

3429.

AUTHORITY OF COUNTY COMMISSIONERS TO LIMIT AMOUNT TO BE EXPENDED FOR DEPUTIES, CLERKS AND EMPLOYES OF OFFICERS MENTIONED IN SECTION 2978 G. C.—COUNTY AUDITOR MAY REFUSE TO CERTIFY MONTHLY PAY ROLL ACCOUNTS.

SYLLABUS:

1. *The compensation of deputies, assistants, clerks and other employes of county departments other than those offices mentioned in section 2978 of the General Code, which is authorized to be fixed by the judges of the several courts, may not be reduced by the refusal of the county commissioners to appropriate sufficient funds therefor.*

2. *The county commissioners have no authority to fix the compensation of deputies, assistants, clerks and other employes of the officers mentioned in section 2978, except that they may limit the aggregate amount which may be expended for such purpose.*

3. *The county commissioners may refuse to approve and the county auditor to certify monthly pay roll accounts of the employes appointed by the officers mentioned under section 2978 and 1554-1 of the General Code, where such appointments have been certified under section 2981, and the compensation fixed on a yearly basis, if the monthly pay roll would exceed for the fiscal year the aggregate appropriated by the county commissioners.*

COLUMBUS, OHIO, June 9, 1926.

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

GENTLEMEN:—I am in receipt of your communication enclosing a letter from the State Examiner as follows:

"I learned through the press that the county commissioners of Cuyahoga County and the Probation Department of Common Pleas Court were having a controversy over the appropriation made for the Probation Department and that the payrolls being certified and paid were on the basis of \$44,700.00 per year while the appropriation for this purpose was but \$25,000.00.

"In a conference last Friday with Deputy Auditor Garran and Ackerman, who have to do with certifications, I advised them that in my opinion they had no legal right to pay anything on these payrolls and that they had erred in certifying to them, my reason being that the obligation shown on these payrolls was \$44,700.00, and not \$3725.00 as they believed. I told them that in my opinion before they could legally certify to any payroll for deputies and clerks on an annual salary basis, the total of the annual salaries shown on such payroll could not exceed the amount of the appropriation.

"If I am right in this matter, it occurs to me that this is a very important subject on which a great many public officials in Ohio need enlightenment because of the hundreds of taxing districts using payroll accounts.

"I would like your opinion on the following questions, to-wit:

"1. When an appropriation of \$25,000 is made for a particular department of county government and a monthly payroll in amount of \$3725.00 is presented to the auditor for certification, can such auditor legally certify to this payroll (a) in case no annual salaries are shown, (b) in case the annual salaries shown amount to \$44,700.00?

"2. It is the practice in Cuyahoga County for the auditor to certify and the commissioners to approve the payroll accounts of each of the offices on the first and the fifteenth of each month; salaries of new employees and increases in salaries are certified to the auditor and subsequent payrolls are amended to comply with such changes.

"In view of the fact that practically all persons whose names appear on payrolls are on an annual salary basis, is it legal for the auditor to certify and for the commissioners to approve semi-monthly payrolls when no certification or approval is made for the annual salaries?

"3. What is the difference, if any, so far as appropriation, certification and approval are concerned between a contract to perform a certain road work for \$3600.00 and an accepted appointment to perform the duties of deputy or clerk for \$3600.00?

"4. When an ordinary payroll is made up in January and is properly approved and certified, does this take the place of the purchase order prescribed by the Bureau?"

While your communication in the first instance seems to refer to the Probation Department of the Common Pleas Court of Cuyahoga County, your questions are general as to the authority of the county auditor to certify and the commissioners to approve the pay roll accounts of the various county offices in cases where the total salaries certified for the month exceed the aggregate amount appropriated by the county commissioners for such office for the fiscal year.

At the outset it will be necessary to distinguish between the departments of county government, in which the term of office and salaries of the employes of such office are fixed by other persons than the county officers referred to under section 2978 of the General Code, and those departments in which the term of office and the salaries are fixed by the officers mentioned in section 2978 of the General Code.

In the first class mentioned may be listed such as the assistants, clerks and stenographers of the prosecuting attorney's office, the court bailiffs of the Common Pleas Court, the official court stenographers of the Common Pleas Court and the probation officers for the Juvenile Court.

In the second class are listed the deputies, assistants, bookkeepers, clerks and other employes of the Probate Judge, Auditor, Treasurer, Clerk of Courts, Sheriffs, Surveyors and Recorder.

In the case of the assistants, clerks and stenographers of the prosecuting attorney's office, the prosecuting attorney appoints such assistants, etc., and fixes their compensation not to exceed the aggregate amount fixed by the Judge or Judges of the Court of Common Pleas.

Section 2914 of the General Code provides that the Judge or Judges of the Court of Common Pleas may fix an aggregate sum to be expended for the incoming year for the compensation of assistants, etc.

In the case of the probation officer of the Juvenile Court, section 1662 of the General Code provides that the judge designated to exercise juvenile jurisdiction may appoint such probation officers and shall fix their compensation, such persons to hold their office during the pleasure of the judge.

