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1. CONSTABLES' FEES—REGULARLY ELECTED AND QUALIFIED CONSTABLES AND PERSONS APPOINTED AS CONSTABLES MAY LAWFULLY BE PAID FEES UNDER SECTION 3347 G. C.—SECTIONS 3329, 3331 G. C.
2. ELECTED CONSTABLES AND CONSTABLES LAWFULLY APPOINTED, DESIGNATED POLICE CONSTABLES UNDER SECTION 3348 G. C., BUT WHO ARE NOT COMPENSATED MAY LAWFULLY BE PAID FEES FOR WHICH PROVISION IS MADE IN SECTION 3347 G. C.
3. POLICE CONSTABLES—THOSE PAID COMPENSATION PROVIDED FOR IN SECTION 3348 G. C. MAY NOT LAWFULLY BE PAID ANY OF THE FEES PROVIDED FOR UNDER SECTION 3347 G. C.

SYLLABUS:

1. No officers other than "regularly elected and qualified constables" and persons appointed as constable under the provisions of Sections 3329 and 3331, General Code, may lawfully be paid the fees provided for in Section 3347, General Code.

2. Elected constables and constables appointed under the provisions of Sections 3329 and 3331, General Code, who have been designated as police constables under the provisions of Section 3348, General Code, but who receive no compensation under the provisions of such section, may lawfully be paid the fees for which provision is made in Section 3347, General Code.

3. Police constables who are paid the compensation provided for in Section 3348, General Code, may not lawfully be paid any of the fees for which provision is made in Section 3347, General Code.

Columbus, Ohio, September 2, 1952

Hon. Joel S. Rhinefort, Prosecuting Attorney
Lucas County, Toledo, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"1. May a police constable appointed under authority of General Code Section 3348, who receives no compensation whatsoever from the township trustees, retain for himself the statutory constable fees due for service rendered by such police constable?"

"2. May such a constable who does receive compensation from the township trustees, retain for himself the statutory fees due for service rendered by him during hours when he is not being compensated for his services by the township trustees?"

Section 3348, General Code, under authority of which police constables are appointed, reads as follows:

"The trustees of a township may designate any qualified person or persons as police constables. The trustees may pay each police constable from the general funds of the township such compensation as the township trustees may by resolution prescribe for the time actually spent in keeping the peace, protecting property and performing their duties as police constables as required by law. Such police constables shall not be paid fees in addition to the compensation allowed by township trustees for services rendered as police constables, but all constable fees provided for by statute, where due for services rendered while the constables performing the same are being compensated as police constables for their performance, shall be paid into the general fund of the township."

Prior to the amendment of this section effective September 7, 1951, the first sentence therein read as follows:

"The trustees of a township may designate any duly elected and qualified constables as police constables. * * *"

The statute relative to fees allowed to constables is Section 3347, General Code. This section reads in part:

"For services actually rendered and expenses incurred, *regularly elected and qualified* constables shall be entitled to receive the following fees and expenses, to be taxed as costs and collected from the judgment debtor, except as otherwise provided by law:
* * *"
(Emphasis added.)

By reference to the 1951 amendment of the first sentence in Section 3348, *supra*, it will be observed that police constables may now be either (1) elected constables who have also been appointed as police constables, or (2) other persons who have been appointed as police constables. Since the fee schedule set out in Section 3347, *supra*, is expressly provided for "regularly elected and qualified constables," it is clear that police constables of the second category indicated above could not, in any circumstances, be paid such fees. It should be observed, however, that where

a vacancy in the office of elected constable has been filled as provided in Section 3329, General Code, or where a constable has been appointed for a special purpose under the provisions of Section 3331, General Code, such officers are entitled to the same fees as elected constables, the authority therefor being found in Section 3332, General Code.

