

provided by Section 3161, supra, he may appoint one of his deputies to be keeper of the jail. Section 2981, supra, authorizes a sheriff to appoint and employ necessary deputies, assistants and other employes for the proper conduct of his office and to fix their compensation, although such compensation must not exceed in the aggregate the amount fixed by the county commissioners for such office.

You will note that Section 3004, supra, provides for a fund for expenses which may be incurred by the prosecuting attorney in the performance of his official duties and in the furtherance of justice, not otherwise provided for. Obviously, the safe keeping of prisoners confined in a county jail is not an official duty of the prosecuting attorney. Although it may be said that the safe keeping of prisoners in county jails is in furtherance of justice the expense therefor is otherwise provided for. The manner of providing deputies for the safe keeping of prisoners in county jails being specifically provided for by law such expense may not be paid from the fund provided by Section 3004, supra. In other words, Section 3004, supra, provides a fund different and in addition to all other funds to be used by the prosecuting attorney for expenses incurred by *him* in the performance of his official duties and in the furtherance of justice, the expense therefor not being otherwise provided by law.

Answering your question specifically, it is my opinion that a prosecuting attorney may not use the fund provided by Section 3004, General Code, to pay the compensation of a guard employed by a sheriff to guard prisoners confined in a county jail.

Respectfully,

EDWARD C. TURNER,
Attorney General.

1712.

GASOLINE TAX—FUEL PURCHASED FOR USE OF OHIO NATIONAL
GUARD—EXEMPT FROM TAX.

SYLLABUS:

Motor vehicle fuel purchased by the United States property and disbursing officer for Ohio with Federal funds for the use of The Ohio National Guard is exempt from the payment of the motor vehicle fuel tax.

COLUMBUS, OHIO, February 14, 1928.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your recent communication which reads:

“An inquiry was made at this office by Mr. G. C. Price of the Standard Oil Company, Fourth and Long Streets, Columbus, Ohio, as to whether the Ohio National Guard could purchase motor vehicle fuel without the Ohio 3c motor vehicle fuel tax and in answer to that inquiry we wrote to Mr. Price under date of January 19, 1928, as follows:—

‘The Standard Oil Co., 4th. & Long Sts., Columbus, Ohio.

Att: Mr. Price

Dear Sir:—

With reference to your inquiry as to whether the Ohio National Guard

could purchase motor vehicle fuel without the Ohio three cent tax, will kindly advise, that it is our opinion that all motor fuel purchases made by it would come within the meaning of Section 5526-3 of the General Code and thereby be made subject to the tax.

If, however, the Ohio National Guard were called into service by the Federal Government, they would then be permitted to purchase motor vehicle fuel tax exempt.

Very truly yours,
 THE TAX COMMISSION OF OHIO,
 (Signed) C. Elbert Black,
 Gasoline Tax Accountant.'

The above letter was directed to the attention of the Adjutant General's Department of the State of Ohio, we suppose, by the Standard Oil Company and under date of January 25, 1928, E. P. Lawler, Assistant Quartermaster General writing for the Adjutant General wrote to us in part as follows:—

'Our attention has been called to the attached communication from your office addressed to the Standard Oil Company on the subject of the payment of gasoline tax in the purchase of gasoline for use of the Ohio National Guard.

It is believed by this office that the opinion contained in your letter was rendered without your having been fully informed of all the circumstances surrounding the federal functions included in the administration and supply of the Ohio National Guard. For this reason we are citing the following facts which are considered pertinent in the question:

(a) This office, through the functions of the United States Property and Disbursing Office for Ohio, disburses federal funds throughout the year in the sum of approximately \$15,000 per month. These figures do not include the disbursements to cover the cost of the summer training camps.

(b) Among these disbursements are included payments for gasoline for transportation, by truck, of military property in transit between the supply department at Columbus and Camp Perry and the various stations in Ohio. In addition to this, gasoline is purchased for training activities of the motorised units of the National Guard. These aggregate approximately 18,000 gallons per year.

(c) The purchases for field training amount to approximately 30,000 gallons.

All of this gasoline is paid for with Federal funds, on checks issued by this office.

It is contended by this office that the disbursements made throughout the year from Federal funds in the administration and supply of the National Guard support the opinion that the National Guard, in so far as relates to the expenditure of Federal funds, is a Federal agency and should be so considered in the collection of such taxes as that provided for under the Gasoline Tax Law.'

In order to be properly informed in the matter we kindly request that you advise us as to whether the Adjutant General's Department is right in its contention or whether the opinion given by the Commission is correct."

