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APPROPRIATION MEASURE, ANNUAL — COUNTY COMMISSIONERS REQUIRED TO FIRST MAKE PROVISION FOR EXPENDITURES MADE MANDATORY BY STATUTE — LAW LIBRARIAN, DULY APPOINTED BY COUNTY LAW LIBRARY ASSOCIATION — WHEN COMMON PLEAS COURT FIXED COMPENSATION, SECTION 3054 G.C. — MANDATORY FOR COUNTY COMMISSIONERS TO APPROPRIATE FUNDS FOR COMPENSATION — COUNTY COMMISSIONERS, LIMITATION, GENERAL REVENUE FUND — BUDGET COMMISSION — WHERE APPEAL, BOARD OF TAX APPEALS.

SYLLABUS:

1. *When considering and passing an annual appropriation measure the county commissioners are required to make provision first for those expenditures made mandatory by statute.*

2. *When, under authority of Section 3054, General Code, a Court of Common Pleas has fixed the compensation of a law librarian duly appointed by a county law library association it is mandatory that the county commissioners appropriate funds for the payment thereof.*

3. *The county commissioners may not appropriate from the general fund in excess of the total of the estimated revenue available as certified by the Budget Commission or, in case of appeal, by the Board of Tax Appeals.*

Columbus, Ohio, April 14, 1941.

Hon. Meryl B. Gray, Prosecuting Attorney,
Lebanon, Ohio.

Dear Sir:

This will acknowledge receipt of your request for my opinion which reads in part as follows:

“Will you be kind enough to forward to me, at your earliest

convenience, your opinion based upon the following facts.

The Warren County Budget Commission, in adopting their appropriation resolution for 1941, set up an appropriation for \$400.00 for salary of Law Librarian. The librarian was duly appointed by an entry of our Common Pleas Court and the salary was fixed. The County Commissions, when considering the 1941 appropriation, omitted and failed to set up the \$400.00 for our Law Librarian's salary.

G. C. Section 3054 provides that the Court of Common Pleas shall fix the compensation of the Law Librarian and that said compensation shall be paid from the county treasury, said compensation not to exceed the sum of \$500.00 per annum. The question is, therefore, whether or not the County Commissioners can curtail the expenses of the Common Pleas Court by omitting to appropriate the fund from which the compensation of the Law Librarian is paid."

The provisions for the appointment and compensation of a librarian of a county law library association are contained in Section 3054, General Code, which reads as follows:

"The judges of the court of common pleas of any county in which there is a law library association which furnishes to all of the county officers and the judges of the several courts in the county admission to its library and the use of its books free of charge, upon the appointment by the trustees of such library association of a person to act as librarian thereof, shall fix his compensation, which shall be paid from the county treasury. In counties where not more than one judge of the court of common pleas holds regular terms of court at the same time, the compensation so to be paid such librarian shall not exceed the sum of five hundred dollars per annum."

It will be noted that the librarian is appointed by the association but his compensation, which is fixed by the Court of Common Pleas, is payable from the county treasury. Your communication reveals that the Warren County Law Library Association has appointed a librarian and the Court of Common Pleas has fixed his compensation at \$400.00 per annum, but the county commissioners have failed to make provision in their appropriation measure for the payment thereof. An answer to your request, therefore, will require an examination of the Uniform Tax Levy Law (Section 5625-1, et seq., General Code), commonly referred to as the Budget Law, to ascertain the powers and duties of the county commissioners with respect to appropriations in such cases.

Section 5625-29, General Code, provides in part:

“On or about the first day of each year, the taxing authority of each subdivision or other taxing unit shall pass an annual appropriation measure and thereafter during the year may pass such supplemental appropriation measures as it finds necessary, based on the revised tax budget and the official certificate of estimated resources or amendments thereof. * * * 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; * * * ”

In the case of a county the “taxing authority” is the board of county commissioners (Section 5625-1, paragraph (c), General Code).

The amount of appropriations is limited by Section 5625-30, General Code, as follows:

“The total amount of appropriations from each fund shall not exceed the total of the estimated revenue available for expenditure therefrom as certified by the budget commission or in case of appeal by the tax commission of Ohio. * * * ”

Provisions for amending and supplementing the original appropriation, ordinance or measure are contained in Section 5625-32, General Code. Section 5625-33, General Code, provides:

“No subdivision or taxing unit shall: * * *

(b) Make any expenditure of money unless it has been appropriated as provided in this act. * * * ”

One who fails to comply with the provisions of this section is subject to penalties prescribed in Section 5625-37, General Code.

