

1350.

APPROVAL, FINAL RESOLUTIONS, ROAD IMPROVEMENTS IN THE FOLLOWING COUNTIES: PORTAGE, WAYNE, (2) ASHTABULA, WASHINGTON AND TRUMBULL.

COLUMBUS, OHIO, April 11, 1924.

*Department of Highways and Public Works, Division of Highways, Columbus, Ohio.*

1351.

APPROVAL, FINAL RESOLUTIONS, ROAD IMPROVEMENTS IN THE FOLLOWING COUNTIES: HOLMES, HARRISON, ATHENS, ERIE AND LAKE.

COLUMBUS, OHIO, April 11, 1924.

*Department of Highways and Public Works, Division of Highways, Columbus, Ohio.*

1352.

APPROVAL, FINAL RESOLUTION, ROAD IMPROVEMENT IN KNOX COUNTY.

COLUMBUS, OHIO, April 11, 1924.

*Department of Highways and Public Works, Division of Highways, Columbus, Ohio.*

1353.

SPECIAL FISH AND GAME PROTECTORS—HOW PAID.

SYLLABUS:

*The statutes clearly provide for the employment of special fish and game protectors. When such are appointed, they have all of the authority and power of a regular protector. Such employes may legally be paid a percentage, based upon the fines procured in connection with his duties, in the discretion of the Director of Agriculture.*

COLUMBUS, OHIO, April 12, 1924.

HON. A. V. DONAHEY, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—In your recent communication, you request my opinion as follows:

“For some year there have been several hundred non-salaried fish and game protectors, so-called ‘card-deputies,’ in the fish and game division of

the Department of Agriculture, the number at one time having been 550 to 600. They were appointed by the department and have been compensated by court fees or a percentage of fines imposed upon violators by local courts, usually justices of the peace and mayors of villages.

"In view of your opinion on temporary inspectors of the State Prohibition Department, I desire a ruling from you as to whether or not there is any authority for the appointment of such non-salaried fish and game protectors by the state and whether the methods of compensation mentioned above are lawful."

From a report made by the Auditor of State, it has been found that the practice has been to issue an official badge and authority to the so-called "temporary game protectors;" that such protectors do not receive any regular salary, but, in the language of the Examiner, such employes

"operate on a percentage basis, 80 per cent of the first \$50.00 fine and 25 per cent of the amount above \$50.00 going to the unsalaried man making the arrest. In case of two unsalaried men or one unsalaried man and a regular fish and game protector working together, the unsalaried man receives 40 per cent of the total fine and the salaried man receives nothing."

Such report further discloses the method of payment of such employe by quoting from the official minutes of the department, under date of October 1, 1921:

"Following a conference with the Chief of the Fish and Game Division, the following change in the compensation of non-salaried wardens is accounted as in force until further notice:

"80 per cent. of all fines assessed and paid up to \$50, 25 per cent of all fines in excess of \$50.00. Payment to be made within thirty (30) days after fine is received and deposited with the State Treasurer.

"Commission protector assisted by regular, 40 per cent."

The following is also quoted from the comment of the Examiner in said report:

"In cases where the fines are paid in full the total is remitted by the officer assessing the fine, to the Fish and Game Division, which immediately makes up a voucher in favor of the protector for his commission in the case and this money is paid from the A-3 Wage Classification appropriated by the General Assembly. In cases where only part of the fine is paid at the time it is assessed, no commission is given the protector until the final installment of fine is paid.

"Each temporary protector is bonded for the sum of \$200.00, which bond and oath is filed with the Fish and Game Division."

In order to determine your question, it will be necessary to consider the provisions of section 1438, et seq., of the General Code, which relate to the powers and duties of the Secretary of Agriculture in connection with the fish and game preservation and protection, which said duties are now, by virtue of the administrative code, exercised by the Director of the Department of Agriculture.

Section 1438 authorizes such officer to control all matters pertaining to the protection, preservation and propagation of game birds, wild animals and fish within the state, and requires him to enforce the laws in this respect. Section 1439 requires the appointment of a Chief of the Division of Fish and Game, Assistant Chief, a

Lake Erie Supervising Protector, and such number of fish and game protectors and *special fish and game protectors* as the Board of Agriculture (Director of Agriculture) may prescribe. Said section further provides:

“The chief of the division of fish and game, assistant chief, Lake Erie supervising protector and each fish and game protector shall hold his office for a term of two years, unless sooner removed by the secretary of agriculture. Each special fish and game protector shall have the same powers and perform the same duties as a fish and game protector.”

