

2011.

APPROVAL, FINAL RESOLUTION FOR ROAD IMPROVEMENTS, STARK COUNTY, OHIO.

COLUMBUS, OHIO, April 16, 1921.

HON. LEON C. HERRICK, *State Highway Commissioner, Columbus, Ohio.*

2012.

APPROVAL, BONDS OF HARPERSFIELD TOWNSHIP RURAL SCHOOL DISTRICT IN AMOUNT OF \$70,000.

COLUMBUS, OHIO, April 18, 1921.

Industrial Commission of Ohio, Columbus, Ohio.

2013.

SHERIFF—ALLOWANCE FOR DEPUTY HIRE—SPECIFIC CASE PASSED UPON—ADAMS COUNTY.

1. *An allowance for payment of salaries of the sheriff's office made in November, 1919, for the year beginning January 1, 1920, being insufficient, the law under which such allowance was made having been repealed, additional allowance for an emergency must be made under the amended law as found in section 2980 G. C. If such allowance is refused by the county commissioners on the application of the sheriff for the same, or if he is not satisfied therewith, he may appeal to the court of common pleas as provided in said amended section 2980 G. C.*

2. *The sheriff's application, made December 4, 1920, nearly four months after the fund for deputy hire was exhausted, in so far as it exhibits existing conditions after mid-August, 1920, and in the absence of other pertinent facts, if any such there be, does not appear to state facts sufficient to establish an emergency. It is the duty of the county commissioners to decide this matter.*

COLUMBUS, OHIO, April 20, 1921.

HON. A. HARMON HOLDERNESS, *Prosecuting Attorney, Manchester, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your letter requesting an opinion upon a statement of facts, which reads substantially as follows:

“Under section 2980-1 G. C. our county sheriff had an allowance made to him for deputy hire by the county commissioners which was found to be insufficient.

Under the above section this officer would go to the court of common pleas for additional allowance, but it seems that the last legislature amended or repealed this section. Now, should the commissioners refuse to make an additional allowance, what is the officer's remedy?

The contention seems to be that the commissioners hold that the emergency part of the amended section does not have reference to 1920, but to 1921; that is, that the present law does not apply to the allowances made for 1920."

From further correspondence the following facts have been learned: That the sheriff filed his application for an additional allowance on December 4, 1920; that the original allowance for the sheriff's office for deputy hire made on November 20, 1919, pursuant to section 2980-1 G. C., was the sum of \$426.00 for the year ending December 31, 1920; and that a deputy was appointed for the year ending December 31, 1920, at a salary of \$50.00 per month.

Section 2980-1 G. C. has been repealed. Before repeal it had been amended and the statute as amended may be found in 108 O. L., Part I, p. 62. In the present law, as last amended, former section 2980-1 G. C. was in part written into section 2980 G. C. The law as last amended became effective on May 18, 1920, and may be found in 108 O. L., Part II, at page 1216, and reads as follows:

"Sec. 2980. On the first Monday of each November such officers shall file with the county commissioners a detailed statement of the probable amount necessary to be expended for deputies, assistants, bookkeepers, clerks and other employes, except court constables, of their respective offices, showing in detail the requirements of their offices for the year beginning January first next thereafter with the sworn statement of the amount expended by them for such assistants for the preceding year. Not later than five days after the filing of such statement, the county commissioners shall fix an aggregate sum to be expended for such period for the compensation of such deputies, assistants, bookkeepers, clerks or other employes of each of such officers, except court constables, which sum shall be reasonable and proper, but in no case shall the allowance be less than forty per cent on the first two thousand dollars or fractional part thereof, sixty per cent on the next eight thousand dollars or fractional part thereof, and eighty-five per cent on all over ten thousand dollars of the fees, costs, percentages, penalties, allowance and other perquisites collected for the use of the county in any such office for official services during the year ending September 30, next preceding the time of fixing such aggregate sum, and shall enter such finding upon their journal. In case of emergencies arising the county commissioners shall make additional allowances upon application by the proper officer, stating all the facts in connection therewith. When the term of an incumbent of any such office shall expire within the year for which such aggregate sum is to be fixed, the county commissioners at the time of fixing the same, shall designate the amount of such aggregate sum which may be expended by the incumbent and the amount of such aggregate sum which may be expended by his successor for the fractional parts of such year. The allowances and any additional allowances so made shall be certified to by the county commissioners and filed with the county auditor, who shall transfer said amounts thus fixed from the general county fund to a separate salary fund for each of said offices. Any officer or taxpayer who is not satisfied with the allowances thus made shall be entitled to the right of appeal to the court of common pleas.

