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PROSECUTING ATTORNEY — SERVING IN ARMED FORCES OF UNITED STATES — ASSISTANT PROSECUTING ATTORNEY APPOINTED BY HIM, WHEN AUTHORIZED BY HIM, MAY SIT AS MEMBER OF COUNTY BUDGET COMMISSION—MAY PERFORM FUNCTIONS ENJOINED UPON PROSECUTING ATTORNEY—SECTION 5718-3 G. C.

SYLLABUS:

An assistant prosecuting attorney appointed by a prosecuting attorney who is serving in the armed forces of the United States may, when authorized so to do by the prosecuting attorney, sit as a member of the county budget commission and perform the functions enjoined upon the prosecuting attorney by Section 5718-3, General Code.

Columbus, Ohio, June 29, 1943.

Hon. Frank M. Cornwell, Assistant Prosecuting Attorney,
Jefferson, Ohio.

Dear Sir:

Your request for my opinion reads as follows:

“Mr. Roland Pontius, the duly elected, qualified and acting Prosecuting Attorney for Ashtabula County, is now a member of the armed forces of the United States.

Prior to his induction into the army, he appointed Mr. Ward C. Cross of Ashtabula, Ohio, and the undersigned as Assistants to carry on the duties of his office during his absence. It was expressly understood that Mr. Cross should have full responsibility for all criminal matters and that the writer should be fully responsible for all other matters in connection with the conduct of the office.

We wish to be advised whether or not, in your opinion, we, as Assistants, are authorized to perform the duties which are expressly delegated to the Prosecuting Attorney, such as those in connection with the Budget Commission or foreclosure proceedings had in connection with the sale of delinquent lands (Sec. 5718 G. C.).

If you will furnish us with your opinion, it will be greatly appreciated.”

Section 2915, General Code, provides :

“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.”

This is the section under authority of which you and Mr. Ward C. Cross were appointed assistant prosecuting attorneys by Mr. Pontius, and you now desire to know whether such appointment as assistant prosecuting attorney authorizes you to sit as a member of the county budget commission and to exercise the authority conferred upon the prosecutor by that portion of Section 5718-3, General Code, which is hereinafter quoted.

The budget commission is created by Section 5625-19, General Code, and its powers and duties are prescribed in sections of the General Code which follow thereafter. It is unnecessary to discuss the functions of the budget commission in detail, but suffice it to say that the powers and duties of the members of the budget commission as fixed by said statutes necessarily require the exercise of discretion on the part of the members.

Section 5718-3, General Code, provides in part :

“It shall be the duty of the prosecuting attorney of the county, except as hereinafter provided, upon the delivery to him by the county auditor of a delinquent land tax certificate, to institute a proceeding thereon in the name of the county treasurer to foreclose the lien of the state, in any court of competent jurisdiction within nine months thereafter unless the taxes, assessments, penalty, interest and charges are sooner paid, and to prosecute the same to final judgment and satisfaction. If in the opinion of said prosecuting attorney and of the county board of revision said lands or properties will not bring, upon a sale, a sufficient amount of money to pay all taxes, assessments and penalties thereon in arrears, together with costs of foreclosure, said prosecuting attorney may re-deliver said delinquent land tax certificate to the county auditor, thereupon said lands or properties shall be forfeited to the state of Ohio and sold as other forfeited lands are sold, provided, however, lands or properties shall not be forfeited as herein provided unless notice shall have been given by first class mail to all lien holders of record, and said lien holders shall have failed to object to said forfeiture within thirty days of the date of making such notice. * * * ”

It is clear that this section authorizes the prosecuting attorney to exercise

discretion in connection with the forfeiture of lands to the State of Ohio. In passing, it should be noted that this section was amended by House Bill No. 260, which will become effective August 11, 1943, in the event no referendum petition is filed.

In Opinion No. 2573, found in the Opinions of the Attorney General for 1925, at page 406, the then Attorney General reached the conclusion that a deputy county auditor or a deputy county treasurer could not sit as a member of the county budget commission. This conclusion was based on the theory that the members of the budget commission were required, in the performance of their duties, to exercise judgment and discretion of a quasi-judicial nature and that such authority could not be delegated to a deputy. This opinion was a subject of consideration in Opinion No. 3791, found in Vol. III of the Opinions of the Attorney General for 1931, at page 1417, and also in Opinion No. 3605, found in Vol. III of the Opinions of the Attorney General for 1934, at page 1721, and the conclusion reached in the 1925 opinion was disapproved. Since said time, it has been a common practice in a great many of the counties of the state for deputies to sit in place of the auditor or treasurer as members of the county budget commission. I have carefully considered all three of these opinions and believe that the conclusions reached in the 1931 and 1934 opinions to the effect that deputies may so sit in place of their principals, are correct.