Section 1541 of the General Code, provides that the Common Pleas Judge may appoint a court interpreter, criminal bailiff and chief court constable and fix his compensation during the pleasure of the Common Pleas Judge.

Section 1546 and section 1550 of the General Code, provide that the Common Pleas Court may appoint an official stenographer who shall hold the appointment for a term not exceeding three years and until a successor is appointed and qualified

and provides that the court making the appointment shall fix the compensation of such appointee.

In the cases mentioned under the first heading there is no provision that the amounts allowed for compensation shall be within the amount appropriated for such purposes by the Common Pleas Court.

For the offices mentioned in section 2978 provision is made in section 2981 of the General Code that such officials may appoint and employ necessary deputies, assistants, clerks, bookkeepers or other employes for their respective offices, fix their compensation, and discharge them and shall file with the county auditor certificates of such action. Such compensation shall not exceed in the aggregate for each office the amount fixed by the commissioners for such office.

In the cases mentioned under the first heading by the authority given to the various officials to make the appointments and to fix the compensation, it is believed that an obligation has been incurred in the name of the county, for which the appointee may collect upon furnishing the services prescribed for such offices.

In the cases in which the appointments are made, the term depending upon the pleasure of the appointing power, the term is the same as that of the officer appointing such person, subject to his displeasure. The compensation of such appointee would be fixed until the appointing power exercised its displeasure or changed the amount of the compensation. In such cases it is believed that it is a mandatory duty upon the county commissioners to appropriate sufficient to cover the compensation so fixed.

This is for the reason it would be inconsistent to say that one authority could fix the compensation and the term of the employment, and that some other authority could, by refusing to appropriate that amount, nullify the power given in the first instance. Since the appointment and fixing of the compensation creates an obligation against the county, certainly nothing could be gained by refusing to appropriate sufficient to pay the compensation as the appointees would have a valid claim against the county, which could be enforced by legal proceedings.

In the second instance section 2981, while authorizing the various county officials mentioned under section 2978 to employ and discharge and fix the compensation of the employes mentioned, the compensation so fixed is limited in the aggregate to the amount fixed by the county commissioners for such office.

In the case of *County Commissioners vs. Rajerty*, 19 O. N. P. (N. S.) page 97, the court says:

“The county commissioners are without power to fix the compensation of deputies and assistant clerks of county auditor, treasurer, probate judge and recorder. The authority to fix such compensation is vested in these several officers, with the limitation that the aggregate compensation to be paid in each office shall not exceed the amount allowed by the county commissioners for such offices.”

In this case the court also discusses the meaning to be given to the words “shall be paid monthly from the county treasury,” and the court therein on page 103 of the opinion holds as follows:

“The legislature has plainly said, in so many words, that such officers may appoint and employ deputies and assistants, fix their compensation and discharge them; and if this court were to read into the latter part of this section that this aggregate sum should be paid in equal monthly installments, such a construction would abrogate and nullify the plain provisions of the statute, reading that such officers may fix the compensation of their deputies.”

Also in the case of *In re: Diemer*, 17 O. N. P. (N. S.), page 374, the court on page 374 of the opinion say:

"Such officer may appoint and employ deputies, etc., only when the county commissioners, or the court, in a proper case for such purposes, have made an allowance therefor. The provisions of this section, that such officer may fix the compensation of such deputies, etc., means that which has been ordered and prescribed by the county commissioners or the court."

The court further say in connection with section 2981 or the General Code, on page 375, as follows:

"The provisions of section 2981, that county officers may employ necessary deputies, etc., and fix their compensation, does not create a liability against the county if no allowance or compensation has been fixed by the commissioners or the court under the provisions of statute."

Halpin vs. Cincinnati, 2 Gaz. 386;
Lease's Claim, 4 C. C. 3;
Strawn vs. Com. 47 Ohio St. 404—408;
Clark vs. Com. 58 Ohio St. 107;
Butler Co. vs. Welliver, 12 C. C. 440;
Clark vs. Lucas Co., 14 C. C. 349;
Tuall vs. Lucas Co., 3 N. P. 112;
Reeves vs. Griffin, 29 B. 281.

From the above cases and the sections relating to the appointment and compensation of deputies, etc., the conclusion follows that the duties and powers conferred upon the county commissioners authorize and require them to allow or disallow, regulate and limit the employment of deputies, etc., and the expenditure of public funds therefor to the actual requirements of the public service. The duties and powers so conferred on the board of county commissioners are not arbitrary and they must be used by such board of county commissioners with legal and not arbitrary discretion.

The officers mentioned in section 2978 are authorized to employ necessary deputies, etc., to fix their compensation and to discharge them, and the authority of the county commissioners is limited to fixing the aggregate amount of money which shall be expended by such officers for deputies, etc. No authority is given to the county commissioners to say who shall be employed or how such aggregate amount shall be apportioned among the deputies, etc., or what the monthly salary of any deputy shall be.

