

“A city which has and is enforcing an ordinance providing that no plumbing alterations shall be made until a permit is obtained from a city plumbing inspector, and a fee paid into the city treasury, may require the local board of education to obtain a permit, and pay the fee prescribed, in the event that schoolhouse plumbing is to be altered.”

The court in the Jackson case had little difficulty with the authority of the board of education to pay the assessment. In substance the conclusion was reached that the levy of the assessment created a debt against the owner of the property which was the board of education.

In the present instance the county commissioners and the boards of education undoubtedly have authority properly to maintain their buildings, and if as an incident to proper maintenance it becomes necessary to pay a fee to the municipality in compliance with the ordinance relative to the regulation of elevators, there should be no hesitancy in saying that the authority to expend funds for that purpose exists.

Accordingly, by way of specific answer to your inquiry, I am of the opinion that:

1. A municipality may not exact a building permit fee from the state or county when a state or county building is to be constructed in such municipality.
2. A municipality may not exact a fee for inspection of elevators in buildings belonging to the state which are located in such municipality.
3. A municipality may exact a fee for inspection of elevators in buildings belonging to a county or school district which are located in such municipality.

Respectfully,

GILBERT BETTMAN,
Attorney General.

1269.

VILLAGE CLERK—ALLOWANCE OF NECESSARY EXPENSES FOR PRIVATE AUTOMOBILE LEGAL—NOT A CHANGE IN COMPENSATION DURING HIS TERM.

SYLLABUS:

1. *The council of a village may lawfully provide by ordinance for an allowance to the village clerk for necessary expenses incurred in the use of his private automobile, based on the mileage covered while such automobile is being used by the clerk in the performance of his official duties.*
2. *An allowance to a village clerk, for expenses, in an amount not greater than will reasonably cover the actual expenses incurred, does not constitute a change in the compensation of the clerk in violation of Section 4219, General Code.*

COLUMBUS, OHIO, December 7, 1929.

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

GENTLEMEN:—This will acknowledge receipt of your request for my opinion which reads as follows:

“Section 4219 G. C. provides in part that council in a village shall fix the compensation of all officers, clerks and employes except as otherwise provided by law and that the compensation so fixed shall not be increased or diminished during the term for which any officer, clerk or employe may have been elected or appointed.

Question: 1. Does this or any other section of the General Code permit council to provide by ordinance or resolution that the clerk of the village shall be allowed six cents a mile for the use of his automobile on official business of his office in addition to his salary?

Question: 2. Would an ordinance or resolution allowing the village clerk mileage for the use of his automobile be effective during his term, if passed during such term?"

In addition to the duties imposed on the clerk of a village by the terms of Sections 4280 et seq; of the General Code, he is required by force of Section 3862, General Code, to serve certain notices therein provided for. Specific reference is made therein for the services of these notices by the clerk of the village in that the statute provides that such notices shall be served by the "clerk of the council in villages." Provision is also made for the service of other notices by the "clerk of council" in municipalities, by the terms of Sections 3818 and 3854, General Code. As the village clerk is the clerk of council in villages, it becomes his duty to serve these notices as such clerk of council.

In the service of notices, as provided in the above statutes, and perhaps in other instances, the village clerk very probably would incur some expense for transportation. The statutes do not specifically authorize council to provide for the payment of such expenses from public funds, although under the broad authority contained in Section 4219, General Code, authorizing council to fix the compensation of the village clerk, there seems little doubt, even under the statutes and independent of the home rule powers of the municipality, but that the council of a village may lawfully provide for the payment of necessary expenses incurred by the village clerk in the performance of his duties, or fix his salary upon such basis that the clerk shall pay his own expenses, as council sees fit.

If the salary for a village clerk is fixed at a definite amount and no provision made for an allowance for expenses, he of course cannot be reimbursed for expenses. He would be expected to perform the duties of the position, however, even though he incurred some expense in doing so. When later council saw fit to make an allowance to the clerk for expenses, the question of whether or not the clerk then in office could lawfully benefit by the allowance depends on whether such expense is considered to be a part of his compensation or salary, or whether it is something other than compensation or salary.

Cases involving the precise question are not numerous, and the authorities available are not strictly in point. An early case frequently referred to is the case of *Briscoe vs. Clark*, 96 Ill., 309. The Constitution of the State of Illinois, at that time provided that the county board should fix the compensation of all county officers with the amount of their necessary expenses "provided that the compensation of no officer shall be increased or diminished during his term of office." The Supreme Court held that it was the salary of the county officer—the compensation for the personal discharge of official duty—which the board was forbidden to change. The compensation or salary was to be fixed in advance, but the expenses were to be determined by the necessity, which the business of the office should develop, and being so, the allowance for expenses could be increased.

In the case of *McCoy vs. Handlin*, 35 S. D., 487; 153 N. W., 361, 371, it is held:

"An extra allowance of a specified sum per month to such of the judges of the Supreme Court as take up their residence at the capital, to meet the extra expenses thereby caused, is not prohibited by constitutional provisions that such judges shall receive no fees or perquisites whatever for any duties connected with their offices, that their salaries shall not be increased, and

that no judge shall receive any compensation, perquisite or emolument for or on account of his office in any form whatever, except his salary."

