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1. CRIMINAL OFFENSES UNDER STATE STATUTES—"ADDITIONAL COMPENSATION AS THE BOARD OF COUNTY COMMISSIONERS MAY PRESCRIBE"—PROVISIONS, SECTION 1613 G. C. PERMISSIVE, NOT MANDATORY.
2. "ADDITIONAL COMPENSATION"—SERVICES PERFORMED BY DESIGNATED OFFICERS—PROSECUTION, CRIMINAL OFFENSES—COUNTY COMMISSIONERS AUTHORIZED TO PRESCRIBE COMPENSATION TO PROSECUTING OFFICERS OF ANY MUNICIPALITY WITHIN COURT'S TERRITORY.

SYLLABUS:

1. The provision in Section 1613, General Code, relative to "additional compensation as the board of county commissioners may prescribe" is permissive and not mandatory.

2. The "additional compensation" for which provision is made in Section 1613, General Code, is for services rendered by the several officers therein designated in the prosecution of criminal offenses under state statutes; and the county commissioners are authorized to prescribe such compensation with respect to the prosecuting officers of any of the municipalities within the court's territory.

Columbus, Ohio, December 29, 1952

Hon. Roland Pontius, Prosecuting Attorney
Ashtabula County, Jefferson, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"The County Commissioners of Ashtabula County desire a ruling from your office. The fact situation is as follows:

"There is a municipal court of Conneaut, Ohio. Under the Uniform Municipal Court Act, the Municipal Court has jurisdiction in that city, and also within the territorial limits of Lakeville, which entirely surrounds the city of Conneaut. (Prior to incorporation about two years ago, it comprised all of the area outside of Conneaut City lying within the limits of the Township of Conneaut.) The City of Conneaut has a Solicitor elected by the people. The Village of Lakeville has a Solicitor employed by the Council, under the provisions of the Statute.

“The Solicitor of the City of Conneaut, on occasions, in the prosecution of misdemeanors under State statutes, has employed an assistant. The Solicitor of the Village of Lakeville handles the prosecution of misdemeanors under State Statutes in the Conneaut Municipal Court when the offense is committed outside the City limits of Conneaut.

“Section 1613 of the Uniform Municipal Court Act, in so far as pertinent, provides as follows:

“The City Solicitor for each municipality shall prosecute all criminal cases brought before said Court, concerning violations of the ordinances of the municipality for which he is solicitor, or concerning violations of the State statutes, or other criminal offenses occurring within the municipality for which he is solicitor. The solicitor of the most populous city within the territory shall prosecute all criminal cases brought before the court arising within the unincorporated areas within said territory. The solicitor shall perform the same duties as required of the prosecuting attorney. He, or his assistants, whom he may appoint, shall receive for such services additional compensation as the board of county commissioners may prescribe.”

“Four questions arise:

(1) Are the County Commissioners obligated to pay the cost of the assistant appointed by the Conneaut City Solicitor under the above stated circumstances?

(2) If not so obligated, may the Commissioners, nevertheless, make such payment, if they so desire?

(3) Are the County Commissioners obligated to pay the Solicitor of the Village of Lakeville anything for services rendered in connection with handling State cases in the Conneaut Municipal Court?

(4) If not so obligated, may the commissioners nevertheless make such payment, if they so desire?

“It seems to me that the answer to these questions may lie in the proper interpretation of the last two sentences of the statute above quoted. Referring to it again, I quote the last sentence as follows: ‘He, or his assistants, whom he may appoint, shall receive for such services additional compensation as the Board of County Commissioners may prescribe.’

“Does the phrase ‘for such services’ refer to the word ‘duties’ in the sentence immediately preceding, or does such phrase refer to the duties of the city solicitor when prosecuting criminal cases arising in the unincorporated areas of the Court’s jurisdiction, as same are referred to in the next immediately preceding sentence in said section?

“Your opinion on this question and others found to be necessarily involved by inference, will be greatly appreciated.”

