

1687.

PROSECUTING ATTORNEY—MAY RECEIVE ACTUAL AND NECESSARY EXPENSES IN USE OF PRIVATE AUTOMOBILE, BASED ON FLAT RATE PER MILE, WHEN USED IN OFFICIAL BUSINESS—APPLICABLE TO ASSISTANT PROSECUTING ATTORNEY—STENOGRAPHER IN SAID OFFICE NOT ENTITLED TO ADDITIONAL COMPENSATION FOR WORK AFTER HOURS.

SYLLABUS:

The prosecuting attorney and assistant prosecuting attorney may receive their actual and necessary expenses incurred in the use of their private automobiles, based on a flat rate per mile, for the mileage covered while such automobiles are being used by the prosecuting attorney and assistant prosecuting attorney in the performance of their official duties.

A stenographer in the prosecuting attorney's office may not receive additional compensation, by virtue of the fact that she is called upon to render additional services after working hours, even though such services might be necessary for the general welfare of the county.

COLUMBUS, OHIO, October 7, 1933.

HON. GEO. L. LAFFERTY, *Prosecuting Attorney, Lisbon, Ohio.*

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

"I would like your opinion on the following matter inasmuch as the question involved concerns me personally:

Whenever I use my own automobile in criminal investigation it is my understanding that the expenses thereof may be paid out of the fund created by Section 3004 of the General Code. If you concur in this view I would like to know how to arrive at a rate to charge per mile the car is driven.

Too, I often have to send my Assistant on some investigation, sometimes even out of the state, and he uses his own privately owned automobile, and I presume that what would apply to one of us would apply to the other.

Heretofore, and while I was Assistant in this office, stenographic statements were taken by different stenographers from prisoners, principally one or the other of our official court stenographers. When such statements were taken by these court stenographers they were paid for their services, as I understand from my predecessor. Since I have been in office, however, our stenographer in the Prosecutor's Office has been able to take many of the statements that we have needed from prisoners, and has done so in many instances during the regular working hours prescribed for her, and thereby we have saved several hundred dollars of expense. Such statements taken during her regular working hours I feel she is compensated for in her regular salary. However, there have been numerous instances so far this year where we have taken our regular stenographer to places where crimes have been committed and where prisoners were in charge of different police departments and taken state-

ments from prisoners at all hours of the night, in one or two instances working practically all night in order to get first hand information as to crimes. Then, too, we have asked her to transcribe such notes as she would take after working hours, and in order to have them transcribed when we needed them she has had to do certain transcribing work after working hours.

I feel that she should be paid for her services rendered outside of her working hours, and paid out of Section 3004 Funds, at reasonable rates for similar stenographic services.

I will appreciate your opinion as to whether I may do these things."

As stated in your letter, section 3004, General Code, provides for the payment of expenses of the prosecuting attorney. This section reads in part as follows:

"There shall be allowed annually to the prosecuting attorney in addition to his salary and to the allowance provided by section 2914, an amount equal to one-half the official salary, to provide for expenses which may be incurred by him in the performance of his official duties and in the furtherance of justice, not otherwise provided for. * * *"

It is obvious that this section permits the payment of actual expenses of a prosecuting attorney. See Opinions of the Attorney General for 1918, Vol. I, page 998. Likewise, the assistant prosecuting attorney may receive his expenses where the same are incurred upon official business. See Opinions of the Attorney General for 1919, Vol. II, page 1238. It is proper to use a private car in the furtherance of the public duties of a county official where no car is furnished by the county. See Opinions of the Attorney General for 1927, Vol. I, page 438; Opinions of the Attorney General for 1930, Vol. II, page 1024; Opinion No. 1060, rendered July 22, 1933.

The remaining phase of your first question pertains to the manner of arriving at a mileage rate. This of necessity is more an auditing question than it is a legal question. In an opinion to be found in Opinions of the Attorney General for 1927, Vol. I, page 438, at page 442, the following is stated:

"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.*" (Italics the writer's.)

This opinion was approved in Opinions of the Attorney General for 1930, Vol. II, page 1024, and in Opinion No. 1060, rendered July 22, 1933. It is obvious that in determining the rate to be fixed, various elements may be considered such as the make of the car, the price of gasoline, oil, etc. Likewise, the mileage rate as fixed for other county officials might be considered.

It is therefore my opinion, in specific answer to your first question, that the prosecuting attorney and assistant prosecuting attorney may receive their actual

and necessary expenses incurred in the use of their private automobiles, based on a flat rate per mile, for the mileage covered while such automobiles are being used by the prosecuting attorney and assistant prosecuting attorney in the performance of their official duties.

Your second question relates to whether or not a stenographer appointed by the prosecuting attorney, by virtue of section 2915, General Code, may receive additional compensation for services rendered the prosecuting attorney's office after working hours. Section 2915, General Code, reads as follows:

"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."

In this connection I call your attention to an opinion of this office to be found in Opinions of the Attorney General for 1919, Vol. I, page 969. The syllabus of that opinion reads in part as follows:

"The compensation of deputies, clerks and other employes of the several county officers is to be fixed by the said officers respectively and a certificate thereof filed with the county auditor as provided in section 2981 G. C., and allowances to such employes in excess of the amount so fixed and certified, purporting to be made in consideration of extra work or for extra hours are unauthorized."

In the body of the opinion at page 970, the following appears:

"While instances may readily be conceived wherein it would appear to the public advantage to avail of the services of regular employes in a public office for the discharge of a temporary accumulation of work of the office or other exigency, by the devotion of additional time outside of the usual hours of the office, yet in its operation such a practice would be fraught with much of opportunity and tendency to open the way for abuse and fraud against the public treasury, which, in practice, would be found difficult of ascertainment and restraint.

Public policy usually has been held to demand the rejection of practices which, though free from objection in particular cases, yet in their general adoption and operation tend to facilitate the accomplishment of fraud and circumvention. The suggested practice of payment of extra compensation to regular employes is not a faithful compliance with the letter and the spirit of the statute above noted, providing the conditions of creation of valid obligations against the public treasury on account of services required in the various offices of the county."

In fixing the compensation of a stenographer in his office, the prosecuting attorney would, no doubt, be justified in considering the fact that she is often called upon to work overtime. However, I do not feel that she is entitled to any additional compensation, and I concur in the holding of the 1919 opinion.

It is therefore my opinion, in specific answer to your second question, that a stenographer in the prosecuting attorney's office may not receive additional compensation, by virtue of the fact that she is called upon to render additional services after working hours, even though such services might be necessary for the general welfare of the county.

Respectfully,
JOHN W. BRICKER,
Attorney General.

1688.

APPROVAL, NOTES OF MONTVILLE TOWNSHIP RURAL SCHOOL DISTRICT, MEDINA COUNTY, OHIO—\$1,285.00.

COLUMBUS, OHIO, October 7, 1933.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

1689.

APPROVAL, BONDS OF ALLIANCE CITY SCHOOL DISTRICT, STARK COUNTY, OHIO—\$78,948.42.

COLUMBUS, OHIO, October 7, 1933.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

1690.

APPROVAL, BONDS OF AMHERST VILLAGE SCHOOL DISTRICT, LORAIN COUNTY, OHIO—\$10,000.00.

COLUMBUS, OHIO, October 7, 1933.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

1691.

APPROVAL, BONDS OF TOWNSEND TOWNSHIP RURAL SCHOOL DISTRICT, SANDUSKY COUNTY, OHIO—\$2,400.00.

COLUMBUS, OHIO, October 7, 1933.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.