Specific provisions for the expenditure of funds for payrolls is set forth in Section 5625-38, General Code, as follows:

“Each political subdivision shall have authority to make expenditure for the payment of current pay rolls upon the authority of a proper appropriation for such purpose provided that the positions of such employees and their compensation have been determined prior thereto by resolution or ordinance or in the manner provided by law. * * * ”

An examination of the foregoing readily reveals that in the case

of a county the authority to appropriate rests with the county commissioners, and further, that no moneys may be expended by the county unless they have been appropriated as provided in the Budget Law. The question now arises: May the county commissioners exercise this authority in such a manner as to nullify Section 3054, supra, by failing to appropriate funds for the payment of the compensation of a duly appointed law librarian?

At the outset it may be pointed out that the enactment of the Budget Law did not repeal by implication Section 3054, supra, and consequently did not bestow the authority to fix the compensation of a law librarian upon the county commissioners. This authority still remains with the Court of Common Pleas. *State, ex rel. Justice vs. Thomas*, 35 O. App. 250; *State, ex rel. Crawford vs. Carr*, 17 Abs. 449.

The language of Section 3054, supra, is clear and unequivocal in providing that once the Court of Common Pleas has fixed the compensation of the law librarian such amount shall be paid out of the county treasury. Moreover, this section creates a fixed liability upon the county and one for which an appropriation must be made. This was the view expressed in the case of *Jenkins vs. The State, ex rel. Jackson County Agricultural Society*, 40 O.App. 312, wherein Mauck, P.J., in discussing benefits accorded to an agricultural society by Section 9894, General Code, said at page 315 as follows:

“* * * At the time the new budget law was passed there were many sections, of which 9894 was but one, creating fixed and inescapable liabilities of the county, such as salaries of county officers, and it is unthinkable that it was the purpose of the Legislature to make any claims of this character subject to the action or nonaction of the county commissioners. Such a construction would impose legislative functions on the commissioners and render the act of doubtful constitutionality.”

The third branch of the syllabus of this case reads as follows:

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

In Opinion No. 974, Opinions of the Attorney General for the year 1933, Vol. II, page 938, the doctrine of this case was limited as evidenced by

the eighth branch of the syllabus, which reads as follows:

“It is incumbent on the appropriating authority of a subdivision or other taxing unit to provide first for all those expenditures made imperative by the Constitution, statutes, charter provisions or ordinance, such as duly fixed salaries of officials, heads of departments and divisions, providing it is possible to do so within the limits of resources available for appropriation.”

At page 949 it is said:

“ * * * Of course, such appropriations are limited to the estimated resources as shown by the budget commission’s certificate, and if no resources are shown, no appropriation can be made.”

Section 2981, General Code, relative to the appointment and compensation of county employes, provides in part as follows:

“*Such officers* may appoint and employ necessary deputies, assistants, clerks, bookkeepers or other employes for their respective offices, fix their compensation, and discharge them, and shall file with the county auditor certificates of such action. Such compensation shall not exceed in the aggregate for each office the amount fixed by the commissioners for such office. * * *”
(Emphasis the writer’s.)

The term “such officers” above emphasized refers to those named in Section 2977, General Code, as follows:

“ * * * a county auditor, county treasurer, probate judge, sheriff, clerk of courts, surveyor or recorder, * * *.”

In line with the provisions of Section 2981, *supra*, and the portions of the Budget Law above set forth, it is at once apparent that employes of those county officers may not be compensated in excess of the amount appropriated for such services by the county commissioners. This view is in accord with expressions of former attorneys general contained in the following opinions: Opinions of the Attorney General for the year 1927 — Opinion No. 59, Vol. I, page 78; Opinion No. 156, Vol. I, page 267 and Opinion No. 745, Vol. II, page 1285; Opinion No. 1913, Opinions of the Attorney General for the year 1928, Vol. I, page 787; Opinion No. 396, Opinions of the Attorney General for the year 1933, Vol. I, page 384.

In the 1928 opinion just referred to, it was held as evidenced by the syllabus as follows:

"A court constable appointed under authority of Section 1692, General Code, or a criminal bailiff appointed under the authority of Section 1541, General Code, can not be paid a salary in excess of the amount appropriated therefor; nor may the discretion of the board of county commissioners in fixing the amount of the appropriation for the payment of the salaries of such employes be controlled so long as its discretion be exercised in such a manner as not to amount to an abuse thereof."

At page 789, the then Attorney General observed:

"Neither the appropriating authority nor the court has such control over the other as to invade the discretionary powers of each other, except that the court is the judge in the first instance of its needs and if it sees fit to appoint a court constable or criminal bailiff, or both, the county commissioners can not defeat the power of the court in this respect by arbitrarily refusing to make any appropriation for the purpose of meeting the salaries, or making an appropriation so disproportionate to the real needs of the situation as to amount to an abuse of discretion. It has been pointed out in a number of previous opinions of this department that the discretion vested in appropriating authorities is a sound discretion and can not be exercised captiously or arbitrarily but must be exercised in such a manner as not to amount to an abuse thereof."