As to police constables of the first category mentioned above, it will be noted that Section 3348 provides that the trustees "may" pay them such compensation from township funds as the trustees choose to prescribe. Moreover, this section provides for payment into the general fund of the township of all statutory constable fees in cases "where due for services rendered while the constables performing the same are being compensated as police constables for their performance, * * *." There is a clear implication in this language that in some instances elected constables, even though appointed as police constables, will serve in the latter capacity without any compensation having been prescribed for them by the trustees. In such cases it is clear that the language last above quoted relative to the payment of constable fees into the general fund of the township will not be applicable. In this situation we find the strongest kind of implication that the provisions in Section 3347 for the payment of stated fees to elected constables will continue to be operative, and I specifically conclude that such elected constables may lawfully be paid such fees in circumstances where the trustees have made no provision for their compensation as authorized in Section 3348, General Code.

In your second question it appears that you are suggesting the possibility of an interpretation of Section 3348, which would permit the trustees, in prescribing the compensation of a police constable, to designate certain "working hours" in each day during which he is expected to perform the services with respect to which such compensation is provided. There is certainly no language in this section expressly authorizing the trustees to do this so that if such authority is found at all it will necessarily be based on implication.

In approaching this question we must bear in mind that here, too, we are concerned only with elected constables since, as already noted herein, other persons who have been appointed as police constables are not eligible in any circumstances to claim the fees set out in Section 3347, General Code.

By referring to Sections 3340 and 3345, General Code, it will be observed that the duties imposed by statute on constables fall into two distinct categories. First, a constable is required to apprehend and bring to justice all felons, disturbers of the peace and violators of the criminal laws "and, generally, keep the peace in his proper county." Second, constables are "ministerial officers of the courts held by justices of the peace, in criminal cases, within their respective counties," and in such capacity "may execute all writs and process in criminal cases throughout the county in which they reside." Although not expressly so provided in the statute, it would appear that such constables are ministerial officers of the courts held by justices of the peace in civil cases also since provision is made in Section 3347, General Code, for the payment to them of fees relating to services performed in civil cases in such courts.

With this classification in mind, it becomes important to note the nature of the services for which a constable may claim fees under the provisions of Section 3347, General Code. This section makes provision for the *reimbursement of expenses actually incurred* by a constable with respect to "transportation, meals and lodging of prisoners, and the moving and storage of goods and the care of animals taken on legal process." These allowances are not properly fees at all, and may be disregarded in our present inquiry since it is clear that an elected constable would be entitled to such reimbursement for actual expenditures whether or not he receives the compensation prescribed by the trustees under authority of Section 3348, General Code. Disregarding such expense allowances, therefore, it will be observed that the only *fees* provided in Section 3347, General Code, relate to "serving and making return of each of the following orders and writs * * *."

Here it is apparent that although an elected constable, not appointed as a police constable, is under the duty (a) to keep the peace and (b) to act as the ministerial officer of the court of a justice of the peace, it is only in the *latter capacity* that the statute permits him any compensation of any kind; and this compensation is allowed by way of fees. Moreover, the statute requires that when such officer accepts an appointment as police constable, and the trustees provide a compensation to him for "keeping the peace, protecting property and performing their (his) duties * * * as required by law," such officer shall not be paid fees in addition to such compensation. In other words, such an officer may receive fees for services as the ministerial officer of a court and such fees

constitute compensation for his services in keeping the peace also; but, if he becomes a police constable, he receives a compensation for keeping the peace and must forego his fees as a ministerial officer of the court. Accordingly, it is plain that there can be no "division of the duties" of a police constable on such a basis as would justify "compensation" for certain services, and "fees" for others.

In this view of the law it is a matter of no concern, in the case of an elected constable who receives the compensation provided for in Section 3348, General Code, whether the duties which he performs as the ministerial officer of the court of a justice of the peace be performed while "on duty" or during "off duty" hours. In either case, by accepting the compensation for which provision is made in this section, he becomes ineligible to receive any of the fees for such ministerial services under the provisions of Section 3347, General Code.

Respectfully,

C. WILLIAM O'NEILL

Attorney General