The above discussion leads to the following conclusions: First, that in the case of employes of departments other than those mentioned in section 2978 of the General Code that the county commissioners may not reduce the salaries fixed by the judges of the several courts by the refusal to appropriate sufficient funds therefor. This is for the reason that since the sections authorizing the judges of the several courts to make appointments and to fix the term and compensation of such employes, have not been repealed, and as repeals by implication are not favored by the courts, it is necessary that the different sections which are apparently in conflict must be harmonized so as to give full effect to both in so far as it is necessary. Second, that the total amount that may be expended for employes of the officers mentioned in section 2978 is limited to the aggregate amount which is appropriated by the county commissioners.

These conclusions bring us to the question as to whether the county commissioners shall approve and the county auditor certify the monthly pay roll accounts, when it is evident from such accounts, that the total amount per month for the year will exceed the aggregate amount allowed by the county commissioners for such office.

In the case of *Theobold vs. The State of Ohio*, 10 O. C. C. (N. S.) page 175, on page 161 of the opinion the court say:

"It must not be overlooked that the officer fixes the compensation of each particular employe, as well as the number of employes. With that the board has nothing to do, save that it may limit the aggregate that may be thus expended."

Section 2981 of the General Code provides that such officers shall file with the county auditor certificates of his action in employing, fixing the compensation and discharging a deputy, etc. If this section is followed and the certificate showing the action of the officer is filed and shows that the deputy is employed and his compensation fixed on a yearly basis, it is believed that the county commissioners would be justified in refusing to approve and the county auditor in refusing to certify to a monthly pay roll which included the compensation of deputies, etc., fixed upon a yearly basis, which on the face of it, would exceed the total aggregate sum allowed by the county commissioners for such office for the fiscal year. However, if such certificate shows that the deputy, etc., appointed has his compensation fixed upon a monthly basis, and the monthly pay roll account submitted, which for the remainder of the fiscal year would exceed the aggregate amount allowed by the county commissioners, it is not believed that the county commissioners would be justified in refusing to approve and certify such pay roll.

This brings us now to the specific department mentioned in the communication of the examiner. That is, the probation department as established by the Court of Common Pleas.

Section 1554-1 of the General Code, as enacted in 111 Ohio Laws, page 423, provides as follows:

"The judge of the court of common pleas of a county, or the judges of such court in joint session, if they deem advisable, may with the concurrence of the board of county commissioners establish a county department of probation. The establishment of such department shall be entered upon the journal of said court and the clerk thereof shall thereupon certify a copy of such order to each elective officer and board of the county. Such department shall consist of a chief probation officer, and such number of other probation officers and employes, clerks and stenographers, as may be fixed from time to time by the judge or judges. The judge or judges of the common pleas court of the county shall appoint to positions within the department, fix the salaries of appointees within the amount appropriated therefor by the board of county commissioners and supervise their work; * * *."

It will be noted in the first instance that the establishment of such probation department is by the judge or judges of the Court of Common Pleas with the concurrence of the board of county commissioners. Secondly, it will be noted that this section provides that the judge or judges shall appoint to positions within the department and fix the salaries of appointees within amounts appropriated therefor by the board of county commissioners.

This section it is believed placed the appointees of the Probation Department in the same category as that of appointees under the officers named in section 2978. And it follows necessarily that in fixing the salaries of such appointees that the same must be within the aggregate amount appropriated therefor by the county commissioners. And it is believed that the same rule would apply, with reference to whether the county commissioners should approve and the county auditor certify the monthly payroll accounts, as applies to the officers mentioned in section 2978 of the General Code.

Respectfully,
C. C. CRABBE,
Attorney General.

3430.

DISAPPROVAL, BONDS OF VILLAGE OF HARROD, ALLEN COUNTY,
\$15,388.38.

COLUMBUS, OHIO, June 10, 1926.

Re: Bonds of Village of Harrod, Allen County, \$15,388.38.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—An examination of the transcript for the foregoing issue of bonds discloses that the same contains only one proof of publication, giving notice of the sale of the bonds, whereas the provisions of section 3924 of the General Code provide that such notice shall be published in two newspapers of general circulation in the municipality.

The bond resolution which was passed on April 1, 1926, provides that the bonds shall be dated not later than December 1, 1925. The advertisement for the sale of the bonds recites that the bonds shall be dated December 1, 1925. Following this advertisement of sale, the bonds were sold on May 20, 1926.

In the Opinions of the Attorney General, 1921, Volume I, page 168, we find the following:

“Upon examination of the transcript for the above bond issue, I find that the resolution authorizing the issuance of the bonds was adopted November 10, 1920, and that it is provided in said bond resolution that the bonds shall be dated October 1, 1920. I find no provision in the General Code which authorizes a board of education to issue bonds bearing date prior to the date of the passage of the legislation authorizing their issuance. In fact, the General Code contains no provision relative to the dating of bonds issued under authority of section 5656. It cannot, however, be assumed that the mere absence of any provision will authorize the board of education to issue bonds which shall bear date prior to their authorizing act. If they are authorized to issue bonds bearing date six weeks prior to the bond resolution, by the same reasoning they could issue bonds bearing date a year or more prior to the bond resolution. This practice should not to say the least be approved, and I therefore advise you not to accept the bonds.”

In this case there is now due on said bonds as sold more than six months' accrued interest. It does not seem to be the intention of the law and common prac-