Section 1440 requires each fish and game protector to give bond in the sum of two hundred dollars, to insure the faithful discharge of the duties of his office.

Section 1441 requires “the fish and game protectors and special fish and game protectors” to enforce the provisions of the laws relating to the protection, preservation and propagation of birds, fish, game and fur bearing animals, etc.

Section 1442 authorizes “protectors” to serve and execute warrants, etc., and, among other things, said section authorizes “any game protector” to make arrests under the provisions of the section and to enter on any private lands or waters for the purpose of carrying out the provisions of the act.

Section 1443, which relates to compensation, provides:

“The compensation of the chief of the division of fish and game, assistant chief, Lake Erie supervising protector, fish and game protectors and special fish and game protectors shall be fixed and paid in the same manner provided for in section 1087 of the General Code for the compensation of other agents of the secretary of agriculture. There may also be allowed and paid in the same manner provided in section 1087 all necessary expenses incurred by them in the performance of their duties.”

It is believed that the foregoing will be sufficient for the purpose of determining the nature of the duties and powers of a fish and game protector. It will be observed that the law considers two classes of protectors—the regular fish and game protector and the special fish and game protector. Certain sections do not differentiate between the two classes of protectors. For instance, the section providing for the appointment provides for the *special* fish and game protector; whereas, the sections granting powers and duties relate solely to *protectors*. It will be noted that the general expression “Protector” covers both classes of protectors.

The section which relates to compensation differentiates by reference to the two classes. Therefore, it will seem to be clear that there is a specific provision made for the appointment and payment of special fish and game protectors and that such protectors, when so appointed, have the same powers and duties as a regular protector.

Section 1443, heretofore quoted, requires the compensation and expenses to be fixed and paid in the same manner provided for in section 1087 for the compensation of other agents of the Secretary of Agriculture. Said section 1087 provides that the Secretary of Agriculture (now the Director of Agriculture) shall

“appoint all heads of bureaus, experts, inspectors, wardens, clerks, stenographers and all other assistants and employees and shall fix their compensation within the limits prescribed by law. All of such appointees shall be entitled to receive from the state their actual and necessary expenses incurred while traveling on the business of the department, but all such bills shall be itemized and certified to by the person incurring the expenses and be paid when allowed by the secretary.”

In connection with your inquiry, it will be profitable to examine the provisions of section 1445, which in part provides:

"All fines, penalties and forfeitures arising from prosecution, convictions, confiscations, or otherwise, under this act, unless otherwise directed by the secretary of agriculture, shall be paid by the officer by whom the fine is collected to the secretary of agriculture and by him paid into the state treasury to the credit of a fund which shall be appropriated biennially for the use of the secretary of agriculture."

From the foregoing, it will be observed that there is authority for the appointment of *special* fish and game protectors; that such a protector has all the powers and duties of a regular protector and that the Director of Agriculture is authorized to fix such compensation as he desires, under the provisions of section 1087.

It will also be observed that section 1445 requires all fines and penalties to be paid into the state treasury unless otherwise directed by the Director of Agriculture. When the fines are paid into the state treasury and are, in turn, paid from the state treasury to the game protector under a proper appropriation, such a procedure would seem to meet all legal requirements.

The status of such fish and game protectors is clearly distinguishable from the so-called "card men" of the Prohibition Department. In the latter, the question of incompatibility enters into the situation. The "card men" were designated by the Prohibition Department and used the powers of such department by virtue of such alleged appointment and were in the *actual employ and pay* of the municipality.

In the case of the special fish and game protectors, they are hired by the Director of Agriculture and perform their duties under the supervision of such director, and every step necessary to the appointment, supervision and payment is provided for by statute.

As a matter of law, it would seem to be in the discretion of the Director of Agriculture as to what compensation may be paid to such an officer. He can pay him a monthly, weekly or daily stipend; or he can fix his compensation upon a percentage basis. Under such circumstances, as a matter of law, it is not the splitting of the fine with the court on the part of such officers, but theoretically, at least, the amount of the fine is used in order to determine the amount of compensation which such special fish and game protector shall receive.

From the foregoing, it is my opinion that the protectors to whom you refer are "special fish and game protectors" as provided for in the statute, and that such protectors may legally be paid upon a percentage basis.

It is further believed that it is within the power of the department to provide both a salary and a percentage compensation if, in its judgment, the same seems advisable.

Therefore, what has been said with reference to a special fish and game protector receiving a percentage of the fine, would be equally applicable to a regular protector receiving a percentage, when properly authorized by the Director of Agriculture.

Respectfully,

C. C. CRABBE,

*Attorney General.*