

Note from the Attorney General's Office:

1952 Op. Att'y Gen. No. 52-2184 was modified by 1957
Op. Att'y Gen. No. 57-736.

2184

MUNICIPAL COURT BAILIFF:

1. AUTHORITY TO FIX COMPENSATION PLACED WITH COURT RATHER THAN WITH LEGISLATIVE AUTHORITY—SECTION 1611 G. C.
2. AMOUNT OF TRAVEL EXPENSE—COURT AND LEGISLATIVE AUTHORITY SHOULD REACH AGREEMENT—AMOUNT DETERMINED SHOULD BE REASONABLY RELATED TO EXPENSE ACTUALLY INCURRED.
3. EXPENSE ALLOWANCE NOT "COMPENSATION"—AMOUNT "SHALL NOT EXCEED THAT OF THE CLERK"—SECTION 1611, PARAGRAPHS A, C, G. C.
4. ALLOWANCE FOR TRAVEL EXPENSE—MAY BE BASED ON MILEAGE—HOW DETERMINATION MAY BE MADE AS TO A FIXED MONTHLY AMOUNT.
5. ALLOWANCE FOR TRAVEL EXPENSE—MAY NOT BE MADE IN AMOUNT EQUAL TO AGGREGATE OF FEES AND COSTS CHARGED IN ANY ACTION OR PROCEEDING—OFFICIAL DUTIES PERFORMED BY BAILIFF—SECTION 1605 G. C.

SYLLABUS:

1. Under the provisions of Section 1611, General Code, the authority to fix the compensation of a bailiff of a municipal court is placed with the court rather than with the legislative authority.

2. In determining the amount of the travel expense allowance to be paid such bailiff, it will normally be necessary, as a practical matter, for the court and the legislative authority to reach an agreement; but neither the court nor the legislative authority can be compelled to accept any such determination by the other which is not reasonably related to the travel expense actually incurred by the bailiff in the discharge of his official duties.

3. The bailiff of a municipal court may lawfully be paid an expense allowance under the provisions of paragraph (C) of Section 1611, General Code, in addition to the compensation for which provision is made in paragraph (A) of this section; and such expense allowance does not constitute "compensation" within the meaning of this term as used in the limitation in this section of the compensation which such bailiff may receive to an amount which "shall not exceed that of the clerk."

4. The allowance for travel expense for which provision is made in Section 1611, General Code, may properly be based on mileage and in exceptional cases,

where sufficient statistical data relative to the average monthly travel expense actually incurred by the bailiff is available to permit the determination of a fixed monthly amount which is reasonably related to such average, such allowance may be made in a fixed monthly amount.

5. The allowance for travel expense for which provision is made in Section 1611, General Code, may not be made in an amount equal to the aggregate of the fees and costs charged in any action or proceeding, under the provisions of Section 1605, General Code, with respect to the official duties performed therein by the bailiff.

Columbus, Ohio, December 29, 1952

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen:

Your request for my opinion reads as follows:

"We are in receipt of a letter from the City Solicitor, of Cambridge, Ohio, requesting that this Bureau submit certain questions pertaining to the compensation that may be provided and paid a bailiff of the Cambridge Municipal Court under authority of Section 1611, General Code.

"Enclosed herewith is a copy of the City Solicitor's letter which sets forth in detail the problem confronting city and court officials.

"Please review the aforesaid letter together with the pertinent statutes governing the fixing of compensation for a municipal court bailiff, and give us your formal opinion in answer to the following questions:

"1. Does the municipal council have any authority or control over the compensation of a bailiff in the Cambridge Municipal Court?

"2. If the answer to question number one is in the affirmative, may an allowance be made for costs and expenses incurred by the bailiff in the operation of his private automobile on official business, in addition to the compensation fixed by the court under Section 1611, General Code?"

