

1505.

VILLAGES—FINES AND FORFEITURES ARE NOT FEES, COSTS OR EXPENSES AND ARE NOT INCLUDED IN TERM "LEGAL FEES" AS USED IN SECTION 4270 G. C.—VILLAGE COUNCIL WITHOUT AUTHORITY OF LAW TO PASS ORDINANCE ALLOWING FINES TO BE RETAINED BY VILLAGE OFFICER—WHEN MAYOR OR MARSHAL MAY RETAIN ALL OR ANY PART OF HIS LEGAL FEES AS COMPENSATION—SALARIES OF VILLAGE OFFICERS SHOULD BE PROVIDED FOR AT BEGINNING OF EACH FISCAL HALF YEAR—SEE SECTION 3797 G. C.

1. *Fines and forfeitures are not fees, costs or expenses and are not included in the term "legal fees" as used in section 4270 G. C.*

2. *A village council is without authority of law to pass an ordinance allowing fines to be retained by any village officer for any purpose.*

3. *Under section 4270 G. C. a village council by ordinance may allow the mayor or marshal to retain all or any stipulated part of their legal fees as compensation. In such event a marshal shall not be entitled to his expenses. Such payment of compensation or salary is permitted to no other village officer.*

4. *By authority of section 3797 G. C. salaries of village officers should be provided for at the beginning of each fiscal half-year by appropriation by resolution or ordinance of the village council. Payment must be within such appropriation and balance thereof for any fiscal half-year.*

COLUMBUS, OHIO, August 19, 1920.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Acknowledgment is made of the receipt of your request for opinion which reads as follows:

"(1) Can a village council legally fix compensation of mayor at \$500.00 per year and 25 per cent of all fines and licenses collected?

(2) Can compensation for legal adviser be fixed at \$100.00 per year and 25 per cent of all fines?

(3) Can legal adviser be paid \$100.00 per year and additional for special improvements and court trials? If so, how should such compensation be provided for by council?

The above questions are all village questions."

Some sections of the municipal code relating to the government of villages have been amended and section 4257 G. C., which relates to your inquiry, has been repealed. The law pertinent to a discussion of the questions asked as recently changed is to be found in 108 O. L., Part II, p. 1203, and is as follows:

"Section 4270. All fines and forfeitures in ordinance cases and all fees collected by the mayor, or which in any manner comes into his hands, due such mayor or to a marshal, chief of police or other officer of the municipality and any other fees and expenses which have been advanced out of the municipal treasury, and all moneys received by such mayor for the use of the municipality, shall be by him paid into the treasury of the municipality on the first Monday of each month, provided that the council of a village may, by ordinance, authorize the mayor and marshal to retain

their legal fees in addition to their salaries, but in such event a marshal shall not be entitled to his expenses. At the first regular meeting of council in each and every month, he shall submit a full statement of all moneys received, from whom and for what purposes received and when paid into the treasury. Except as otherwise provided by law, all fines and forfeitures collected by him in state cases together with all fees and expenses collected, which have been advanced out of the county treasury, shall be by him paid over to the county treasury on the first business day of each month."

"Section 4556. The fees of the mayor, in all cases, shall be the same as those allowed justices of the peace, and the fees of the marshal, chief of police, or other officer serving the writs or process of the court, in all cases, shall be the same as those allowed constables."

It is provided in section 4219 G. C. that "the council shall fix the compensation and bonds of all officers, clerks and employes in the village government, except as otherwise provided by law."

The law as found in section 4270 G. C., read in connection with section 4219 G. C., authorizes a village council to fix by ordinance the salaries of the mayor and marshal and further to allow these officers to retain their legal fees. These sections cover both salary and fees and are not ambiguous and require no rule of construction save what is the ordinary meaning of the language used therein.

Your first and second questions may be discussed together. It is noted that they refer to fines and not to fees, except that in the first question the word "fees" is to be supplied after the word "license" so as to be read "license fees."

It is therefore necessary to distinguish "fines" and "fees."

In *Walsh vs. Ringer*, 2 Ohio, 328, the court said:

"Fines are debts due the state, within the meaning of the law authorizing the sale of lands without appraisalment for such debts."

In this case from the statement of facts it appears, among other things, that J. G. Ward was convicted of assault and battery in the November term of court, 1820. Upon conviction execution was issued for fine and costs amounting to about \$30.00. The sheriff took Ward into custody. He, to obtain his release, surrendered to the sheriff seventy acres of land situated in Harrison county, which was sold on March 8, 1824, for \$31.25. Evidently, from this partial statement of facts and the decision of the court, fines are debts due the state for punishment for violation of law.

In the opinion in *State vs. Auditor*, 77 O. S., 338, this language is used:

"Costs, in the sense the word is generally used in this state, may be defined as being the statutory fees to which officers, witnesses, jurors and others are entitled for their services in an action or prosecution and which the statutes authorize to be taxed and included in the judgment or sentence. The word does not have a fixed legal signification. As originally used it meant an allowance to a party for expenses incurred in prosecuting or defending a suit. Costs do not necessarily cover all of the expenses and they were distinguishable from fees and disbursements."

