

commissioners are required to pay a claim for loss caused by a dog to horses, sheep, cattle, swine, mules or goats.

Respectfully,

GILBERT BETTMAN,  
*Attorney General.*

3714.

LEGAL COUNSEL—COMMON PLEAS COURT MAY AUTHORIZE EMPLOYMENT OF OUTSIDE COUNSEL TO ASSIST PROSECUTING ATTORNEY—AUTHORITY TO INCLUDE COST OF ENGINEERING AND STENOGRAPHIC SERVICES—LIMITATIONS.

*SYLLABUS:*

1. *The Common Pleas Court has the discretion, under the terms of section 2412, General Code, to authorize the employment of legal counsel to assist the prosecuting attorney, on application therefor by the prosecuting attorney and the board of county commissioners, whenever legal services are required in any matter in which the expenditure of county funds is or may be involved.*

2. *An assistant prosecuting attorney, appointed under section 2412, General Code, may include the cost of engineering services, if other than that furnished by the county surveyor's office is required, as a reasonable expense of his employment, when the employment of such engineering services is not an abuse of discretion and if for the efficient conduct of the legal proceeding for which he was appointed.*

3. *An assistant prosecuting attorney, appointed under section 2412, may include the cost of stenographic service, if other than that furnished by the prosecuting attorney's office is required, as a reasonable expense of this employment, when the employment of such services is not an abuse of discretion and is for the efficient conduct of the legal proceeding for which he was appointed.*

COLUMBUS, OHIO, October 30, 1931.

*Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.*

GENTLEMEN:—This will acknowledge the receipt of your recent request for my opinion, which reads:

“In a certain county in this state the commissioners of the county made an appropriation of \$750.00 to pay an assistant to the prosecuting attorney to contest before the Public Utilities Commission an increase in telephone rates in that county. An attorney was employed, his bill presented for \$300.00, and he received payment. This payment was made to the attorney on December 6, 1928, and on December 31, 1928, the Common Pleas Court made an entry on its journal, of which the following is a copy:

‘It appearing to the court on request by the prosecuting attorney for an assistant in representing the taxpayers of M. county, Ohio, before the Public Utilities Commission of Ohio, at Columbus, in protesting the increase of rates made by The O. C. Telephone Corporation in M.

County; and it further appearing to the court that the board of commissioners of M. county, Ohio, has in behalf of said taxpayers appropriated the sum of \$750.00 for said protestants, and that legal counsel to assist said prosecutor should be allowed, it is ordered, adjudged and decreed that one B. W. W., an attorney and counsellor at law, duly licensed to practice law in the State of Ohio, be employed as such assistant and that the amount allowed for the trial in said case by the county commissioners be approved.

W. P. VAUGHN, Judge.'

The attorney is now presenting an additional bill for \$200.00 for final payment for his services.

Question: Was there any authority on the part of the county commissioners, by the consent of the Common Pleas Court, to employ an attorney to contest the increase of telephone rates in the county, and if there was no such authority, may the amount paid be recovered on a finding made by this bureau and the county auditor instructed to refuse payment on the subsequent bill?

In connection with the same matter, there was paid to an engineer out of the general fund of the county the sum of \$304.00 for services in investigating the right of the telephone company to make an increased charge and there was paid to a firm of stenographers \$77.90 out of the general county fund in connection with the contest of this increased rate.

Question: Did the county commissioners have any authority to make any such employment or to pay any such expenses, and, if not, may the same be recovered on a finding of this department?"

Section 2412 of the General Code reads:

"If it deems it for the best interests of the county, the common pleas court, upon the application of the prosecuting attorney and the board of county commissioners, may authorize the board of county commissioners to employ legal counsel temporarily to assist the prosecuting attorney, the board of county commissioners or any other county board or officer, in any matter of public business coming before such board or officer, and in the prosecution or defense of any action or proceeding in which such county board or officer is a party or has an interest, in its official capacity."

From the language of your inquiry it appears that the Common Pleas Court approved the sum of \$750.00 which was appropriated by the county commissioners for the payment of the services of an assistant to the county prosecuting attorney. Of this amount \$300.00 has been expended, leaving a balance of \$450.00. It appears that in the event of the county commissioners approving the additional bill of \$200.00 rendered by the assistant to the prosecuting attorney for final payment of services, this amount could be paid from the \$450.00 in the fund.

It is to be noted that payment was made to the specially appointed prosecuting attorney prior to the approval entry of such employment on the records of the Common Pleas Court.

