

4178.

COMPENSATION—DUTY OF COUNTY COMMISSIONERS TO APPROPRIATE AMOUNT FIXED FOR COURT REPORTER BY COMMON PLEAS COURT—MUST APPROPRIATE AMOUNT FIXED FOR STENOGRAPHER OF PROSECUTING ATTORNEY AND CRIMINAL BAILIFF.

SYLLABUS:

1. *A board of county commissioners must appropriate the amount fixed by the common pleas court for the compensation of a common pleas court stenographic reporter.*

2. *When a common pleas judge appoints a stenographic reporter for a term of three years, and until his successor is appointed and qualified, and fixes said reporter's compensation, said judge may not reduce the compensation so fixed at any time after the expiration of the three years, unless a reappointment of the reporter is made.*

3. *A board of county commissioners must appropriate the amount fixed by a prosecuting attorney for the compensation of his only employe, a clerk-stenographer, providing said amount does not exceed the amount allowed by the common pleas judge for said prosecutor's employe.*

4. *A board of county commissioners must appropriate the amount fixed by the common pleas court for the compensation of a criminal bailiff.*

COLUMBUS, OHIO, March 25, 1932.

HON. J. S. HARE, *Prosecuting Attorney, New Philadelphia, Ohio.*

DEAR SIR:—I am in receipt of your letter of recent date which is as follows:

"I desire that you render an opinion upon the statement of facts that I am submitting to you concerning the authority of the County Board of Commissioners of Tuscarawas County, Ohio, to reduce the salaries of the official court stenographer, prosecuting attorney's stenographer and court bailiff.

1. *AS TO THE OFFICIAL COURT STENOGRAPHER.*

On July 10th, 1925, an official court stenographer was appointed by the judge of the common pleas court of Tuscarawas county, Ohio, for a term of three years, and until his successor was appointed and qualified, as provided by section 1546 of the General Code of Ohio, and his compensation was fixed at \$2000.00 per annum under section 1550, and a journal entry is on record in the clerk of court's office to that effect.

The stenographer so appointed has served and is still serving under that appointment without further action by the judge in reference thereto.

Can the board of county commissioners reduce the compensation so allowed by refusing to appropriate sufficient funds therefor?

If the board can not reduce the salary in this manner, then can the judge do so before this three year period expires?

In this county the county board of commissioners have cut all appointees and are attempting to cut the official court stenographer who had been a court stenographer for thirty-nine years continuously from the salary of \$2000.00 to \$1600.00.

2. *AS TO THE PROSECUTING ATTORNEY'S STENOGRAPHER.*

The present stenographer for the prosecuting attorney was appointed as of January 5th, 1931, for the period of one year and the allowance was made by the judge of the common pleas court of this county in the sum of \$1200.00 annually, on application of the prosecuting attorney. for an allowance for compensation for his stenographer. Then this year on the date of January 4th, 1932, there is an entry of the same kind made fixing her salary for this year in the sum of \$1200.00 annually. The appropriation for the prosecuting attorney's stenographer has been changed by the county board of commissioners from \$1200.00 to \$1080.00 for the year 1932 payable at \$90.00 per month, but said reduction in the appropriation is being held off from the record until a ruling can be obtained. The prosecuting attorney in this county has but one stenographer who also acts as his clerk.

Section 2914 and 2915 seem to govern the appointment and compensation of said stenographer. Section 2914 states that the judge may fix an aggregate sum to be expended for the incoming year, for the compensation of assistants, clerks and stenographers of the prosecuting attorney's office. Section 2915 gives the prosecuting attorney the power of appointment of his said stenographer and clerk or clerks and seems to give him the power to fix the said stenographer's compensation, but not to exceed in the aggregate the amount fixed by the judge of the court of common pleas. Said section also says, 'that 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.'

Can the county board of commissioners reduce the amount of the compensation fixed by the prosecuting attorney and which compensation does not exceed the aggregate amount fixed by the judge of the court of common pleas?

3. *AS TO THE OFFICIAL COURT BAILIFF.*

The official court bailiff was appointed by the judge of the court of common pleas September, 1931, for a period of one year at a certain salary annually, payable monthly.

Can the county board of commissioners reduce the appropriation as to the court bailiff which would make the appropriation below the amount fixed by the judge, and make it impossible for the county auditor to issue a warrant upon the county treasurer to pay the amount fixed? If the county board of commissioners reduce said compensation, can it become effective prior to the expiration of the year for which the court bailiff was appointed?"