The county auditor shall not draw any warrant for compensation of deputies, assistants, bookkeepers, clerks or other employes for any such office in excess of the amount so transferred to the salary fund for each of said offices, and should he do so, he and his bondsmen shall be individually liable therefor."

This section provides that the aggregate sum to be expended during any year "shall be reasonable and proper and in no case less than forty per cent of the first two thousand dollars, etc., of the fees, * * * collected for the use of the county * * * during the year ending September 30th, next preceding the time of fixing the aggregate sum." Formerly it was provided that this aggregate sum "shall not exceed an aggregate amount to be ascertained by computing forty per cent, etc., of the fees collected * * *." That is, the law now directs a sum not less than a fixed amount ascertained by the computation set out therein, with the added provision that it "shall be reasonable and proper." This sum may exceed the computed amount if that amount is not considered reasonable and proper. It is also provided that "in case of an emergency," additional allowances may be made by the county commissioners. The term "emergency" is not used in the law before repeal, but that law says "if at any time any one of such officers require additional allowances said officer may make application to the judge of the court of common pleas of the county" for money to be taken from the general fund of the county at the discretion of the court on the hearing had.

The present law intends that the county commissioners shall first sit in judgment on the question of an emergency, and allow or disallow additional sums to an officer on an application for the same. It further provides that any officer or taxpayer who is not satisfied with the allowance thus made shall be entitled to the right of appeal.

It is believed that this answers your question as to what is the sheriff's remedy in case his application for additional allowance in an emergency is refused by the county commissioners. He may appeal to the judge of the court of common pleas of his county and must abide by the court's decision in the matter.

Relative to the contention of the repealed law's application at this time, you are referred to an opinion of this department found in Opinions of the Attorney-General, 1919, Vol. I, at page 539, the headnote of which says:

"The provision of section 2980 G. C. as to the time within which the county commissioners are to fix the aggregate sum to be expended by the county officers therein referred to, is directory.

The county commissioners are empowered under sections 2980 and 2980-1 G. C. to make allowances from time to time from the county fee fund, subject to the limitation that the aggregate sum allowed does not exceed an aggregate amount to be ascertained by making the percentage computations therein specified."

You are further referred to an opinion found in Opinions of the Attorney-General, 1919, p. 917, which discusses section 2980-1 G. C. as amended, the headnote of which says:

"Under authority of section 2980-1 G. C., as effective July 9, 1919, the county commissioners are empowered to make reasonable and proper allowances for clerk hire in the several county offices, up to the forty, sixty and eighty-five per cent limitation prescribed in the amended section, from and

after the date it became effective, the jurisdiction of the commissioners in this regard being a continuing one, to be exercised as the needs of the offices may require."

No reason is seen why the discussion of these sections as found in the opinions cited does not apply to the amended law as quoted above, in that the new law as to time of making the allowances is directory, and as to the jurisdiction of the county commissioners being continuing, and to be exercised as the needs of the offices may require.

The statement of facts found in the letter from Mr. Mahaffey, written at your request, in reply to our letter, says:

"Charles H. Pettit, sheriff of Adams county, Ohio, makes application for an additional allowance for deputy hire in said sheriff's office for the year ending December 31, 1920, because an emergency exists therein, in this, to-wit:

On the 20th day of November, 1919, the sum of \$426.00 was allowed for that purpose and that no further allowance has been made; that Frank Richmond was duly appointed deputy sheriff for said period at a salary of \$50.00 per month; that said compensation is reasonable; that the allowance heretofore made has been exhausted, and that there is now available no moneys to the credit of the fund from which said salary should be paid for the payment of such salary now due and to become due; that an additional allowance of \$174.00 is now necessary for payment thereof."

