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1. TOWNSHIP TRUSTEES—VACATION PAY TO EMPLOYEES—LEGAL HOLIDAYS—HOURLY OR PER DIEM PAY BASIS.
2. TOWNSHIP TRUSTEES—DEPUTY CLERK, APPOINTMENT ONLY IN ACCORD WITH 507.02 RC.
3. TOWNSHIP TRUSTEES—REIMBURSEMENT FOR TRAVEL EXPENSES—PERSONAL AUTOS ON OFFICIAL BUSINESS.

SYLLABUS:

1. Township trustees may grant vacation pay to all employees of the township, but pay for legal holidays may not be granted to township employees working on an hourly or per diem basis.
2. Township trustees may appoint a deputy township clerk only if the township clerk's inability to perform the duties of the office is based on one or more of the reasons set forth in Section 507.02 of the Revised Code.
3. Township trustees may be reimbursed for their necessary traveling expenses incurred by them while using their personally owned automobiles on their official business.

Columbus, Ohio, March 22, 1957

Hon. George E. Schroeder, Prosecuting Attorney
Putnam County, Ottawa, Ohio

Dear Sir:

Your request for my opinion presents the following questions:

1. May the township trustees pay vacation pay and holiday pay to its employees?
2. May the township trustees appoint a deputy clerk under Section 507.02 of the Revised Code of Ohio, where the clerk absents himself for several months at a time from the township, viz., a vacation in Florida, when there are checks that must be written by the clerk to pay regular township employees and to take care of other important matters?
3. Are township trustees allowed mileage for the use of their personal automobile when going for parts for township equipment when said trip is outside the township?

Your first question was considered by my immediate predecessor in office in Opinion No. 6033, Opinions of the Attorney General for 1955, page 667, and I concur in his reasoning and conclusions. The syllabus, insofar as it pertains to the question before us, is as follows:

"2. In the absence of a statute granting specific sick leave, and vacation leave to township employees, the township trustees have implied authority in the exercise of a sound discretion to grant such employees reasonable periods of leave with pay, for such purposes.

"3. In the absence of specific authority granted by statute, the trustees of a township may not grant their employees working on an hourly or daily basis, pay for legal holidays on which no service is performed."

You will note the distinction made between employees working on an hourly or daily basis and those on a full-time or salaried basis. Specifically, if the township has both full-time or salaried employees and hourly or per diem employees, vacation pay may be granted to all employees in both classifications, but pay for legal holidays may not be granted to those employees working on an hourly or per diem basis.

Section 507.02 of the Revised Code sets forth quite clearly the circumstances under which the township trustees may appoint a deputy township clerk. It provides that when a township clerk is unable to carry out the duties of his office as a result of illness, or because of his entry into the military service of the United States, or is otherwise incapacitated or disqualified, the township trustees shall appoint a deputy clerk who shall have full power to discharge the duties of the office. Section 507.02 reads as follows:

“When a township clerk is unable to carry out the duties of his office because of illness, because he has entered the military service of the United States, or because he is otherwise incapacitated or disqualified, the board of township trustees shall appoint a deputy clerk, who shall have full power to discharge the duties of such office. Such deputy clerk shall serve during the period of time the clerk is absent or incapacitated, or until a successor clerk is elected and qualified. Before entering on the discharge of his duties the deputy clerk shall give bond, for the faithful discharge of his duties, as required under section 507.03 of the Revised Code. The board shall, by resolution, adjust and determine the compensation of the clerk and deputy clerk. The total compensation of both the clerk and any deputy clerk shall not exceed the sums fixed by section 507.09 of the Revised Code in any one year.”

Therefore, before the township trustees may appoint a deputy clerk to discharge the duties of the office during the clerk's absence, they must find the clerk's inability to perform the duties of the office is based on one or more of the reasons as set out in Section 507.02 of the Revised Code. Mere absence alone would not, in my opinion, permit the invoking of the provisions of this section.

Under circumstances provided by statute, absence can be considered a basis for declaring a township office vacant and in this connection, I direct your attention to Section 503.241 of the Revised Code which reads as follows:

“Whenever any township officer ceases to reside in the township, or is absent from the township for ninety consecutive days, except in case of sickness or injury as provided in this section, his office shall be deemed vacant and the board of township trustees shall declare a vacancy to exist in such office.

