

1350.

## COUNTY AUDITOR—MAY BE APPOINTED ADMINISTRATOR OF AN ESTATE.

## SYLLABUS:

*A county auditor may in the sound discretion of the Probate Court be appointed as the administrator of an estate.*

COLUMBUS, OHIO, December 12, 1927.

HON. EARL D. PARKER, *Prosecuting Attorney, Waverly, Ohio.*

DEAR SIR:—I am in receipt of your request for an opinion reading as follows:

“Would the duties of the County Auditor conflict with his duties as an administrator of a large estate so that he would be incompetent to act as such administrator under Sec. 5341, G. C.?”

Section 2565, General Code, provides as follows:

“No judge or clerk of a court, county commissioner, county recorder, county surveyor, county treasurer, or sheriff, shall be eligible to the office of county auditor.”

In addition to the foregoing inhibitions is the question of compatibility or incompatibility of offices. However, as the office of administrator of an estate is not the same kind of a public office as that of county auditor, the question of compatibility or incompatibility between the two does not arise except in the exercise of the discretion of the Probate Court in making the appointment under Section 10617 of the General Code.

Specifically answering your question, I am of the opinion that a county auditor may in the sound discretion of the Probate Court be appointed as the administrator of an estate.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

1351.

## DOG AND KENNEL FUND—CLAIMS IN CURRENT YEAR PAID FIRST—CLAIMS ALLOWED, BUT NOT PAID IN FORMER YEARS MAY BE PAID OUT OF SURPLUS—SECTION 5652-7A, GENERAL CODE, DISCUSSED.

## SYLLABUS:

1. *By the provisions of House Bill No. 164, (112 v. 347) a Board of County Commissioners is authorized to expend a surplus remaining in the dog and kennel fund at the close of the year 1927, for the payment of claims heretofore allowed, but unpaid regardless of the year in which such claims were allowed. Such claims should be paid in full in the order in which they have been allowed in so far as such surplus permits.*

2. Section 5652-7a, *General Code*, is applicable only when, in any year, there is not sufficient money in the dog and kennel fund, after paying the expenses of administration, to pay the claims allowed for live stock injured or destroyed by dogs during that year.

3. Claims allowed in former years, but unpaid cannot be considered as a basis for determining whether or not a deficit exists in the dog and kennel fund in any current year. Such claims can be paid only when a surplus exists in the dog and kennel fund after the expenses of administration and the claims allowed for such current year have been paid.

COLUMBUS, OHIO, December 12, 1927.

HON. G. O. MCGONAGLE, *Prosecuting Attorney, McConnellsville, Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter dated December 6, 1927, which reads as follows:

“Our County Commissioners are in doubt as to the proper construction of Section 5652-7a, O. L. Vol 112, page 349. The facts are as follows: Under the former statutes as originally enacted in 1917, O. L. Vol. 107, page 534 and the later amendatory and supplemental sections thereto, (O. L. Vol. 108, page 539, and O. L. Vol. 111, page 16) there was in the year 1920, money in the dog and kennel fund to pay only 51 per cent of the claims allowed, in 1921, 85%. 1922 paid in full, but no surplus to apply on unpaid claims of previous year. 1923 paid 85%. 1924, 85%. 1925 85% in June. The amended statute then becoming effective requiring the payment of claims in December, there was allowed and paid only 7%, that is, of claims filed after the June settlement of 1925. In December of that year there were paid only 7% of claims allowed for that period. In December, 1926, only 77% was paid on allowed claims. In no year were the Commissioners able to comply with that provision of Section 5846, G. C., to-wit: ‘The part thereof allowed, but unpaid by reason of lack of funds, shall be paid in any year thereafter in which year there is a surplus in the fund after the claims for such year have been paid.’ (See O. L. Vol. 107, page 539 and O. L. Vol. 111, page 16.)

There are for these years, 1920 to 1926, inclusive, except 1922, unpaid claims, heretofore allowed, a sum now amounting to about \$2,000.00.

For this year, 1927, there is sufficient money in the fund, after paying the cost of administration, to pay all claims allowed this year and leave a small surplus of about \$400.00.

QUERY: Under the present law, Section 5652-7a, G. C., shall such surplus be applied to the payment of the unpaid claims allowed in those preceding years? If so, must it be applied pro rata as to all claims, taking the entire sum, or must it be first applied to those left unpaid in order of their priority of allowance until the surplus is exhausted?