In the case of *Milwaukee County vs. Halsey*, 139 Wis., 82; 136 N. W., 139, it is held:

"Laws 1889, chapter 263, provided that each of the several judges of the circuit courts of the state should receive \$400 per annum as and for his necessary expenses in the discharge of his duties, in addition to his salary then provided by law and that the act should apply to the several judges then in office. Held, that such allowance was not a part of the 'compensation' of the judges within Constitution Article IV, Section 26 providing that the compensation of a public officer shall not be increased or diminished during his term of office."

In the case of *Kirkwood vs. Suto*, 87 Cal., 394, 25 Pac., 488, it is held:

"Under Constitution Cal. Article XI, Section 9 providing that 'the compensation of any county, city, town or municipal officer shall not be increased for his election or during his term of office' it is the compensation for services to be rendered and not traveling and other incidental expenses of the office that is forbidden to be raised."

It seems clear, from the authorities above noted, that an allowance for expenses of a public officer in the performance of his duties is not made as a part of his salary or compensation for services rendered. It at least is clear that when such an allowance is limited to the actual expenses of the officer in the performance of his official duties, it would not be classed as salary or compensation. Under such circumstances, he would receive no personal financial benefit from the allowance. The payment of expenses would merely enable him to perform the duties he is required to perform more easily and perhaps more expeditiously. It follows that when a village clerk's salary is fixed on the basis of payment for services rendered, and an allowance is made separately, for actual, necessary expenses incurred by him in the rendering of those services, a change made in the manner of making that allowance would not be increasing or diminishing his compensation.

Where there has been no provision made originally for the payment of expenses as well as salary, a much more difficult question exists. In my view it is impossible to lay down a rule of general application. The answer depends upon the circumstances of each case. Certain officers and employes perform duties of a character which necessarily require the expenditure of money in order properly to perform them. This is particularly true of those who are employed by the state or the larger subdivisions and whose duties require their presence in widely scattered localities. The expenses necessarily incurred in the performance of those duties are what are ordinarily known as traveling expenses, i. e., the expenditure incident to getting from place to place, together with maintenance at a place other than the residence of the employe.

On the other hand, the term "traveling expenses" would not ordinarily comprehend expenses incurred by employes of subdivisions of small territorial limits, such as municipalities. While the expenditure of funds might be necessary in getting expeditiously from place to place in a large municipality, yet it would be rare indeed where any appreciable expenditure would be entailed in connection with the performance of the duties of officials of ordinary villages. It would accordingly be unusual to make any specific provision for the payment of traveling expenses of an officer whose duties would not require him to go beyond the corporate limits. At the same time, the village clerk has the duty of serving certain notices and other similar functions which require him to go from place to place within the village. In the perform-

ance of these functions, there is no absolute certainty that he will expend funds, for he may walk and accomplish what he has to do. The use of an automobile for such purposes would, of course, result in his being able more expeditiously to perform these duties and I see no reason why the allowance of the use of an automobile should be termed an increase in the compensation of the clerk. This follows from the fact that theretofore there was no obligation upon the clerk to make any necessary expenditures in the performance of these same functions which he is to perform by the use of the machine. Surely, were the council of the municipality to provide for the purchase of an automobile for the use of its engineer or other employe, this would not in itself constitute an increase of compensation even though it were done during the term. The same rule would apply to the clerk and, in my opinion, he may be provided the use of an automobile during his term, although no specific provision was made at the commencement of his term for the payment of necessary traveling expenses.

When an officer uses his own automobile in the performance of his duties, it is difficult to determine exactly the actual cost of running the machine. A lawful approach to the determination of such cost, it has been held, may be on the basis of a fixed rate per mile of travel. In an opinion of my predecessor, reported in the Opinions of the Attorney General for 1927, at page 438, it is held:

“County Commissioners are authorized to make allowances to a sheriff for necessary expenses incurred in the use of his private automobile, based on the mileage covered while such automobile is being used by the sheriff in the performance of his official duties.”

In the course of the opinion, it is said:

“I think that the cost per mile for the operation of the various makes of automobiles can now be readily ascertained. Therefore, I am of the opinion that the county commissioners are authorized to make an allowance to the sheriff in reimbursement for his necessary expenses incurred in the use of his private automobile based on a flat rate per mile for the mileage covered while such automobile is being used by the sheriff in the performance of his official duties. This will authorize nothing but reimbursement and good faith must be used in fixing the mileage rate.”

In conclusion, therefore, I am of the opinion, in specific answer to your questions:

First, the council of a village may lawfully provide by ordinance, for an allowance to the village clerk for necessary expenses incurred in the use of his private automobile for official business based on the mileage covered while such automobile is being so used.

Second, an allowance to a village clerk for the use of his private automobile in the performance of the duties of his position based on the mileage covered by said auto while being so used, may be made to the clerk then in office, even though his salary previously had been fixed at a definite amount and no allowance had been made for expenses.

Respectfully,
GILBERT BETTMAN,
Attorney General.