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JAIL MATRON — PROBATE JUDGE — DISCRETIONARY POWER TO APPROVE OR DISAPPROVE APPOINTMENT — SECTION 3178 G.C. — WHEN JUDGE APPROVES APPOINTMENT AND FIXES SALARY OF SUCH MATRON APPOINTED BY THE SHERIFF, MANDATORY FOR COUNTY COMMISSIONERS TO MAKE APPROPRIATION TO PAY SUCH SALARY.

SYLLABUS:

1. *Section 3178, General Code, confers upon the probate judge discretionary power either to approve or disapprove an appointment of a jail matron.*

2. *When, under authority of Section 3178, General Code, the probate judge has approved the appointment and fixed the salary of a jail matron appointed by the sheriff, it is mandatory that the county commissioners make an appropriation for the payment of such salary.*

Columbus, Ohio, April 25, 1941.

Hon. Harry A. Mettler, Prosecuting Attorney,  
Athens, Ohio.

Dear Sir:

This will acknowledge receipt of your request for my opinion as follows:

“Our county jail and residence was ordered remodeled or vacated by the Fire Marshal. There being no funds for remodeling, the jail was vacated and a contract made with the cities of Athens and Nelsonville for the care of our county prisoners, both male and female. In April, 1940, the Board of Commissioners passed a resolution vacating the position of jail matron. In January of this year, the Probate Judge, upon the application of the Sheriff, approved the appointment of a jail matron, and set her salary. The County Commissioners wish to know whether appropriation for said salary of jail matron is mandatory.”

You have submitted a second letter which reads in part as follows:

“ \* \* \* As one of the propositions, I stated the Probate Judge had approved the appointment and fixed a salary. I have since learned that the Commissioners were in error on this point, as the Probate Judge has now asked me for an opinion as to whether his action in this matter is discretionary or ministerial.

I would, therefore, appreciate your amending my former request consistent with the information contained herein.”

Your inquiries arise by virtue of Section 3178, General Code, which provides:

“The sheriff may appoint not more than three jail matrons, who shall have charge over and care for the insane, and all female and minor persons confined in the jail of such county, and the county commissioners shall provide suitable quarters in such jail for the use and convenience of such matrons while on duty. Such appointment shall not be made, except on the approval of the probate judge, who shall fix the compensation of such matrons not exceeding one hundred dollars per month, payable monthly from the general fund of such county upon the warrant of the county auditor upon the certificate of the sheriff. No matron shall be removed except for cause, and then only after hearing before such probate judge.”

The authority conferred on the probate judge by Section 3178, General Code, was discussed in the case of *State, ex rel. v. Robeson*, Probate Judge, 3 N.P. (N.S.) 5. The headnote of that case reads:

“The act of April 8th, 1904 (97 O.L., 86), authorizing the

sheriff of any county to appoint not more than three jail matrons no appointment to be made except on the approval of the probate judge, confers on such probate judge a discretion which can not, at least in the absence of gross abuse, be controlled or directed by writ of mandamus."

At page 7 Judge Allread said:

" \* \* \* To prevent abuse of the general power so granted, and as a check against its unnecessary use, the approval of the appointment by the probate judge was required. Both the sheriff and probate judge must concur in the necessity and propriety of the appointment before it has any validity."

In the case of State, ex rel. v. Ashman, 90 O.S. 200, the court had under consideration Section 10071, General Code, which provides:

"All appointments by such societies under the next preceding section shall have the approval of the mayor of the city or village for which they are made. If the society exists outside of a city or village, appointments shall be approved by the probate judge of the county for which they are made. The mayor or probate judge shall keep a record of such appointments."

The syllabus of the Ashman case reads:

"Under the provisions of Chapter V, Title IX, Div. VI, of the General Code, providing for the organization and powers of humane societies, a probate judge, when called upon to approve the appointment of an agent for such society, has discretion to determine not only whether the person named is a proper person for the discharge of such duties, but also whether there is such necessity for the appointment as would justify the payment of the expense out of the public treasury."