The answer to the Commission's question involves the consideration of Sections 5526, 5526-2, 5526-3 and 5527, General Code, and the application of the provisions of said sections to the facts as submitted in the Commission's communication. Said sections read respectively as follows:

Sec. 5526. "The following words, terms and phrases, as used in this act (G. C. Sections 5526 to 5540, 6292 and 6295), are hereby defined as follows:

'Motor vehicles' shall include all vehicles, engines, machine (s) or mechanical contrivances which are propelled by internal combustion of motor vehicle fuels, as herein defined. 'Motor vehicle fuels' shall include gasoline and all other volatile and inflammable liquids derived from petroleum, which are produced, refined, prepared, distilled, compounded or used for the purpose of generating power by means of internal combustion motors, by whatever name such fuels may be known or sold. The term 'motor vehicle fuels,' however, shall not include the product commonly known as kerosene oil.

'Dealer' shall include any person, firm, association, partnership or corporation who imports or causes to be imported into the state of Ohio, any motor vehicle fuel or fuels as herein defined, for use, distribution or sale and delivery in Ohio, and after the same reaches the state of Ohio, also any person, firm, association, partnership or corporation who produces, refines, prepares, distills, manufactures or compounds such motor vehicle fuel as herein defined in the state of Ohio for use, distribution or sale and delivery in Ohio. Provided, however, that when any such person, firm, association, partnership or corporation so importing such motor vehicle fuel into this state, shall sell such motor vehicle fuel in tank car lots or in its original containers to any purchasers for use, distribution or sale and delivery in this state, then such purchasers and not the seller shall be deemed the dealer as to the motor vehicle fuels contained in such tank car lots or original containers."

Sec. 5526-2. "An excise tax at the same rate, to be assessed and collected in the same manner, and under the same limitations, as is now provided in G. C. Sections 5526 to 5540 is hereby levied and imposed on the sale or use of each gallon of such motor vehicle fuel."

Sec. 5526-3. "In addition to its meaning as defined in original Section 5526, the term 'dealer' shall be held to mean and include the state of Ohio, and any political subdivision thereof, which imports or causes to be imported into the state of Ohio any motor vehicle fuel or fuels, for use, distribution or sale and delivery in Ohio, and after the same reaches the state of Ohio, or which produces, refines, prepares, distills, manufactures or compounds such motor fuel, as herein defined, in the state of Ohio for use, distribution or sale and delivery in Ohio."

Sec. 5527. " * * *

The sale of motor vehicle fuel shall not be subject to said tax

* * * *

(c) if such motor vehicle fuel be sold by a dealer, as herein defined, to the United States Government or any of its agencies; * * *"

It is evident under the provisions of the foregoing sections that The Ohio National Guard may not purchase motor vehicle fuel without the payment of the prescribed motor vehicle fuel tax unless said sale when so made to the said The

Ohio National Guard is made to "the United States Government or any of its agencies."

It is stated in the letter of E. P. Lawler, Assistant Quartermaster General writing for the Adjutant General that:

"The National Guard, in so far as relates to the expenditure of Federal funds, is a Federal agency and should be so considered in the collection of such taxes as that provided for under the Gasoline Tax Law."

It is the opinion of the Tax Commission that the exemption would not apply unless The Ohio National Guard were called into service by the Federal Government.

Section 5178 of the General Code provides as follows:

"The National Guard shall consist of the regularly enlisted militia between the ages of eighteen and sixty-four years, and of commissioned officers between the ages of twenty-one and sixty-four years."

Section 5179, General Code, reads as follows:

"The National Guard of Ohio shall consist of such companies, troops, batteries, battalions, squadrons, regiments, brigades, divisions, medical units, and the administrative staff as they now exist or as the governor may from time to time authorize to be formed, all of which to be in accordance with the laws governing the regular army, and with the regulations issued by the secretary of war."

Section 5185 of the General Code reads as follows:

"Hereafter original enlistments in the National Guard of Ohio and all subsequent enlistments shall be for such period or periods as may be prescribed or authorized by act of the Congress of the United States."

Section 5186, General Code, provides as follows:

"All men enlisting in the National Guard of Ohio shall sign an enlistment contract and subscribe to the following oath of enlistment: 'I do hereby acknowledge to have voluntarily enlisted this -----day of -----, 19 ---, as a soldier in the National Guard of the United States and of the state of Ohio, for the period of ----- year ----, under the conditions prescribed by law, unless sooner discharged by proper authority. And I do solemnly swear that I will bear true faith and allegiance to the United States of America and to the state of Ohio, and that I will serve them honestly and faithfully against all their enemies whomsoever, and that I will obey the orders of the President of the United States and of the governor of the state of Ohio, and of the officers appointed over me according to law and the rules and articles of war.'"