I observe that in your inquiry you have omitted certain material in Section 1613, General Code, and because I regard certain of this omitted language to be helpful in disposing of one of the questions raised, I here set out this section in full, as follows:

“The city solicitor, city attorney, or director of law for each municipality within the territory shall prosecute all criminal cases brought before said court concerning violations of the ordinances of the municipality for which he is solicitor, attorney, or law director or concerning violations of state statutes or other criminal offenses occurring within the municipality for which he is solicitor, attorney, or law director. The city solicitor, city attorney, or director of law of the most populous city within the territory shall prosecute all criminal cases brought before said court arising in the unincorporated areas within said territory. The city solicitor, city attorney, or director of law shall perform the same duties, as far as they are applicable thereto, as are required of the prosecuting attorney of the county. He or his assistant or assistants whom he may appoint shall receive from such services additional compensation as the board of county commissioners may prescribe to be paid from the county treasury.”

For reasons which will hereinafter become apparent we may first inquire whether the commissioners are authorized to prescribe such additional compensation with respect to the prosecuting officers of either or both of the municipalities concerned.

The determination of this question depends, as you suggest, on what is meant by “such services” as this expression is used in the final sentence of Section 1613, General Code.

It is a familiar rule of statutory construction that “referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent.” Horack’s Sutherland on Statutory Construction, 3rd Edition, Volume 2, p. 448, Section 4921. Because I find “no contrary intention” either expressed or implied in this section, I conclude that “such services” refer to the “duties” to which reference is made in the next but last sentence in Section 1613, supra.

This sentence, in turn, however, contains a referential phrase which is indicative of the precise nature of such “duties.” This phrase is “as far as they are applicable thereto.” Under a strict and literal interpretation of this language the argument could perhaps be made that the word “thereto” in turn refers back to the “criminal cases * * * arising in the

unincorporated areas" within the court's territory as described in the next preceding sentence in this section. It is to be doubted, however, whether any such interpretation can be justified in view of the history of the Ohio legislation regarding municipal courts.

The first municipal court in Ohio appears to have been established in Cleveland in 1910 by the enactment of Senate Bill No. 132, Seventy-eighth General Assembly (101 Ohio Laws, 364). It appears that this enactment contained no provision relative to the designation of an officer to prosecute criminal cases therein, although the court was given certain criminal jurisdiction. This act was extensively amended in 1913 by the Eightieth General Assembly which, in the same session, by five separate enactments, established municipal courts in Cincinnati, Columbus, Dayton, Hamilton, and Youngstown. In the acts relating to the Cincinnati, Columbus and Youngstown courts, and in the amended act relating to the Cleveland court, express provision was made for the allowance of "further compensation from the county treasury" for those assistants whom the city solicitor had detailed to prosecute criminal cases in such courts. Prior to the repeal of these several municipal court acts by the enactment of the uniform act, these provisions in pertinent part were as follows:

Section 1558-39, General Code:

"The solicitor for the city of Cincinnati shall also be prosecuting attorney of the municipal court. He may designate such number of assistant prosecutors as the council of the city of Cincinnati may authorize. The persons thus appointed shall be subject to the approval of the city council and such assistants shall receive for their services in city cases such salaries as the council prescribes, and the county commissioners shall allow such further compensation as they deem proper which shall be paid from the county treasury. The prosecuting attorney of the municipal court shall prosecute all cases of a criminal nature brought before such court and perform the same duties, so far as they are applicable thereto, as are required by the prosecuting attorney of the county."

Section 1579-45e, General Code:

"The solicitor for the city of Cleveland shall also be prosecuting attorney for the municipal court. He may designate such number of assistant prosecutors as the council of the city of Cleveland may authorize. The persons thus appointed shall be subject to the approval of the city council and such assistants shall receive for their services in city cases such salaries as the council may

prescribe, and the county commissioners may allow such further compensation as they deem proper, which shall be paid from the county treasury.

“The prosecuting attorney of the municipal court shall prosecute all cases brought before such court and perform the same duties, so far as they are applicable thereto, as are required of the prosecuting attorney of the county.”

Section 1558-88, General Code:

“The solicitor or city attorney of the city of Columbus shall be prosecuting attorney of the municipal court. He may detail such of his assistants as he may deem proper to assist in such work. He shall prosecute all cases brought before such court and perform the same duties as far as they are applicable thereto, as are required of the prosecuting attorney of the county. In addition to the salaries paid such assistant or assistants by the city of Columbus, they shall receive such further compensation from the county treasury as the county commissioners may allow.”

