5649-3g, 5660 and 5660-1 are sufficiently broad to be applicable to the salaries of deputies and clerks in all the county offices as well as to allowances made by the common pleas court for the use of the prosecuting attorney under the provisions of Section 3004-1 of the General Code.

As to the other inquiry in which you say you would like to know whether Section 3004-1 governs or whether Sections 5660, 5660-1 and 5661 place the final authority in

regulating funds to be expended by the prosecuting attorney's office in the hands of the commissioners, I am of the opinion that the commissioners are bound by Sections 5660, 5660-1 and 5661, but these sections do not go as far as to say that the final authority in regulating funds to be expended by the prosecutor's office is in the hands of the commissioners because, as I have said before, if the appropriation has been made, the prosecuting attorney may, and is entitled to, draw the money and expend it as he sees fit, limited only by the provision that it shall be expended in the performance of his official duties, and in the furtherance of justice, and the county commissioners have no control in this respect. However, by virtue of the authority vested in them with reference to fixing the amount of appropriations under Section 5649-3g and 5649-3h, they may, by failing or refusing to appropriate funds, render the action of the court in making allowances under Section 3004-1, ineffective.

Respectfully,  
 EDWARD C. TURNER,  
*Attorney General.*

77.

SALE OF NURSERY STOCK—SECTION 1138 G. C. IS VALID EXERCISE OF POLICE POWER—STATE MAY REQUIRE LICENSE FEE—ADMINISTRATIVE OFFICERS SHOULD COMPLY WITH STATUTE.

*SYLLABUS:*

1. *Section 1138, General Code, is a valid exercise of the police power and the State of Ohio may properly require a license fee as therein provided.*
2. *The provisions of the duly enacted statute should be followed by administrative officers unless and until such statute be declared unconstitutional by a court of competent jurisdiction.*

COLUMBUS, OHIO, February 12, 1927.

*Department of Agriculture, MR. RICHARD FAXON, Chief, Division of Plant Industry, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter dated January 11, 1927, wherein you refer to Section 1138, General Code, and request my opinion "as to whether it is constitutional for the State of Ohio to require a license fee" as therein provided.

Article I, Section 10, Clause 2, of the Constitution of the United States, provides:

"No state shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws. \* \* \*"

The question that you present involves whether or not Section 1138, General Code, contravenes either the federal or state constitutions. So long as Congress has not invaded the field of regulation or inspection this power is reserved in the state.

The legislature has the right to determine the necessity, the policy and the wisdom of requiring inspection laws in the interest of public safety. A large discretion is vested in the legislature to determine what the interests of the public require and also what is necessary for the protection of such interests.

It is a matter of common knowledge that all forms of plant life are subject to