At pages 201 and 202 it was said:

" \* \* \* But the fact that the absence of the approval of the probate judge protects the county from the payment of salary or compensation to the agent must, we think, be regarded as vesting in the probate judge a discretion to determine whether, in view of all conditions existing, there is a public necessity for such appointment. No language of the statute restricts his discretion to a consideration of the fitness of the person whom the society names as agent, and the effect of his approval would not authorize us to infer such limitation."

Likewise in the case of State, ex rel. v. Colwell, 123, O.S. 535, the

first branch of the syllabus reads:

“Under Sections 10070, 10071 and 10072, General Code, a probate judge has the power to determine whether there is such necessity for the appointment of an agent for a humane society as would justify the payment of the expense out of the public treasury. (*State, ex rel. Coshoccon Humane Society v. Ashman, Probate Judge*, 90 Ohio St., 200, 107 N.E., 337, approved and followed.)”

At pages 540 and 541 it was stated:

“ \* \* \* However, while the term ‘appoint’ is used of the selection by the humane society, the approval of the mayor or probate judge under these statutes certainly possesses greater vitality than a mere confirmation.”

Clearly the power vested in the probate judge by Section 3178, supra, is more than ministerial. His approval is made a condition precedent to the appointment and in his sound discretion he may approve or disapprove the same. Furthermore, it is apparent from the foregoing authorities that he may disapprove such appointment because of the unfitness of the applicant or because he does not concur with the sheriff in the necessity and propriety of the appointment.

With reference to the duty of the county commissioners to make an appropriation for the salary of the jail matron, a similar question was considered in Opinion No. 3681, rendered by me under date of April 14, 1941. In that opinion I had for consideration Section 3054, General Code, which provides that the trustees of a county law library association shall appoint a librarian whose compensation shall be fixed by the judges of the Court of Common Pleas of the county. Said section further provides that such compensation shall be paid from the county treasury.

The syllabus of that opinion reads:

“1. When considering and passing an annual appropriation measure the county commissioners are required to make provision first for those expenditures made mandatory by statute.

2. When, under authority of Section 3054, General Code, a Court of Common Pleas has fixed the compensation of a law librarian duly appointed by a county law library association

it is mandatory that the county commissioners appropriate funds for the payment thereof.

3. The county commissioners may not appropriate from the general fund in excess of the total of the estimated revenue available as certified by the Budget Commission or, in case of appeal, by the Board of Tax Appeals."

In Opinion No. 974, Opinions of the Attorney General for the year 1933, Vol. II, page 938, the eighth branch of the syllabus reads as follows:

"It is incumbent on the appropriating authority of a subdivision or other taxing unit to provide first for all those expenditures made imperative by the Constitution, statutes, charter provisions or ordinance, such as duly fixed salaries of officials, heads of departments and divisions, providing it is possible to do so within the limits of resources available for appropriation."

At page 949 it was said:

" \* \* \* Of course, such appropriations are limited to the estimated resources as shown by the budget commission's certificate, and if no resources are shown, no appropriation can be made."

The foregoing conclusions are applicable to the instant situation. Section 3178, supra, provides that when the probate judge has approved the appointment and fixed the salary of a jail matron, such salary shall be paid out of the county treasury. This section creates a fixed liability and, therefore, an appropriation must be made.

In view of the above and in specific answer to your inquiries, I am of the opinion that:

1. Section 3178, General Code, confers upon the probate judge discretionary power either to approve or disapprove an appointment of a jail matron.

2. When, under authority of Section 3178, General Code, the probate judge has approved the appointment and fixed the salary of a jail matron appointed by the sheriff, it is mandatory that the county commissioners make an appropriation for the payment of such salary.

Respectfully,

THOMAS J. HERBERT,  
Attorney General.