"3. If such expense allowance is determined to be legal, is it limited by the provisions of Section 1611, General Code, which reads in part as follows:

"* * * The compensation of the bailiff shall not exceed that of the clerk. * * *"

With respect to your first question, your attention is invited to the following provision in Section 1611, General Code:

“The court shall appoint a bailiff who shall receive such annual compensation as the court may prescribe which compensation shall be payable, in semi-monthly installments, from the same sources and in the same manner as provided in section 1591 of the General Code. The compensation of the bailiff shall not exceed that of the clerk.

This provision plainly places with the court the sole authority to fix the bailiff's compensation and it clearly appears, therefore, that the legislative authority has no authority or control over the matter.

As to the allowance of funds to reimburse the bailiff for expenses, however, it would seem that the legislative authority does possess some degree of control. The statutory authority for an allowance to the bailiff based on expenses is found in paragraph (C), Section 1611, General Code, which reads:

“The legislative authority may purchase such motor vehicle or vehicles for the use of the bailiffs and deputy bailiffs as the court shall determine they need to properly perform the duties of their office. All expenses, maintenance, and upkeep of such vehicle or vehicles, or any allowances, costs, and expenses for the operation of a private car for official duties, including the cost of oil, gasoline and maintenance shall be paid by the legislative authority, upon approval by the court.”

The provision in this paragraph that the allowance shall be “upon approval of the court” would indicate that no payment would be authorized if such approval should be withheld. It does not necessarily follow, however, that when the court has approved an expense allowance on a particular basis the payment thereof becomes mandatory on the legislative authority. It will be observed that the statute authorized either (1) the purchase of a motor vehicle and the payment of the expense of operating it, or (2) the payment of an allowance for the operation of a private motor vehicle. The discretion to choose one or the other of these methods of providing for travel expense quite clearly is reposed solely in the legislative authority.

When one or the other method has been selected, however, an argument of considerable weight could be made to the effect that the payment of whatever allowance under such method has been approved by the court

would become mandatory on the legislative authority. Whatever the merits of such a view of the law, it would appear, as a practical matter, to be necessary in most cases for the court and the legislative authority to come to an agreement on the subject. This is true for the reason that in fixing the precise amount to be allowed there is obviously an area or range within which the amount so fixed would be a reasonable one and the act of determining such amount would not be an abuse of discretion. Accordingly, in the event the legislative authority should fix the amount so allowed at a reasonable figure, but not in the full amount approved by the court, it is doubtful whether mandamus would lie to compel the legislative authority to pay such greater amount. This being so, it would appear necessary, as a practical matter, for the court and the legislative authority to reach an agreement on the subject.

In response to your second and third questions, it is necessary only to point out the distinction between (1) compensation and (2) expense allowance. The former is a payment to an officer or employe in consideration of the rendition of his personal services. An expense allowance, on the other hand, is a payment to an officer or employe to reimburse him for an expenditure out of his own funds for a public purpose. In such case the consideration for such reimbursement is ultimately supplied by a third party, the expense with respect to which has temporarily been met by the officer or employe concerned. In my opinion No. 1869, dated September 23, 1952, I pointed out the distinction in the following language:

“My immediate predecessor, in Opinion No. 2187, Opinions of the Attorney General for 1950, page 571, held:

“‘County coroners who use their own automobiles in discharging the duties of their office are not entitled to mileage for such use either by statute or by implication. Their compensation is limited to that provided for them in Section 2855-3 of the General Code.’

“It was doubtless on the strength of that opinion that the findings mentioned in your letter were made.

“It appears to me that the use of the word ‘compensation’ in the above syllabus is not accurate. It implies that an allowance for reimbursement of expenses of traveling is a part of the compensation of an officer. I submit that an officer could not live long on that kind of ‘compensation.’”

It is accordingly my conclusion, in view of the distinction thus pointed out, that the expense allowance for which provision is made in

paragraph (C) of Section 1611, General Code, is not "compensation" within the meaning of this word as used in paragraph (A) of this section. This being the case, it would follow that there could be no objection to the payment of an expense allowance based on the operation of a private motor vehicle by the bailiff, in addition to the compensation paid to that officer in the amount fixed by the court.