With respect to your first question, your attention is directed to the case of *State ex rel. Justice vs. Thomas*, 35 O. App. 250. In that case it appeared that the common pleas judge of Marion county had appointed a criminal bailiff and court constable for his court on January 1, 1929, under authority of Sections 1541, 1692 and 1693, General Code. Said judge fixed the annual salary at \$1200.00 for each position. The county commissioners appropriated only \$1800.00 for the year 1929 for these positions. The appointee presented his monthly vouchers to the auditor of Marion County, but on November 1, 1929, payment was refused. He filed a mandamus action against the auditor and the court refused the writ,

inasmuch as it appeared from the facts that there was no appropriation to meet the vouchers and the county commissioners were not made a party to the action. Had the commissioners been made a party, undoubtedly the court would have compelled the commissioners to appropriate the remaining \$600.00, for the court discussed Sections 1541, 1692 and 1693 in connection with the budget law (sections 5625-1, et seq.) and stated at page 256:

“When the common pleas court judge appoints a court constable and criminal bailiff and fixes the compensation, as he is expressly authorized to do under Sections 1541, 1692 and 1693, General Code, it has been fixed by a person or tribunal authorized so to do, and it is an act equivalent to and on parity with a fixing by law.

The county commissioners are bound to accept this act of a common pleas court judge, who is authorized to fix compensation by law, in the same manner as if it had been fixed by statutory enactment.”

As you indicate in your communication, Section 1546, General Code, authorizes the common pleas court judge to appoint a stenographic reporter, and Section 1550, General Code, authorizes the court to fix his compensation. Obviously, the language of the above case is equally applicable to a court stenographer, since the provisions of Sections 1546 and 1550, General Code, are very analogous to the provision of Section 1541, General Code, which was before the court in the above case. Therefore, it appears to me that the county commissioners are bound to appropriate the compensation fixed by the common pleas judge for the court stenographer, and are not authorized to appropriate a lesser amount than that fixed by said common pleas judge.

This conclusion is strengthened by construing the language of the court in the Thomas case with the language of the court in the case of *Jenkins, Aud., vs. State, ex rel.*, 40 O. App. 312; Ohio Bar, issue of February 16, 1932. In the last mentioned case, the court held that the county commissioners must appropriate \$1500.00 to a county agricultural society under the terms of Section 9894, General Code. In the opinion it is stated at pages 314 and 315:

“This language (part of Section 9894, General Code) is direct and unequivocal and entitled the agricultural society to not less than the sum of \$1,500, and deprived the commissioners and all other county officers of any discretion in the premises except that the commissioners might determine the amount within the limits mentioned which an agricultural society is to receive. *State, ex rel. Justice, vs. Thomas, Aud.*, 35 Ohio App., 250, 172 N. E., 397. * * *

* * * At the time the new budget law was passed there were many sections, of which 9894 was but one, creating fixed and inescapable liabilities of the county, such as salaries of county officers, and it is unthinkable that it was the purpose of the Legislature to make any claims of this character subject to the action or nonaction of the county commissioners. Such a construction would impose legislative functions on the commissioners and render the act of doubtful constitutionality.” (Words in parenthesis the writer’s.)

As for the second part of your first question, it is to be observed that sections 1546 and 1550, General Code, provide as follows:

"Sec. 1546. When in its opinion the business requires it, the court of common pleas of a county may appoint a stenographic reporter as official shorthand reporter of such court, who shall hold the appointment for a term not exceeding three years from the date thereof, and until a successor is appointed and qualified, unless removed by the court, after a good cause shown, for neglect of duty, misconduct in office, or incompetency. Such official shorthand reporter shall take an oath to faithfully and impartially discharge the duties of such position."

"Sec. 1550. Each such shorthand reporter shall receive such compensation as the court making the appointment shall fix, not exceeding three thousand dollars each year in counties where two or more judges of the common pleas court hold court regularly, and in all other counties not more than two thousand dollars. Such compensation shall be in place of all per diem compensation in such courts. Provided, however, that in case such appointment shall be for a term of less than one year, such court may allow a per diem compensation not exceeding the sum of fifteen dollars per day, for each day such shorthand reporter shall be actually engaged in taking testimony or performing other duties under the orders of such court, which allowance shall be in full for all services so rendered.