In the case of *State, ex rel. Justice vs. Thomas, supra*, the Court of Appeals for Marion County had under consideration a question very similar to the one which you propound. In that case the court held as follows:

"The Budget Act, Sections 5625-1 to 5625-39, General Code (112 Ohio Laws, 391, 113 Ohio Laws, 670), does not authorize the county commissioners to fix the amount of the salary of the criminal court bailiff and court constable of the common pleas court. That power is granted to the judge of said court under Sections 1541, 1692 and 1693, General Code."

At page 256, Hornbeck, J. said:

" * * * When the respective county officers mentioned in Section 2977 et seq., General Code, have set the salaries of their deputies, etc., in accord with the amount fixed by the commissioners, this becomes the amount due, authorized to be fixed by law in accord with Section 2460, General Code. When the common pleas court judge appoints a court constable and criminal bailiff and fixes the compensation, as he is expressly authorized to do under Sections 1541, 1692 and 1693, General Code, it has been fixed by a person or tribunal authorized so to do, and it

is an act equivalent to and on parity with a fixing by law.

The county commissioners are bound to accept this act of a common pleas court judge, who is authorized to fix the compensation by law, in the same manner as if it had been fixed by statutory enactment."

In reaching this conclusion the court was influenced by the fact that the office of Common Pleas Judge was not enumerated in Sections 2977 and 2981, General Code, and consequently, the limitations contained in the latter section were not applicable to the court's employes; also the fact that Section 2460, General Code, permitted the payment of claims against the county without allowance by the county commissioners in cases in which the amount due is fixed by law or authorized to be fixed by some other person or tribunal. In the Justice case, *supra*, the salaries of the criminal court bailiff and court constable were authorized to be fixed by the Court of Common Pleas and were so fixed. The court, however, did not issue a writ of mandamus against the county auditor ordering him to issue warrants based upon the salary fixed by the court rather than the amount appropriated by the county commissioners by reason of the inhibition contained in Section 5625-33, *supra*, and the penalty prescribed in Section 5625-37, General Code.

In concluding the court noted that its decision was *contra* to the 1928 opinion, *supra*. An examination of the 1928 opinion and the Justice case reveals that both opinions recognized that the court's employes could not receive payment of a salary in excess of the amount appropriated therefor by requiring a county auditor to issue warrants for payment of moneys not appropriated. They vary, however, with respect to the authority of the county commissioners to appropriate for the services of court employes. Judge Hornbeck, speaking for the court, was of the view that the board has no discretionary power in regard thereto, whereas the 1928 opinion holds that some discretion rests with the county commissioners and it could not be controlled in the absence of an abuse. The two opinions, however, are not at great variance when the syllabus of the 1928 opinion is considered with the language in the body of the opinion above quoted. That language leads to the conclusion that if the county commissioners arbitrarily refused to appropriate, even though funds were available, its inaction would amount to an abuse of discretion and the commissioners could be compelled to act. The opinions, however, can not be reconciled upon the question of discretionary power of the board

of county commissioners. Such being the case, I deem it proper to adopt and follow the pronouncement of the Court of Appeals. Its holding was considered and followed in *Jenkins vs. The State, ex rel. Jackson County Agricultural Society, supra*, and *State, ex rel. Crawford vs. Carr, supra*.

Turning now to your request, it appears that the librarian was duly appointed by the law library association and his salary fixed by the Court of Common Pleas. To adopt the language used by Hornbeck, J., it appears that when the court has so acted under the provisions of Section 3054, *supra*, the compensation of the law librarian has been fixed by a person or tribunal authorized so to do and it is an act equivalent to and on parity with a fixing by law. The county commissioners are, therefore, bound to accept the act of the court, which is authorized to fix the compensation by law, in the same manner as though it had been fixed by statutory enactment. Accordingly, they must appropriate sufficient funds to pay the law librarian. Of course, by force of Section 5625-30, *supra*, the amount of such appropriations from the general fund may not exceed the total of the estimated revenue available for expenditures therefrom as certified by the Budget Commission or in the case of appeal, by the Tax Commission (now the Board of Tax Appeals, Sections 1464 and 1464-1 (4), General Code).

As above pointed out, the county commissioners are bound to provide first for all those expenditures made mandatory by statute, of which the compensation of a law librarian is one. Thereafter, if the funds are available, the county commissioners may exercise a discretion in providing for other necessary expenditures which are not made mandatory by law.

In view of the foregoing, I am of the opinion that:

1. When considering and passing an annual appropriation measure the county commissioners are required to make provision first for those expenditures made mandatory by statute.
2. When, under authority of Section 3054, General Code, a Court of Common Pleas has fixed the compensation of a law librarian duly appointed by a county law library association it is mandatory that the county commissioners appropriate funds for the payment thereof.
3. The county commissioners may not appropriate from the general

fund in excess of the total of the estimated revenue available as certified by the Budget Commission or, in case of appeal, by the Board of Tax Appeals.

Respectfully,

THOMAS J. HERBERT,
Attorney General.