This statement requires no different or further discussion in so far as the law of the question is concerned, but it does show that the amount of the fund for the pay of a deputy at the rate of \$50.00 per month became exhausted about the middle of August, 1920. This is a fact which the sheriff should have taken notice of if he desired to continue to employ his deputy for a longer term than eight and one-half months. He could have asked for an additional allowance up to the time the new law became operative, i. e., up to May 18, 1920, and should have asked this of the common pleas court. After that time and before August 15, 1920, he could have asked the county commissioners for more money with which to pay the deputy, claiming either that an emergency existed or that \$426.00 was not an amount that was "reasonable and proper" for the use of his office for deputy hire, or he might have used both statements in his application.

In these applications the sheriff probably would have been successful, because no one could then look into the future months and say a deputy's services would not be needed at any moment. It cannot be well argued that the services of at least one deputy in the sheriff's office in any county are not sometimes needed; that is, that the sheriff cannot at all times do his work alone acceptably. There are times when he must have the help of a deputy. The trouble comes in answering your question just at this point. The sheriff failed or neglected to make a timely application, delaying to do so until December 4, 1920, nearly three months after the fund was exhausted and the deputy continued to serve. On December 4, 1920, the events occurring after the fund became exhausted were history. Nothing in your statement says what occurred to base a statement upon, that an emergency existed during that time to require a deputy's services, and the county commissioners have not passed upon the sheriff's application; hence, it is believed the commissioners should decide this phase of the matter, having the law before them, which is thought to be as hereinbefore stated. An opinion cannot control the discretion of the board of commissioners and is not intended to do so.

From this showing we are constrained to hold that the application, in so far as it shows the conditions, and in the absence of other pertinent facts, if any such there be, does not state the existence of an emergency. But such judgment of the matter cannot be taken as a final disposition thereof. As the discussion of the law points out, it is for the county commissioners to decide, and they must decide the matter, and their action may then be appealed to the court of common pleas, whose order will be conclusive.

The present law recognizes that there may be emergencies and that additional allowances may have to be made, and provides that the county commissioners shall at certain times and on proper application, under certain conditions, certify additional sums to the auditor, to be paid out for the expenses of an office.

It is pertinent to observe that it is the intent of the present law that a county officer, after furnishing the county commissioners with a statement of the probable amount required to conduct his office for the ensuing year, together with a statement of the amount expended by him during the year just ended, as required by law to be made, will endeavor to conduct said office within the aggregate amount deemed necessary as estimated probable, if allowed by the county commissioners and, if not, within the sum that is allowed by them as reasonable and proper; and further that when it becomes necessary to ask for an additional amount to pay his employes, upon an emergency arising, such request will be made at the time when the necessity becomes apparent to such officer. That is, a reasonable and proper aggregate sum having been determined upon and allowed by the county commissioners, each officer is expected to run his office within the means thus afforded in the absence of an emergency. The county commissioners are by the law to sit in judgment on matters tending to show an emergency, and if their decision is against such facts proving an emergency or in favor thereof, upon the instance of the officer or a taxpayer an appeal may be had to the court of common pleas upon such judgment of the commissioners. The law concedes that emergencies may arise and additional allowance may be required to be allowed, but because it has specified that an aggregate sum not less than a certain per centum of fees, etc., collected shall be appropriated for an office, if said per centum affords an amount that is reasonable and proper, expenditure in any office in excess of the aggregate sum allowed is to be avoided.

With respect to your statement that the commissioners shall now act under the provisions of repealed section 2980-1 G. C., the following is cited:

“Therefore, the whole contention of defendant as to these sections falls before the settled rule that the whole statute after an amendment has the same effect as if re-enacted with the amendment. *McKibben vs. Lester*, 9 Ohio St., 628; *State ex rel vs. Cincinnati*, 52 Ohio St., 419; 36 Cyc., 1164-1165.” *State vs. Vause*, 84 O. S. 207.

In *McKibben vs. Lester*, supra, it is said:

“Where a section is amended the amended section must be construed with the rest of the original act as if it had been enacted at the same time with it.”

The conclusion follows that the application herein passed upon does not state facts sufficient to constitute an emergency under the provisions of section 2980 G. C., and that if an application is made to the county commissioners for an additional allowance under the emergency provision of section 2980 G. C., and the same is refused, the remedy is an appeal to the court of common pleas.

Respectfully,

JOHN G. PRICE,
Attorney-General,