Section 5204, General Code, reads as follows:

"The Ohio National Guard shall be governed by the military laws of the state, the orders of the commander-in-chief and the code of regulations. Such government shall conform to the system of discipline and administration prescribed for the army of the United States."

Section 5217, General Code, provides as follows:

"Each company, troop, battery and detachment in the national guard shall assemble for drill and instruction, including indoor target practice, not less than forty-eight times each year, and shall in addition thereto participate in encampments, maneuvers, or other exercises, including outdoor target practice, at least fifteen days in training each year, unless such company, troop, battery, or detachment shall have been excused from participation in any part thereof by the secretary of war; provided, that credit for an assembly for drill or for indoor target practice shall not be given unless the assembly shall equal or exceed a minimum to be prescribed by the president, nor unless the period of actual military duty and instruction participated in by each officer and enlisted man at each such assembly at which he shall be credited as having been present shall be of at least one and one-half hours' duration, and the character of training such as may be prescribed by the secretary of war."

United States Code, Title 32, Chapter 3, Sections 49 and 50, provide as follows:

49. "The governor of each State and Territory and the commanding general of the National Guard of the District of Columbia shall appoint, designate, or detail, subject to the approval of the Secretary of War, The Adjutant General or an officer of the National Guard of the State, Territory, or District of Columbia, who shall be regarded as property and disbursing officer of the United States. He shall receipt and account for all funds and property belonging to the United States in possession of the National Guard of his State, Territory, or District, and shall make such returns and reports concerning the same as may be required by the Secretary of War. The Secretary of War is authorized, on the requisition of the governor of a State or Territory or the commanding general of the National Guard of the District of Columbia, to pay to the property and disbursing officer thereof so much of its allotment out of the annual appropriation for the support of the National Guard as shall, in the judgment of the Secretary of War, be necessary for the purposes enumerated therein. He shall render, through the War Department, such accounts of Federal funds intrusted to him for disbursement as may be required by the Treasury Department. Before entering upon the performance of his duties as property and disbursing officer he shall be required to give good and sufficient bond to the United States, the amount thereof to be determined by the Secretary of War, for the faithful performance of his duties and for the safekeeping and proper disposition of the Federal property and funds intrusted to his care. He shall, after having qualified as property and disbursing officer, receive pay for his services at a rate to be fixed by the Secretary of War, and such compensation shall be a charge against the whole sum annually appropriated for the support of the National Guard: *Provided*, That when traveling in the performance of his official duties under orders issued by the proper authorities he shall be reimbursed for his actual necessary traveling expenses, the sum to be made a charge against the allotment of the State, Territory, or District of Columbia: *Provided further*, That the Secretary of War shall cause an inspection of the accounts and records of the property and disbursing officer to be made by an inspector general of the Army at least once each

year: *And provided further*, That the Secretary of War is empowered to make all rules and regulations necessary to carry into effect the provisions of this section."

50. "Under such regulations as may be prescribed by the Secretary of War, property and disbursing officers of the National Guard accountable for public monies may intrust money to other officers of the National Guard for the purpose of having them make disbursements as their agents, and the officers to whom the money is intrusted, as well as the officer intrusting the same to him, shall be held pecuniarily responsible therefor to the United States, and the agent officer shall be subject for his official misconduct to all the liabilities and penalties prescribed by law in like cases for the officer for whom he acts as agent."

It is manifest from the foregoing provisions, that in so far as the United States property and disbursing officer for Ohio disburses Federal funds as an agent of the Federal Government, under the provisions of Section 5527, General Code, the motor vehicle fuel purchased by said officer with said Federal funds would be exempt from the payment of the motor vehicle fuel tax.

It is therefore my opinion that the motor vehicle fuel purchased by the United States property and disbursing officer for Ohio with Federal funds for the use of The Ohio National Guard is exempt from the payment of the motor vehicle fuel tax.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1713.

OFFICES INCOMPATIBLE—TEACHER AND CLERK OF RURAL BOARD OF EDUCATION.

SYLLABUS:

A teacher in the public schools while under contract of employment by a board of education of a rural school district may not legally fill the position of clerk of said board.

COLUMBUS, OHIO, February 14, 1928.

HON. J. B. POLLOCK, *Prosecuting Attorney, Defiance, Ohio.*

DEAR SIR:—I am in receipt of your communication in which, after directing my attention to a certain rural school district in Defiance County, you request my opinion as to whether or not a regularly employed and acting teacher in such district may, during the term of said employment, be elected to and fill the position of clerk of the board of education for said district. Sections 4747, 7784 and 7786 of the General Code, read, in part, as follows:

Sec. 4747. "The board of education of each city, exempted village, village and rural school district shall organize on the first Monday of January after the election of members of such board. One member of the