“Such vacancy shall be filled in the manner provided by section 503.24 of the Revised Code. Whenever any township officer is absent from the township because of sickness or injury, he shall cause to be filed with the board of township trustees a

physician's certificate of his sickness or injury. If such certificate is not filed with the board within ten days after the expiration of the ninety consecutive days of absence from the township, his office shall be deemed vacant and the board of township trustees shall declare a vacancy to exist in such office.

"This section shall not apply to a township officer while in the active military service of the United States."

Thus, under this statute if a township clerk absents himself for a period of 90 consecutive days, except in case of sickness or injury as provided in this section, or is in the active military service of the United States, the board of township trustees must declare a vacancy in the office. Such a vacancy shall be filled in accordance with Section 503.24 of the Revised Code.

Except for the section quoted, I find no statutes in Ohio which could cause the absence of a township officer from his office to result in a vacancy of that office.

Non performance of the duties of the office, while not being sufficient ground for declaring the office vacant—State, *ex rel.* Clinger, v. White, 143 O. S., 175—might conceivably be sufficient ground for removal under Section 3.07, et seq., Revised Code. Section 3.07 reads as follows:

"Any person holding office in this state, or in any municipal corporation, county, or subdivision thereof, coming within the official classification in Section 38 of Article II, Ohio Constitution, who willfully and flagrantly exercises authority or power not authorized by law, refuses or willfully neglects to enforce the law or to perform any official duty imposed upon him by law, or is guilty of gross neglect of duty, gross immorality, drunkenness, misfeasance, malfeasance, or nonfeasance is guilty of misconduct in office. Upon complaint and hearing in the manner provided for in sections 3.07 to 3.10, inclusive, of the Revised Code, such person shall have judgment of forfeiture of said office with all its emoluments entered thereon against him, creating thereby in said office a vacancy to be filled as prescribed by law. The proceedings provided for in such sections are in addition to impeachment and other methods of removal authorized by law, and such sections do not divest the governor or any other authority of the jurisdiction given in removal proceedings."

If the officer is removed under the above cited provisions, a vacancy exists and could be filled pursuant to Section 503.24 of the Revised Code.

There is no specific statutory authority for the payment from township funds of expenses necessarily incurred by township trustees in the

performance of their duties. Compensation of the township trustees is as set out in Section 505.24 of the Revised Code; however, my immediate predecessor observed in Opinion No. 1869, Opinions of the Attorney General for 1952, page 703, and I concur with him, that an allowance for reimbursement of expenses of traveling is not a part of the compensation of an officer unless otherwise specifically provided.

In Opinion No. 2170, Opinions of the Attorney General for 1930, page 1241, a similar question was considered and particular attention should be given to the second and third syllabus of that opinion which read as follows:

“2. In the absence of statutory or charter provision prohibiting or limiting such action, a public officer or public employe may lawfully be reimbursed from public funds for traveling and other personal expenses actually and necessarily incurred by him in the performance of a public duty in furtherance of a definite project or undertaking then under way or in immediate prospective contemplation, provided in the exercise of a sound and proper discretion, it appears that the incurring of said expenses is necessary for the benefit of the political subdivision which the officer or employe serves, and in the performance of a duty enjoined or authorized by law. If by statute or charter provision such expenses are limited the officer or employe may be reimbursed within the limitations allowed by such law only.

“3. Keeping in mind the rule of law stated in the second branch of this syllabus, the determination of the lawfulness of the allowance of traveling and other personal expenditures of a public officer or employe when in the performance of his public duties requires consideration of pertinent questions of fact, and is thereby reduced to a pure question of auditing.”

It was stated in the opinion that the holding of the above syllabus had been sustained by a large number of previous opinions. Most recently it was followed by my immediate predecessor in office in Opinion No. 690, Opinions of the Attorney General for 1951, page 405 and Opinion No. 1869, Opinions of the Attorney General for 1952, page 703.

I concur with the syllabus above quoted and feel that it is equally applicable to the question which you presented. Whether such reimbursement shall be on a mileage or other basis is a matter for the township officials having final authority in this regard in their sound discretion, to determine.

In specific answer to your questions, it is my opinion, and you are accordingly advised, that:

1. Township trustees may grant vacation pay to all employees of the township, but pay for legal holidays may not be granted to township employees working on an hourly or per diem basis.

2. Township trustees may appoint a deputy township clerk only if the township clerk's inability to perform the duties of the office is based on one or more of the reasons set forth in Section 507.02 of the Revised Code.

3. Township trustees may be reimbursed for their necessary traveling expenses incurred by them while using their personally owned automobiles on their official business.

Respectfully,
WILLIAM SAXBE
Attorney General