Again, in *State vs. Commissioners*, 6 O. D. N. P. 240, it is said:

"Expense is costs when made so by statute. The word 'costs' includes

only those expenditures which are by law taxable and to be included in the judgment."

Fees are fixed by statute and a village mayor is entitled to such fees as are provided by law for a justice of the peace. Fees for issuing licenses are usually provided for by ordinance of the village and perhaps in some few cases by the statutes. License fees are to be included in the term "legal fees" as used in section 4270 above and may by ordinance be retained by the mayor in addition to his salary.

But in view of the court's decision as quoted above, no fine or forfeiture may be retained by the mayor or other village officers though such be authorized by ordinance. Fines and forfeitures are not fees and the village council is confined by law to an ordinance applying fees only to the compensation of the mayor or the marshal.

No law is to be found that permits the legal counsel of a village to accept fees as a part of his compensation and the village council is nowhere authorized to pass an ordinance permitting him to be so paid.

In *Rosebaugh vs. Saffin*, 10 Ohio, 31, the court said :

"The term forfeiture is, undoubtedly, distinguishable from the term fines, inasmuch as it may mean the sequestration of property, and the other term does not necessarily carry that signification."

Fines and forfeitures are clearly distinguished from fees, costs and expenses. Fees and costs include items to be distinguished from expenses. In so far as the compensation of the mayor or marshal of a village is provided for by fees the law uses the term legal fees and when such legal fees are a part of the marshal's compensation, he is not allowed to make a charge for his expenses.

In *Smallwood vs. City*, 75 O. S. 339, Judge Summers, delivering the opinion of the court, uses the following language :

"Under the municipal code of 1869, and until the adoption of the present code, it has been a reproach to our municipal corporation laws that in cases for the violations of ordinances the compensation of the mayor for his services depended upon a conviction. There is no more difficulty in compensating him by a salary instead of by fees than in case of a police judge, and the same reasons for it."

The court is here speaking of the municipal code of 1902 in which mayors of villages only could retain certain fees as part of their official compensation when permitted to do so by village ordinance. The municipal code as now effective is not materially changed from that of 1902 in so far as it affects mayors of villages.

The law provides that a village council may enter into a contract with its legal adviser embodying the terms and conditions indicated in your third question. Section 3797 G. C. is as follows :

"At the beginning of each fiscal half year, the council shall make appropriations for each of the several objects for which the corporation has to provide, or from the moneys known to be in the treasury, or estimated to come into it during the six months next ensuing from the collection of taxes and all other sources of revenue. All expenditures within the following six months shall be made from and within such appropriations and balances thereof."

Appropriations of sufficient funds to provide for the expenses incurred for the services rendered by a legal adviser contingent upon special improvements and court trials must be made by the council. The law is mandatory. If a council should make a contract with its legal adviser contingent on per diem services for work required for special improvements and court trials, it must provide reasonable appropriations each half year to meet such obligations and it is able to provide such reasonable sum by estimate since it can know what improvements are in immediate contemplation and what court work the village is likely to have based upon the expense that it has had during a term of years.

From the foregoing reasons and the law this department is of the opinion that a village council can pay no part of any fine or forfeiture as compensation to any officer, but it may allow the mayor or the marshal to retain all or any stipulated part of their legal fees as a part of such compensation. The legal adviser may be paid a salary or a salary and per diem for services rendered, but the same must be within the amount of the balances and the sum appropriated by council for that purpose in the appropriation made in any six months period.

Your first and second questions therefore, except as to license fees, must be answered in the negative, and the third in the affirmative.

Respectfully,

JOHN G. PRICE,

Attorney-General.

1506.

MUNICIPAL CORPORATION—STREETS AND ALLEYS—CHANGE OF STREET GRADE PETITIONED FOR BY MAJORITY OF PROPERTY OWNERS—PREVIOUSLY LAID WATER MAINS LOWERED—COST ASSESSABLE AGAINST LOTS AND LANDS AFFECTED.

Where a change of a street grade is petitioned for by a majority of the property owners affected and such change necessitates the lowering of previously laid waterworks service pipes for house connections, the cost of lowering such pipes is a part of the cost of such street improvement and as such is assessable against the lands and lots affected.

COLUMBUS, OHIO, August 19, 1920.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Acknowledgment is made of the receipt of your recent letter requesting the opinion of this department, as follows:

“We are today in receipt of the following communication from the village clerk of Kenmore, Ohio:

“In the process of improving a certain street in our city, we found it necessary to lower the water mains to accommodate a change of grade petitioned for by the property owners concerned. Now, the question of paying the cost of this additional work confronts us. Can we charge the cost of lowering the service lines from the main line to the building or any part of it, to the property owner? Would it be possible to pay the cost of lowering the main line out of that street improvement fund? The service lines were originally paid for by the property owners.