The city solicitor's questions relative to the discretion of the court and the legislative authority in fixing the measure of expense allowances which may be paid to a municipal court bailiff present somewhat more difficulty. In view of the alternative formulae which the solicitor has suggested, I assume that it is not the intention of the legislative authority to purchase a motor vehicle for the use of the officer concerned, but rather to provide for "allowances, costs, and expenses for the operation of a private car for official duties."

The several formulae to be considered are set out in the following question which the solicitor has presented to you:

"Could any such 'allowances, costs and expenses for the operation of a private car for official duties' paid by the legislative authority to the bailiff of the municipal court be fixed in the discretion of the court and the legislative authority on the basis of (a) mileage traveled in the performance of official duties, (b) a fixed amount per month regardless of mileage traveled or extent of official duties performed, or (c) an amount equal to the fees and costs taxed in any action or proceeding, under the provisions of Section 1605, General Code, with respect only to the official duties performed by the bailiff in such actions or proceedings."

In considering a somewhat similar question in Opinion No. 690, Opinions of the Attorney General for 1951, page 405, I concluded (pp. 409, 410):

"The answer to your first question, therefore, is that county officers and employes may be reimbursed for necessary travel expenses incurred by them while using their personally owned automobiles on official county business; *that the method adopted for payment of these expenses is discretionary with the county officials who have final authority in this regard, unless otherwise provided by law*; and that whether the method of payment so adopted provides for separate payment of itemized parking charges or, instead, covers all expenses including parking by the payment of a flat rate per mile is a question of fact to be determined by the language and circumstances of each authorization."
(Emphasis added.)

In the instant case, since the statute does not prescribe a formula by which the amount of expense allowance is to be determined, I conclude that the fixing of the method of computation of such allowance is discretionary with the legislative authority and the court.

This does not mean, of course, that such discretion is unlimited. It is manifest, for example, that the amounts allowed must (1) be based on the use of a privately-owned motor vehicle and (2) bear some reasonable relationship to the actual expense incurred in the operation of such vehicle. One of the most common methods of computing the expense of travel and transportation by motor vehicle, both to public officers and as to employes of private commercial enterprises, is a computation based on mileage. Assuming that the amount to be allowed per mile is a reasonable one, it would appear that the allowance in the aggregate would necessarily bear a reasonable relationship to the expense actually incurred by a municipal court bailiff, and I conclude, therefore, that it lies within the discretion of the court and the legislative authority to make an allowance to the bailiff on a mileage basis.

The authority to make a fixed expense allowance monthly to the bailiff is by no means so clear. As already indicated, any such allowance must be reasonably related to the actual expenses incurred by the officer concerned and for this reason it may be concluded that such a fixed monthly allowance, without regard to this factor, is not authorized. It may be pointed out, however, that where the court has been in existence for some period of time, and where it is thus possible to determine the *average* of the official expense actually incurred over a number of months, it is conceivable that it would be possible to fix the amount of such monthly expense allowance at a figure which is reasonably related to the actual expense which the bailiff can be expected to incur within limited future periods. Such an amount would, of course, necessarily be subject to periodic revision based on actual experience, and for this reason this method is not one which I should think either the court or the legislative authority would be inclined to favor.

As to the third alternative formula suggested in your inquiry, your attention is invited to the following provisions in Sections 1605 and 1610, General Code:

Section 1605:

“Costs in a municipal court shall be fixed and taxed as follows:

“(A) The municipal court, by rule, may establish a schedule

of fees and costs to be taxed in any action or proceeding, either civil or criminal, which in no case shall exceed the fees and costs provided by law for a similar action or proceeding in the court of common pleas. * * *

Section 1610:

“* * * (F) The clerk of a municipal court shall receive and collect all costs, fees, fines, penalties, bail, and other moneys payable to the office or to any officer of the court and issue receipts therefor, and shall each month disburse the same to the proper person or officers and take receipts therefor, provided that fines and costs received for violation of municipal ordinances shall be paid into the treasury of the municipality the ordinance of which was violated and to the county treasury all fines collected for violation of state laws, subject to sections 3056 and 3056-3 of the General Code.” * * *