In Opinions of the Attorney General for 1928, at page 3080, a similar question was presented to this office as to whether or not a finding should be made against an attorney employed by the county commissioners upon application of

the prosecuting attorney for money paid before such employment was authorized by an entry of the Common Pleas Court. In that opinion, after suggesting that the appearance of the attorney in the common pleas court, without objection by the court, would perhaps amount to a tacit approval of the employment, the then Attorney General stated that it was unnecessary to reply upon the proposition hereinbefore discussed in order to decide the case presented, and under the authority of *State ex rel vs. Fronizer*, 77 O. S., 7, in the absence of fraud, no payment could be recovered from the attorney employed by the county commissioners.

It appears that such employment and expenditure have been approved by a court of competent jurisdiction, and it would be improper for this office to assume to review the proceedings of such court. (1928 Opinions of the Attorney General, p. 1648.)

The argument may be made, however, that the judge's approval under section 2412 does not extend to the legality of the purpose for such appointment. However this may be, an investigation discloses that the telephone rate controversy in question was of a county-wide nature and therefore of interest to the county as a whole. It also appears that the various county governmental offices had an interest in this proceeding in that a decreased rate would have meant a decreased charge for service to the county and, conversely, a higher rate would have meant a greater expenditure of the taxpayers' money, and so under section 2412, above quoted, the employment here under consideration may be authorized. In either event, it would seem that the expenditure has been approved by a court of competent jurisdiction and, as has been stated, it would be improper for this office to review the proceedings of such court.

The next question presented is as to the validity of the payment of \$304.00 to an engineering firm for services in investigating the right of the telephone company to make an increased charge for telephone service in the county.

By the terms of section 2792, General Code, the county surveyor is constituted the civil engineer of the county and the duty of performing civil engineering and surveying services required by the county devolves upon him.

Section 2411, General Code, reads as follows:

"When the services of an engineer are required with respect to roads, turnpikes, ditches or bridges, or with respect to any other matter, and when, on account of the amount of work to be performed, the board deems it necessary, upon the written request of the county surveyor, the board may employ a competent engineer and as many assistant engineers, rodmen and inspectors as may be needed, and shall furnish suitable offices, necessary books, stationery, instruments, and implements for the proper performance of the duties imposed on them by such board."

This section has been construed by this office to authorize only the employment of engineering services for projects in pari-materia with roads, turnpikes, ditches or bridges.

Section 2413, General Code, reads as follows:

"The board of county commissioners shall fix the compensation of all persons appointed or employed under the provisions of the preceding sections, which, with their reasonable expenses, shall be paid from the county treasury upon the allowance of the board. No provisions of law

requiring a certificate that the money therefor is in the treasury shall apply to the appointment or employment of such persons."

Since the employment of an attorney to assist the prosecuting attorney in this instance has been approved by a court of competent jurisdiction, it follows from the order of the court and section 2413, General Code, that such attorney may incur reasonable expenses in the trial of the litigation and that the county commissioners shall make provision for the payment of such reasonable expenses from the county treasury.

From the foregoing sections it seems that if the engineering services required by an assistant prosecuting attorney appointed under section 2412, *supra*, may be furnished by the county surveyor, then the expenses of an engineer other than the county surveyor would be unreasonable, but if such services cannot be rendered by the county surveyor, the specially appointed assistant prosecuting attorney may engage the engineering services necessary for the efficient prosecuting of the litigation.

I am of the opinion, therefore, that an assistant prosecuting attorney, appointed under section 2412, General Code, may include the cost of engineering services, if other than that furnished by the county surveyor's office is required, as a reasonable expense of his employment, when the employment of such engineering services is not an abuse of discretion and if for the efficient conduct of the legal proceedings for which he was appointed.

As to the question of the legality of the payment of \$77.90 for stenographic services, I assume for the purpose of this inquiry that such services were rendered at the request of the special prosecuting attorney. Section 2915, General Code, reads:

"The prosecuting attorney may appoint such assistants, clerks and stenographers as he deems necessary for the proper performance of the duties of his office, and fix their compensation, not to exceed in the aggregate the amount fixed by the judge or judges of the court of common pleas. Such compensation after being so fixed shall be paid to such assistants, clerks and stenographers monthly from the general fund of the county treasury upon the warrant of the county auditor."

Construing section 2915 with section 2415, above quoted, it would seem that if suitable stenographic services could be reasonably furnished by the prosecuting attorney's office to an assistant prosecuting attorney appointed under section 2412, General Code, it would be an unreasonable expense on the part of the assistant prosecuting attorney to hire outside stenographic help.

In reply to the foregoing, I am of the opinion that an assistant prosecuting attorney, appointed under section 2412, may include the cost of stenographic services, if other than that furnished by the prosecuting attorney's office is required, as a reasonable expense of this employment, when the employment of such services is not an abuse of discretion and is for the efficient conduct of the legal proceeding for which he was appointed.

Respectfully,

GILBERT BETTMAN,  
*Attorney General.*