On the other hand, if there were *not* sufficient money in the dog and kennel fund after paying the expense of administration, to pay the claims allowed, etc., this December, (Section 5652-7a) then in making the computation for the price of license tags for next year, must the Commissioners construe the language ‘Plus the balance of said allowed claims remaining unpaid,’ to mean and include said unpaid aggregate sum of about \$2,000.00 still remaining unpaid for the years 1920 to 1926, inclusive, except the year 1922? In other words, does the new law permit the county to evade payment of these formerly allowed, but unpaid claims in so far as it may have a surplus in any year?

Again, one member of the board advances the contention, that, inasmuch as there are unpaid claims in excess of the surplus for this present year, there is in fact not sufficient money in the fund and that there is now such deficit as makes imperative the operation of all of that part of said Section 5652-7a which provides the method of determining the price to be charged for license tags for the ensuing year; while another contends that by reason of there being a small surplus this year such provisions are therefore inoperative this year. Which is correct?"

Prior to August 10, 1927, the effective date of House Bill No. 164 (112 v. 347) Section 5846, General Code, provided:

"The county commissioners at the next regular meeting after such claims have been submitted as provided in the preceding sections shall examine same and may hear additional testimony or receive additional affidavits in regard thereto and may allow the amount previously determined by the township trustees or a part thereof, or any amount in addition thereto as they may find to be just, to be paid out of the fund created by the registration of dogs and dog kennels and known as the dog and kennel fund. Such claims as are allowed in whole or in part shall be paid only at the December session of such commissioners, and if such fund is insufficient to pay the claims in full, they shall be paid pro rata; the part thereof allowed, but unpaid by reason of lack of funds, shall be paid in any year thereafter in which year there is a surplus in the fund after the claims for such year have been paid."

House Bill No. 164, (112 v. 347) amended this section to read as follows:

"The county commissioners at the next regular meeting after such claims have been submitted as provided in the preceding section shall examine same and may hear additional testimony or receive additional affidavits in regard thereto and may allow the amount previously determined by the township trustees or a part thereof, or any amount in addition thereto as they may find to be just, to be paid out of the fund created by the registration of dogs and dog kennels and known as the dog and kennel fund. Such claims as are allowed in whole or in part shall be paid by voucher issued by the county auditor at the close of the following calendar month, after such claims have been finally allowed. If the funds are insufficient to pay said claims, they shall be paid in the order allowed at the close of the next calendar month in which there is sufficient funds available in said dog and kennel fund."

Prior to August 10, 1927, such claims as were allowed by the county commissioners for livestock injured or destroyed were to be paid only at the December session of such commissioners. If the amount of money in the dog and kennel fund were insufficient to pay such claims in full, they were to be paid pro rata, the part thereof allowed, but unpaid by reason of lack of funds, to be paid in any year thereafter in which year there was a surplus in the fund after the claims for such year had been paid. In other words, if, in any one year, the claims allowed during such year exceeded in amount the monies available in the dog and kennel fund, so that such allowed claims could not be paid in full, the monies then available were to be paid pro rata on such claims. The claims allowed, but unpaid would remain on file with such commissioners, the claimant, however, not being entitled to receive the portion allowed, but unpaid by reason of lack of funds, until such year when there would be a surplus in the fund after the claims for such year had been paid.

Since August 10, 1927, such claims as are allowed by the county commissioners are to be paid by voucher issued by the county auditor at the close of the following calendar month after such claims have been finally allowed. If the funds available in the dog and kennel fund are insufficient to pay said claims, they shall be paid in the order allowed at the close of the next calendar month in which there are sufficient funds available in the dog and kennel fund.

You state that a surplus of approximately four hundred dollars remains in the dog and kennel fund for the current year after paying the cost of administration and all claims allowed this year and you inquire whether this surplus must "be applied pro rata as to all claims, taking the entire sum, or must it be first applied to those left unpaid in order of their priority of allowance until the surplus is exhausted?"

Prior to the effective date of House Bill No. 164, (112 v. 347 viz., August 10, 1927, Section 5846, supra, was silent with regard to the question you ask. In other words, Section 5846, supra, did not specify whether a surplus in any one year should be pro rated as to claims previously allowed, but unpaid, or whether such unpaid claims should be paid in the order of their priority in time of allowance.

