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APPROVAL, NOTES OF SMITH TOWNSHIP RURAL SCHOOL DISTRICT,
MAHONING COUNTY, OHIO—\$3,155.00.

COLUMBUS, OHIO, March 24, 1933.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

396.

APPROPRIATION—DEPUTY AND CLERK HIRE FOR COUNTY OFFICES—EXCEPT FOR ABUSE OF DISCRETION COUNTY COMMISSIONERS DECISION IS FINAL.

SYLLABUS:

1. *The duty of making appropriations for the payment of deputy and clerk hire in the various county offices is placed upon the board of county commissioners by Section 5625-29, General Code.*
2. *No right of appeal to the Tax Commission of Ohio has been provided, by the Ohio statutes from an order of the board of county commissioners fixing the amount of the appropriation for deputy hire for the office of county auditor even though in some respects the county auditor may be the agent of the Tax Commission.*
3. *The Court of Common Pleas of the county has no jurisdiction to hear an appeal from such order by virtue of the provisions of Section 2461, General Code.*
4. *Since the statute places the duty upon the board of county commissioners to make appropriations for the various county purposes within certain restrictions provided by statute and the board of county commissioners has made such appropriations the writ of mandamus can not be used to amend or alter such appropriation order, unless there has been such disregard of the duties imposed upon such board by the legislature as will amount in law to an utter failure on the part of the board of county commissioners to use discretion and judgment.*

COLUMBUS, OHIO, March 25, 1933.

HON. VERNON L. MARCHAL, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR:—Your recent request for my opinion reads:

“If the county commissioners, in their appropriation for the clerk and deputy hire for the office of the County Auditor is, in the judgment and opinion of such Auditor, insufficient, what is his remedy to secure an additional appropriation?”

As he is the local representative of the Ohio Tax Commission, I would like to have your opinion as to whether or not an appeal could be taken to the Tax Commission from the appropriation as made by the county commissioners.

Would also desire your opinion as to whether or not he would be authorized to file a mandamus suit to compel the Commissioners to appropriate sufficient money for deputy and clerk hire.”

Section 5625-29, General Code, grants authority to, and directs the taxing authorities of each subdivision to pass an annual appropriation measure, in the following language:

"On or about the first day of each year, the taxing authority of each subdivision * * shall pass an annual appropriation measure * *. Appropriation measures shall be so classified as separately to set forth the amounts appropriated for each office, department and division and within each the amount appropriated for personal services. * *"

The county is a subdivision within the meaning of the language contained in this section (5625-1a General Code) and the county commissioners, in the case of a county, are the taxing authority (Section 5625-1c General Code). It thus appears that the authority to make the appropriations for county purposes is vested in the county commissioners, subject to such limitations and restrictions as may be contained in the statutes.

Section 5625-30, General Code, limits the aggregate appropriations to the official estimate of revenues as made by the Budget Commission or Tax Commission and the County Auditor.

In *Jenkins vs. State*, 40 Oh. App. 312, the Court of Appeals for Jackson County held, as stated in the third paragraph of the syllabus that:

"In preparing an appropriation measure under Section 5625-29, G. C., the taxing authority is bound to provide first for all those expenditures made imperative by statute."

You specifically ask whether an appeal may be taken from the order of the board of county commissioners fixing the appropriation to the Tax Commission of Ohio. It must be remembered that the Tax Commission is a state agency, and as such, has such authority only as is specifically granted to it by the language of the act creating it or is necessarily inferred from such language. The duties of the Tax Commission are set forth in Section 5610, General Code, and Section 5611, General Code, gives to the Tax Commission the right to hear appeals from the decisions of a county board of revision on questions concerning the valuation for purposes of taxation of any parcel of property. Section 5625-28, General Code, gives the Tax Commission the right to hear on appeal a question concerning the action of the budget commission. I find no other provisions of the General Code, giving such Commission the jurisdiction to hear matters on appeal. I must therefore conclude that since no language in any of such sections purports to give the Tax Commission the right to hear on appeal complaints against the action of the board of county commissioners, no such jurisdiction exists.

Section 2461, General Code, provides the statutory method of appeal from the action of the board of county commissioners.

Such section reads:

"A person aggrieved by the decision of the county commissioners in any case may appeal within fifteen days thereafter, to the next court of common pleas, notifying the commissioners of such appeal at least ten days before the time of trial. The notice shall be in writing, and delivered personally to the county commissioners, or left with the auditor of the county. At its next session, the court shall hear and determine the appeal, which decision shall be final."

The board of county commissioners performs duties of two natures, that is, ministerial duties and quasi judicial duties. The courts have held that such Section 2461, General Code, does not authorize an appeal to the Common Pleas Court from any decision of the board of county commissioners rendered by the county commissioners in their ministerial capacity; that such appeal lies only when the decision of the county commissioners complained of arises from their use of their quasi judicial functions. See *Commissioners vs. Hunt*, 33 O. S. 176; *Christ vs. Eirich*, 13 O. N. P. (N. S.) 457; *Southard vs. Stephens*, 27 O. S. 649; *In re. Boundary Line*, 30 O. C. A. 467.

It would therefore appear that unless the duty of the county commissioners in making appropriations for clerk hire is of a judicial nature an appeal would not lie to the Court of Common Pleas by reason of the provisions contained in Section 2461, General Code. The rule is well stated in the syllabus of *In re. Clerk Hire in County Offices*, 7 O. N. P. (N. S.) 8, which was decided by the Common Pleas Court of Sandusky County, the first paragraph of the syllabus of which case reads:

"The right of appeal from the action of the board of county commissioners in rejecting a claim against the county is limited to matters in which the commissioners are vested with a judicial function and does not include those matters in which the commissioners act with discretionary power or in an administrative or governmental capacity."