In Opinion No. 1132, Opinions of the Attorney General for 1952, dated February 8, 1952, I concluded:

“In cases involving a violation of a municipal ordinance, to the extent that statutory provision is not otherwise made for the disposition of moneys coming into the custody of the clerk of a municipal court, including fees, penalties, bail, and other moneys payable to any officer of the court, the clerk should, under the provisions of Section 4300, General Code, pay such moneys into the treasury of the municipality the ordinance of which was violated.

“In cases involving a violation of a state law, to the extent that statutory provision is not otherwise made for the disposition of moneys coming into the custody of the clerk of a municipal court, including costs, fees, penalties, bail and other moneys payable to any officer of the court, the clerk should, under the provisions of Section 4300, General Code, pay such moneys into the treasury of the most populous city in the territory within which such court exercises jurisdiction.”

If, as thus concluded, the statute requires the payment into a public treasury of all costs taxed in municipal court cases the disposition of which is not otherwise provided for by law, it would appear that any scheme by which such costs, or a portion of them, are paid indirectly to an officer of the court as an “expense allowance” would be of doubtful legality. There is, however, a more cogent reason why such costs alone cannot be deemed a fair measure of an expense allowance to the bailiff.

It would appear that the schedule of costs for which provision is made in Section 1605, *supra*, would necessarily be limited, to the extent that they relate to the services of the bailiff, to the fees authorized by statute to be taxed in a similar action or proceeding in the common pleas court for services performed by the sheriff. The services of the sheriff with respect to which costs may be taxed in such proceedings are enumerated in Section 2845, General Code, and among such services we find a great many which in nowise involve any travel. Such being the case, it would follow that if the bailiff were to be paid an "expense" allowance computed on the basis of such services, such allowance would be based on something other than expenses actually incurred in official travel, and that the basis of such computation would have no necessary relationship to such actual expenses; and such reasonable relationship, as already indicated herein, is necessarily the basis for such allowance. I conclude, therefore, that neither the court nor the legislative authority, under the provisions of Section 1611, General Code, has the power to provide for an expense allowance to the bailiff of such court to be computed on the sole basis of the aggregate of the costs taxed therein with relation to the services of such bailiff in actions and proceedings in such court.

Accordingly, in specific answer to your inquiries, it is my opinion that:

1. Under the provisions of Section 1611, General Code, the authority to fix the compensation of a bailiff of a municipal court is placed with the court rather than with the legislative authority.
2. In determining the amount of the travel expense allowance to be paid such bailiff, it will normally be necessary, as a practical matter, for the court and the legislative authority to reach an agreement; but neither the court nor the legislative authority can be compelled to accept any such determination by the other which is not reasonably related to the travel expense actually incurred by the bailiff in the discharge of his official duties.
3. The bailiff of a municipal court may lawfully be paid an expense allowance under the provisions of paragraph (C) of Section 1611, General Code, in addition to the compensation for which provision is made in paragraph (A) of this section; and such expense allowance does not constitute "compensation" within the meaning of this term as used in the limitation in this section of the compensation which such bailiff may receive to an amount which "shall not exceed that of the clerk."

4. The allowance for travel expense for which provision is made in Section 1611, General Code, may properly be based on mileage and in exceptional cases, where sufficient statistical data relative to the average monthly travel expense actually incurred by the bailiff is available to permit the determination of a fixed monthly amount which is reasonably related to such average, such allowance may be made in a fixed monthly amount.

5. The allowance for travel expense for which provision is made in Section 1611, General Code, may not be made in an amount equal to the aggregate of the fees and costs charged in any action or proceeding, under the provisions of Section 1605, General Code, with respect to the official duties performed therein by the bailiff.

Respectfully,

C. WILLIAM O'NEILL,
Attorney General.