Section 9 of the General Code provides in part :

“A deputy, when duly qualified, may perform all and singular the duties of his principal.”

There is no such position as deputy prosecuting attorney, and neither Section 2915, General Code, *supra*, nor any other provisions of our laws specifically prescribe all the powers and duties of an assistant prosecuting attorney under authority of such section. Section 13436-7, General Code, provides that an assistant prosecuting attorney shall have access to the grand jury, but there does not appear to be any section specifically authorizing as assistant prosecuting attorney to participate in the trial of criminal cases or to make a motion for a *nolle prosequi*. Nevertheless, assistant prosecuting attorneys regularly perform these functions without question being raised as to their authority under the law so to do.

Although assistant prosecuting attorneys are not deputies, the legislature, when it authorized the appointment of assistant prosecuting attorneys, must have contemplated and intended that such assistants would perform such part of the official duties of the prosecuting attorney as he might assign to them, and in practice that is how Section 2915.

General Code, has been construed since its enactment. Assistant prosecuting attorneys have sat on the budget commission and have exercised the authority granted to the prosecuting attorney by that portion of Section 5718-3, General Code, hereinabove quoted, and so far as I know their authority so to do has never been seriously questioned.

The construction placed upon a statute by those whose duty it is to apply and execute same is entitled to great weight and this is especially true where such construction has been long continued. See 37 O. Jur., 698, 699.

I am therefore constrained to the conclusion that an assistant prosecuting attorney appointed under authority of Section 2915, General Code, may sit as a member of the county budget commission and may exercise the power granted to the prosecuting attorney by the quoted portion of Section 5718-3, General Code, where such assistant prosecuting attorney is directed by the prosecuting attorney so to do.

I have not been unmindful of Section 2912, General Code, which provides:

"If a vacancy occurs in the office of prosecuting attorney, the court of common pleas shall appoint a prosecuting attorney. In case of sickness or other disability of the prosecuting attorney, preventing him from discharging his duties, the court shall appoint an assistant prosecuting attorney to perform the duties of the office until the disability is removed or a prosecuting attorney is elected or appointed and qualified. A person appointed prosecuting attorney or assistant prosecuting attorney, shall give bond and take the oath of office prescribed for the prosecuting attorney, and the assistant prosecuting attorney shall receive such compensation as the court fixes and the county commissioners allow."

I have also read and considered the decision of Okey, J., in *In re Prosecuting Attorney*, reported in 4 *Western Law Monthly*, 147, in which he declared that it was necessary to appoint a special prosecuting attorney to act in place of the prosecutor during his absence in the armed forces of the Federal Government. Judge Okey's action was based upon Section 7 of the Act of 1852, found in 50 O. L., at page 215. Said Section 7 is somewhat similar to Section 2912, General Code, *supra*.

At the time of this decision there was no provision of law in existence similar to Section 2915, General Code, and consequently the prosecuting attorney could not have appointed an assistant prosecuting attorney. It seems to me that the enactment of Section 2915, General Code, relieves the court of the duty of appointing an assistant prosecuting attorney as

provided in Section 2912, General Code, in a county where the prosecuting attorney has appointed an assistant pursuant to Section 2915, General Code, supra. I believe that this view is strengthened by Section 2397-2, General Code, which provides:

“Whenever any county officer is absent from the county because of sickness or injury, he shall cause to be filed with the county commissioners a physician’s certificate of his sickness or injury; and if such certificate is not filed with the commissioners within ten days after the expiration of the ninety consecutive days of absence from the county, his office shall be deemed vacant and the county commissioners shall declare a vacancy to exist in such office.

Nothing contained in this act shall apply to a county officer while in the active military service of the United States.”

In my Opinion No. 4262, found in Opinions of the Attorney General for 1941, at page 813, I stated that I considered the language contained in the second paragraph of the above quoted section “to be the equivalent of a legislative statement that absence with the military forces does not vacate a county office.” A similar conclusion was reached in my Opinion No. 5412, found in the Opinions of the Attorney General for 1942, at page 637, in which I stated that a prosecuting attorney who is in the armed service of the United States Government carries the responsibility of his office during his absence in such service and is entitled to receive the salary pertaining thereto.

It would present an anomalous situation if the prosecuting attorney were responsible for his office during his absence while in the armed forces, if he could not appoint an assistant to perform his duties during such absence. It seems to me that it is unnecessary for the court of common pleas to appoint an assistant prosecuting attorney in Ashtabula County during the absence of Mr. Pontius in the armed forces.

I am therefore of the opinion that pursuant to your appointment as assistant prosecuting attorney by Mr. Pontius and the instructions which you have received from him you can legally serve as a member of the county budget commission and can exercise the authority conferred upon the prosecuting attorney by Section 5718-3, General Code, to cause lands to be forfeited to the State of Ohio.

Respectfully,

THOMAS J. HERBERT,
Attorney General.