While such case was decided by a Common Pleas Court, other courts have held similar duties performed by the county commissioners to be ministerial duties.

In the case of *Southard vs. Stephens*, 27 O. S. 649, the court held that a final order made by the county commissioners in proceedings to improve a county highway was not made in the exercise of judicial functions and was therefore not appealable.

In *Commissioners vs. Osborn*, 46 O. S. 271, it was held that no appeal would lie from an order of the board of county commissioners fixing and allowing attorney fees for services rendered by a lawyer appointed by the court to assist the county prosecutor in the prosecution of a criminal case.

It therefore appears to me that the county commissioners in making an appropriation for clerk hire in the various county offices, make such order in their ministerial capacity and for such reason no appeal therefrom could be had to the court pursuant to the provisions of Section 2461, General Code.

You further suggest that probably mandamus might lie to compel the county commissioners to increase such appropriation.

It must be borne in mind that a writ of mandamus is not a writ that can be arbitrarily and indiscriminately used. Such writ is defined in the first paragraph of the syllabus of *State ex rel. Van Harlingen vs. Board of Education*, 104 O. S. 360:

"Mandamus is a writ commanding a public board or official to perform an act which the law specially enjoins as a duty resulting from an office, trust or station, and will issue only when it appears that there is a plain dereliction of such duty."

In the case of *State ex rel. Gilder vs. Industrial Commission of Ohio*, 100 O. S. 500, 503, the court said:

"It is too well settled to require the citation of authority that where a public officer in the performance of his duty is required to use official judgment or discretion, his exercise of them, in the absence of fraud, or abuse of discretion, will not be controlled by mandamus. Before the writ will issue the relator must show a clear right to it. Where an official or board refuses to perform a duty or exercise a discretion vested in it by law, mandamus may be invoked to require the performance of the duty, or the exercise of such discretion."

It would therefore appear that mandamus will only lie to compel the board of county commissioners to take action when there is a clear legal duty on the part of the county commissioners which they refuse to perform.

My predecessors in office have on various occasions interpreted the duties of the county commissioners with reference to appropriations for clerk or deputy hire. In Opinions of the Attorney General for 1927, Vol. 1, page 78 it was held as stated in the syllabus:

"1. County commissioners have full authority to fix the amount of the appropriation for deputy hire in the various county offices, and each county officer in fixing the compensation to be paid to his deputies, assistants, clerks, bookkeepers and other employes is limited to the amount of the appropriation.

2. An appropriation measure governing money for deputy hire in county offices when once passed by county commissioners, may be amended by either increasing or reducing the amount appropriated for such purpose, and the county officer appointing such deputies, assistants, clerks, bookkeepers and other employes, cannot expend in any fiscal year a greater sum for the salary of such deputies and other assistants than is fixed in the appropriation measure as amended."

In an opinion found in the Opinions of the Attorney General for 1927, Vol. 1, page 104, it was held as stated in the second paragraph of the syllabus:

"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."

And in an opinion also found in Opinions of the Attorney General for 1927, Vol. 1, page 267, it was held as stated in the first and second branches of the syllabus::

1. "The aggregate amount of compensation that can be paid to any public official or employee, for and during any fiscal year, is limited by the amount appropriated therefor.

2. When an appropriation is made by county commissioners for the yearly compensation of the superintendent and matron of a county children's home which is of a lesser amount than their salaries have theretofore been fixed, it becomes the duty of the trustees of the home to fix the salaries to conform to the appropriation."

See also Opinions of the Attorney General for 1927, Vol. 2, page 745. and for 1927, Vol. 3, page 2055.

It would therefore appear that unless the facts in your case clearly show that the board of county commissioners has failed to use its discretion the remedy of mandamus would not lie to compel it to increase the amount of appropriation for deputy and clerk hire for the office of county auditor.

Specifically answering your inquiries it is my opinion that:

1. The duty of making appropriations for the payment of deputy and clerk hire in the various county offices is placed upon the board of county commissioners by Section 5625-29, General Code.

2. No right of appeal to the Tax Commission of Ohio has been provided by the Ohio statutes from an order of the board of county commissioners fixing the amount of the appropriation for deputy hire for the office of county auditor even though in some respects the county auditor may be the agent of the Tax Commission.

3. The Court of Common Pleas of the county has no jurisdiction to hear an appeal from such order by virtue of the provisions of Section 2461, General Code.

4. When the statutes places a duty upon the board of county commissioners, to make appropriations for the various county purposes within restrictions provided by the statute, and such board has made the appropriations, it can not be compelled to amend or alter such appropriation order by a writ of mandamus, unless there has been such disregard of the duties imposed upon such board by the legislature as will amount in law to an utter failure on the part of the board of county commissioners to use discretion and judgment.

Respectfully,

JOHN W. BRICKER,
Attorney General.

397.

APPROVAL, NOTES OF JACKSON TOWNSHIP RURAL SCHOOL DISTRICT, COSHOCTON COUNTY, OHIO—\$2,753.00.

COLUMBUS, OHIO, March 25, 1933.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

398.

APPROVAL, NOTES OF QUINCY VILLAGE SCHOOL DISTRICT, LOGAN COUNTY, OHIO—\$5,598.00.

COLUMBUS, OHIO, March 25, 1933.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.