Section 1579-172, General Code:

“The solicitor of the city of Youngstown shall also be the prosecuting attorney of the municipal court, and shall prosecute all cases of a criminal nature brought before such court, and perform the same duties, so far as they are applicable thereto, as are required of the prosecuting attorney of the county. He may designate such number of assistant prosecutors as now, or may hereafter be, provided by ordinance of the city of Youngstown, and such prosecutor or assistant prosecutors shall receive for their services in city cases, such salaries as the council or other legislative authority may prescribe, and the county commissioners shall allow such further compensation as they may deem proper, which shall be paid out of the treasury of Mahoning county.”

The enactments relative to the Dayton and Hamilton courts, however, contained no such express provision for “further compensation” of assistants to the city solicitor. In pertinent part these statutes provided as follows:

Section 1579-84, General Code:

“The solicitor for the city of Dayton shall also be prosecuting attorney of the municipal court. He may designate such number of assistant prosecutors as the council or other legal authority of the city of Dayton may authorize. The persons thus appointed shall receive for their services in city cases such salaries as the council or other legal authority may prescribe. The prosecuting attorney of the municipal court shall prosecute all cases of a

criminal nature brought before such court and perform the same duties, so far as they are applicable thereto, as are required of the prosecuting attorney of the county."

Section 1579-122, General Code:

"The solicitor for the city of Hamilton shall also be prosecuting attorney of the municipal court. He may designate such number of assistant prosecutors as the council of the city of Hamilton may authorize. The persons thus appointed shall receive for their services in city cases such salaries as the council prescribe. The prosecuting attorney of the municipal court shall prosecute all cases of a criminal nature brought before such court and perform the same duties, so far as they are applicable thereto, as are required of the prosecuting attorney of the county." * * *

By these and subsequent separate enactments some thirty-five municipal courts were established in the state prior to the enactment of the present uniform act. In nineteen of these enactments there will be found express provision for "further compensation from the county treasury" for assistant city solicitors, all of such provisions being in language quite similar to that quoted above in the acts relating to the Cleveland, Columbus, Cincinnati and Youngstown courts.

In thirteen of such enactments including that by which the municipal court of Conneaut was established, there will be found provisions virtually identical to those already noted in the acts relating to the Dayton and Hamilton courts.

In three instances (the courts in Gallipolis, Portsmouth and Sandusky) there is either no provision at all for assistants to the city solicitor, or no provision relative to compensation either for the solicitor or his assistants.

It will be noted that in Sections 1579-84 (Dayton) and 1579-122 (Hamilton) provision is made for such compensation as the city council may prescribe for services of assistant solicitors "in city cases." It is a matter of more than passing interest that such statutory provisions have been widely interpreted as authorizing by implication the allowance of further compensation from the county treasury for services in "state cases," and I am informed that such allowance in numerous instances has actually been made ever since the courts concerned were established.

In this connection it is to be observed that under the prior municipal court acts solicitors of the several municipalities concerned were required

to prosecute "state cases" as well as "city cases," and it is to be presumed that provision for further compensation from the county treasury was made by reason of the solicitor's services in the prosecution of such "state cases." There is, however, a more compelling reason why it cannot be supposed that the provision in the uniform act relative to "additional compensation" should be limited so as to apply only to cases "arising in the unincorporated areas" within the court's territory. It is fairly obvious that the persons who drafted the uniform act, especially section 1613, General Code, were utilizing as much as possible the analogous provisions in the several prior enactments. An example of this is the third sentence in this section, which reads :

"* * * The city solicitor, city attorney, or director of law shall perform the same duties, as far as they are applicable thereto, as are required of the prosecuting attorney of the county. * * *"

This sentence, standing alone, is clearly ambiguous since it does not readily appear to what the word "thereto" refers. Let us compare this sentence with an analogous provision in former Section 1558-39, General Code (Cincinnati court) :

"* * * The prosecuting attorney of the municipal court shall prosecute all cases of a criminal nature brought before such court and perform the same duties, so far as they are applicable thereto, as are required by the prosecuting attorney of the county."

Here it will be observed that the word "thereto" refers to "all cases of a criminal nature brought before such court" rather than to any limited class of such cases.

It will be observed, too, that in the wording of Section 1613 the draftsmen have "split up" this sentence. The first part, relative to "all criminal cases" is found in the first sentence; and the second part, relative to "duties * * * applicable thereto," is found in the third sentence of Section 1613, *supra*.