By its latest enactment the legislature has clearly expressed its intent that claims for live stock injured or destroyed shall be paid monthly as allowed, to the extent of money available in the dog and kennel fund for such purpose. If the fund is insufficient to pay such claims as are allowed, they shall be paid in the order allowed at the close of the next calendar month in which there are sufficient funds available.

Section 5652-7a, General Code, to which you refer, provides :

"If in any year there should not be sufficient money in the dog and kennel fund, after paying the expenses of administration, to pay the claims allowed for live stock injured or destroyed by dogs, the county commissioners between December 1st and December 15th shall ascertain the number of claims entered and the amount of money allowed for live stock injured and destroyed, and, also the total expense incurred by the administration of the dog law, such commissioners shall also ascertain the amount received for dog and kennel licenses. The license fees for the ensuing year shall then be fixed at such an amount that when multiplied by the number of licenses issued during the previous year the product will equal the aggregate of the claims for injured and destroyed livestock allowed by said county commissioners, plus the balance of said allowed claims remaining unpaid, plus the expense of administration. The increase in said license fee shall always be in the ratio of one dollar for male or spayed female dogs, three dollars for unspayed female dogs and ten dollars for a dog kennel license."

By the terms of Section 5652-7a, supra, the legislature has expressed its intent to the effect that the dog and kennel fund should be self-sustaining. If, in any year, a deficit should occur, rendering impossible the payment of claims for live stock injured or destroyed theretofore allowed, but unpaid, a duty is imposed upon the board of county commissioners to increase the license fees for the ensuing year in order to provide sufficient monies to pay such claims as well as such as may be presented during such year.

Your attention is directed to a recent opinion of this department, being Opinion No. 1017, dated September 19, 1927, Opinions, Attorney General, 1927, the syllabus of which reads as follows :

"By the terms of Section 5652-13, General Code, the amount of money which the Board of County Commissioners may lawfully appropriate out

of the dog and kennel fund for the salary of a county dog warden and deputies is a matter within its discretion, but in no event may such board appropriate more than fifty per cent of the gross receipts of such fund for the purpose of defraying the necessary expenses of registering, seizing, impounding and destroying dogs in accordance with the provisions of Section 5652 and supplemental sections of the General Code, three-tenths of which amount so appropriated may be expended by the county auditor for registration tags, blanks, records and clerk hire. The remaining fifty per cent of such gross receipts shall be expended for claims allowed for livestock injured or destroyed, which amount, if insufficient in any year may be supplemented and increased as provided in Section 5652-7a, General Code."

Summarizing and answering your inquiry specifically it is my opinion that:

1. The Board of County Commissioners of Morgan County, Ohio, is authorized to apply such monies as now remain to the credit of the dog and kennel fund toward the payment of claims heretofore allowed, but unpaid. As provided by Section 5846, supra, the county auditor shall issue vouchers to such claimants paying them in the order in which they have been allowed. In other words, the oldest claim allowed and on file would be entitled to payment first, and so on. The balance remaining in such fund should not be pro rated among allowed, but unpaid claims, but each such claim should be paid in full as long as money for such purpose is available.

2. Upon the facts that you present Section 5652-7a, General Code, would not authorize the County Commissioners of Morgan County, Ohio, to fix increased license fees for the registration of dogs and dog kennels for the year 1928. The provisions thereof are only applicable when, in any year, there should not be sufficient money in the dog and kennel fund, after paying the expenses of administration, to pay the claims allowed for live stock injured or destroyed by dogs during that current year. By the method therein provided for fixing the license fees for the ensuing year it is clear that its provisions were not enacted with the intention that claims heretofore allowed, but unpaid, under the former law were to be considered as a basis for determining whether a deficit existed in the dog and kennel fund. Such allowed, but unpaid, claims from former years are to be paid only as and when a surplus exists in any calendar year. When so paid they should be paid in full in the order of their allowance in so far as such surplus permits.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

1352.

APPROVAL, BONDS OF WASHINGTON TOWNSHIP RURAL SCHOOL DISTRICT, LUCAS COUNTY, OHIO—\$244,000.00.

COLUMBUS, OHIO, December 13, 1927.