The auditor of such county shall issue warrants on the treasurer thereof for the payment of such compensation in equal monthly installments, when the compensation is allowed annually, and when in case of services per diem, for the amount of the bill approved by the court, from the general fund upon the presentation of a certified copy of the journal entry of appointment and compensation of such shorthand reporters."

Under the terms of section 1546, *supra*, it is obvious that the judge may appoint a court stenographer for a term not exceeding three years, and until a successor is appointed and qualified; and under the provisions of section 1550, *supra*, which section is in *pari materia* with section 1546, above quoted, the shorthand reporter shall receive the compensation as the court making the appointment fixes. Plainly, the court in the present instance could have made a reappointment or appointed another person any time after the expiration of the three years from the date of the original appointment of the reporter on July 10, 1925. The judge making the appointment could fix a greater or lesser salary for the position when he makes the reappointment or appointment of another person, but as long as nothing is done in regard to a reappointment, the person now holding over certainly holds at the same compensation which the court fixed for the original three years. The appointment to serve for a term of three years and until a successor is appointed and qualified, made on July 10, 1925, constituted a contract made by the judge on behalf of the county and the reporter. See *in re Grace E. Etter*, 2 O. App., 165, 168.

Therefore, in specific answer to the second part of your first question, I am of the view that the judge cannot reduce the reporter's compensation fixed on July 10, 1925, unless he, in the exercise of his right so to do, makes a reappointment to the position.

Coming now to your second question, it is to be noted that section 2915, General Code, which you mention in your communication, authorizes the prosecuting attorney to fix the compensation of his stenographer, so long as the compensation which he fixes for this position, together with that fixed for any other employes which he may hire, does not exceed the aggregate compensation as fixed by the common pleas court for the total number of employes in the prosecuting

attorney's office. As I understand from your letter, however, you have but one employe in your office, who acts both as clerk and stenographer.

It appears to me that the principle laid down in the Thomas case is also applicable here. Said section 2915, General Code, clearly gives authority for the prosecuting attorney to fix the compensation of his stenographer, and when he so fixes it, the amount has been fixed by a person or tribunal authorized so to do, and is an act equivalent to and on parity with a fixing by law.

Therefore, in specific answer to your second question, I am of the opinion that the county commissioners are unauthorized to appropriate a lesser amount for your stenographer than that fixed by you, since your question implies that the amount you fixed does not exceed the amount allowed your office by the common pleas judge for your employe.

With respect to the first part of your third question, I am of the opinion that in view of what has been said heretofore with reference to the Thomas case, the county commissioners may not appropriate a lesser amount for the bailiff's compensation than that fixed by the common pleas judge. Since the first part of your third question is answered in the negative, an answer to the second part of your third question is rendered unnecessary.

Respectfully,

GILBERT BETTMAN,
Attorney General.

4179.

APPROVAL, LEASES FOR RIGHT TO USE FOR FISH HATCHERY,
LANDS IN SUMMIT AND AUGLAIZE COUNTIES.

COLUMBUS, OHIO, March 25, 1932.

HON. I. S. GUTHERY, *Director, Department of Agriculture, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge the receipt of a recent communication from your department, over the signature of the Chief of the Bureau of Inland Lakes and Parks, in the Division of Conservation, submitting for my examination and approval, two reservoir land leases executed by the Conservation Commissioner, pursuant to the authority conferred upon him by Section 471, General Code.

By the leases here in question, each of which is for a term of fifteen years, permission is granted to the Division of Conservation to occupy and use certain parcels of state reservoir lands for fish hatchery purposes. In one of the leases, the land leased for the purpose above stated, in the large island known as Myers Island, in the Portage Lakes region, the same being in the new reservoir, commonly known as the North Reservoir, in Coventry Township, Summit County, Ohio. The land covered in the other lease is adjacent to the east bank of Lake St. Marys, in the northeast quarter of Section 17, Town 6 south, Range 4 east, and in the southeast quarter of Section 8, Town 6 south, Range 4 east, Auglaize County, Ohio, and is more particularly described in said lease.

The annual rental reserved in each of these inter-department leases is six per cent. of the valuation of the particular tract or parcel of land leased; and in one case, such annual rental is the sum of \$360.00, payable in semi-annual installments of \$180.00 each, and in the other case, the annual rental is \$150.00, payable in semi-annual installments of \$75.00 each.