Between these two provisions has been inserted the second sentence of this section which reads :

"* * * The city solicitor, city attorney, or director of law of the most populous city within the territory shall prosecute all criminal cases brought before said court arising in the unincorporated areas within said territory. * * *"

Can it reasonably be supposed that the General Assembly by this somewhat awkward and ambiguous language intended to deny as to

nineteen municipal courts, the authority which had theretofore been granted by express statutory provision? I am unable to persuade myself that such was the case. Rather I am inclined to believe that if any such result was intended the legislative draftsmen would have taken care to make provision therefor in clear and unambiguous terms.

In support of this view it may be observed that although there is an obvious lack of uniformity in these enactments, there is yet a general "system" or "scheme" discernable as to virtually all of them. This "system" or "scheme" is found in the evident legislative intent that the city should bear the expense of prosecuting the so-called "city cases," and that the county be given authority to aid in meeting the expense of prosecuting the so-called "state cases." It seems to me that any legislative intent to abandon this "system" or "scheme" ought to be found, if at all, in express language in the uniform act.

This appears to me to be an instance, therefore, in which the rule of the last antecedent should not apply; and that the word "thereto" as used in the third sentence of Section 1613 must be deemed to refer to "all criminal cases brought before" the municipal court concerned. From this it follows that the "additional compensation" for which provision is made in this section is for services involved in the prosecution of so-called "state cases," whether prosecuted by the solicitor of the most populous city in the court's territory or by the solicitor of any other municipality therein.

Coming now to examine the question of whether it is mandatory on the commissioners to prescribe such "additional compensation" we may first observe that the statute refers to such "compensation as the board of county commissioners *may* prescribe." The word "may" is clearly indicative of a permissive power rather than of a mandatory duty.

Here it is to be remembered that there is no constitutional necessity for the General Assembly to provide for the additional compensation in the instant case since in matters of state-wide concern the state may impose duties and responsibilities upon its municipalities, and the creation of courts is an attribute of the sovereignty of the state. *Cincinnati v. Gamble*, 138 Ohio St., 220; *State ex rel Cherrington v. Hutsinpillar*, 112 Ohio St., 468.

It is true that although the word "may" ordinarily denotes an optional or permissive provision, it may be interpreted, in proper circumstances, to impose an imperative obligation. 37 Ohio Jurisprudence, 328, Section 31. Such construction is to be adopted, however, only in instances of clear

necessity, the rule having been stated on this point in *Luthringer v. State*, 11 Ohio App. 294, 297, as follows:

“At the hearing it was further contended by counsel for the state that the word ‘may,’ found in section 1579-36, should be construed as ‘shall.’

“We believe the law to be that such construction will never be invoked except when it is necessary by reason of the fact that the public interest demands it, or due administration of justice requires it. *Columbus, Springfield & Cincinnati Rd. Co. v. Mowatt*, 35 Ohio St., 284, 287; *The State of Ohio v. Budd*, 65 Ohio St., 1, 5; *State ex rel. Mitman et al., v. County Commissioners*, 94 Ohio St., 296.”

It can scarcely be said that the public interest demands such an interpretation in the instant case. It must be borne in mind that we are here concerned with additional compensation rather than the primary compensation attaching to a public office, and that provision for such is made by reason of additional duties imposed on the officer concerned. Such additional duties may well range from the complex, voluminous and onerous on the one hand, to the virtually negligible on the other. In this situation it is evidently the legislative intent that the commissioners are to provide additional compensation in amounts commensurate with the additional duties involved, and where such additional duties are negligible, to withhold such additional compensation entirely. Accordingly, in view of the permissive character of the language here under scrutiny, I must conclude that no mandatory duty rests on the commissioners to provide additional compensation for the solicitor of either the city or the village.))

“For these reasons, in specific answer to your inquiry, it is my opinion that:

1. The provision in Section 1613, General Code, relative to “additional compensation as the board of county commissioners may prescribe” is permissive and not mandatory.

2. The “additional compensation” for which provision is made in Section 1613, General Code, is for services rendered by the several officers therein designated in the prosecution of criminal offenses under state statutes; and the county commissioners are authorized to prescribe such compensation with respect to the prosecuting officers of any of the municipalities within the court’s territory.

Respectfully,

C. WILLIAM O’NEILL,

Attorney General.