

years and at the same time the county board elects the assistant county superintendents such board must fix their compensation, and it is believed that when a county board of education has once taken action in this respect and such compensation has been fixed, they would have no further authority or power in that respect.

Further, in this connection, your attention is directed to the case of *State ex rel Clark vs. Cook*, 103 O. S., 465, wherein a similar question with reference to a county superintendent was considered and where, in the opinion by Wannamaker, Judge, there appears the following statement:

"The express power to fix a salary does not grant by implication the power to unfix such salary. The exercise of the power for the full three-year term agreeable to the statute, exhausts the power conferred by the statute. The power to change after once having fixed the term and salary, to employ the language of the *Locher case, supra*, must be 'clear and distinctly granted.' The power not being so granted to the board of education cannot be exercised by the board of education, and its attempted exercise thereof is *ultra vires*. The action of the board in attempting to change the salary of the county superintendent, after once fixed, is illegal and void under the statute."

Therefore, I am of the opinion, and you are advised that the salary of an assistant county superintendent of schools may not be increased by the county board of education during the term for which he is elected.

Respectfully,

C. C. CRABBE,
Attorney General.

3649.

FEEES OF PSYCHOLOGIST OR PSYCHIATRIST MAY BE PAID FROM COUNTY TREASURY.

SYLLABUS:

When the fees of psychologist or psychiatrist are fixed by the court in a proceeding under section 13696, as last amended, they may be paid out of the county treasury the same as other witness fees mentioned in section 3014 G. C.

COLUMBUS, OHIO, September 23, 1926.

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

GENTLEMEN:—In your recent communication you request my opinion on the following:

"Section 13696 of the General Code (111 O. L., 427), provides that courts may appoint psychologists or psychiatrists and further provides that they shall receive a fee fixed by the court and taxed in the costs of the case.

"*Question.*" May such fees be paid out of the county treasury and when the costs are collected the county treasury be reimbursed, or must such persons await the collection of the costs and receive their fees from the clerk of the courts?"

Section 13696, as amended, 111 O. L., 427, provides in substance that when a person is convicted of an offense punishable either in whole or in part by a fine, the

court upon motion may hear testimony in mitigation of the sentence. The section further provides that the court may of its own motion direct the department of probation of the county wherein the defendant resides to make inquiries and report to the court. The section also provides that the court may of its own motion appoint not to exceed two psychologists or psychiatrists, who shall make such report as the court may require. The section then specifically provides:

“Each such psychologist or psychiatrist so appointed shall be entitled to receive a fee which shall be fixed by the court and taxed in the costs of the case.”

Inasmuch as the opening part of the section authorizes the court to hear testimony in mitigation of the sentence and the reports which are required to be made by the psychologists or psychiatrists under the provisions of the section, it would seem that such a report is to be made in the nature of testimony. In other words, one undertaking to perform such duties would be a witness offering testimony in a criminal case and would therefore be governed by section 3014, which provides:

“Each witness attending under recognizance or subpoena, issued by order of the prosecuting attorney or defendant, before the court of common pleas, or grand jury, or other court of record, in criminal causes, shall be allowed the same fees as in civil causes, to be taxed in only one cause, when attending in more causes than one on the same days, unless otherwise directed by special order of the court. When certified to the county auditor by the clerk of the court, such fees shall be paid from the county treasury, and, except as to the grand jury, taxed in the bill of costs. Each witness attending before a justice of the peace, police judge or magistrate, or mayor, under subpoena, in criminal cases, shall be allowed the fees provided for witnesses in the court of common pleas, and in state cases said fees shall be paid out of the county treasury, and in ordinance cases out of the municipal treasury, upon the certificate of the judge or magistrate, and the same taxed in the bill of costs.

“When the fees herein enumerated have been collected from the judgment debtor, they shall be paid to the public treasury from which said fees were advanced.”

It would appear that the case in which such testimony is used is a continuation of the same criminal case and the rules applicable to the payment of witness fees in connection with the motion in mitigation would apply the same as any other part of the trial. Of course, the question might arise as to whether there is a distinction between testimony referred to in the section and the report that is supposed to be made by the psychologist or psychiatrist. In any event, it requires that the reports be made in open court and in the presence of the defendant, which would indicate that it is to be made in the same manner as the testimony by any other witness.

You are, therefore, advised that it is the opinion of this department that when the fees of a psychologist or psychiatrist are fixed by the court in a proceeding under section 13696, as last amended, they may be paid out of the county treasury the same as other witness fees mentioned in section 3014, G. C.

Respectfully,
C. C. CRABBE,
Attorney General.