

1024

COMMON PLEAS JUDGE:

1. ASSIGNED BY CHIEF JUSTICE TO DISPOSE OF BUSINESS IN FOREIGN COUNTY—LEAVES COUNTY OF RESIDENCE DAY BEFORE DATE TO HOLD COURT—UPON APPROVAL BY COUNTY COMMISSIONERS, ACTUAL TRANSPORTATION EXPENSES MAY BE PAID—SECTIONS 1469, 2253 G. C.
2. EXPENSES FOR MEALS AND LODGING—PRECEDING DAY TO DATE OF HOLDING COURT—NOT MORE THAN \$10.00 PER DAY MAY BE ALLOWED UPON APPROVAL OF COUNTY COMMISSIONERS—OPINION 2142, O. A. G. 1950, PAGE 551, OVERRULED IN PART.
3. JUDGE NOT ENTITLED TO PER DIEM COMPENSATION OF \$20.00 FOR DAYS OF TRAVEL WHEN NOT ACTUALLY ENGAGED IN JUDICIAL DUTIES.
4. JUDGE IS AIDING IN DISPOSING OF BUSINESS OF OTHER COUNTY ON ALL DAYS HE IS ENGAGED IN JUDICIAL BUSINESS OF COUNTY WHETHER OR NOT PERFORMED WITHIN GEOGRAPHICAL LIMITS OF OTHER COUNTY—ENTITLED TO RECEIVE \$20.00 FOR EACH DAY OF ASSIGNMENT.
5. WHERE JUDGE ELECTS TO GO BACK AND FORTH FROM RESIDENCE TO COUNTY OF ASSIGNMENT EACH DAY, HE IS ENTITLED TO ACTUAL TRANSPORTATION EXPENSES—ACTUAL AND NECESSARY EXPENSES—NOT TO EXCEED \$10.00 PER DAY—WHEN ENTITLED TO \$20.00 PER DAY.

SYLLABUS:

1. Where a common pleas judge, assigned by the Chief Justice by virtue of Section 1469, General Code, to aid in disposing of the business of some county other than that in which he resides, finds it necessary to leave his county of residence on the day preceding the day set for holding court pursuant to such assignment, Section 2253, General Code, authorizes the payment of "his actual transportation expenses," upon approval by the county commissioners.

2. Where on such preceding day such judge has incurred expenses for meals and lodging while absent from his county of residence, Section 2253, General Code, authorizes the payment of not more than \$10.00 per day for such meals and lodging as "his actual and necessary expenses incurred in holding court under such assignment," upon approval of the county commissioners. Opinion No. 2142, Opinions of the Attorney General for 1950, page 551, overruled in part.

3. Under such circumstances, such judge is not entitled, by Section 2253, General Code, to per diem compensation of \$20.00 for days of travel in which he is not actually engaged in judicial duties in aiding in disposing of the business of the county of assignment.

4. A common pleas judge, assigned by the Chief Justice by virtue of Section 1469, General Code, to aid in disposing of the business of some county other than that in which he resides, is aiding in disposing of the business of such other county on all days when, pursuant to such assignment, he is engaged in the judicial business of such other county, whether or not such be performed within the geographical limits of such other county, and, thus, is entitled, pursuant to Section 2253, General Code, to receive \$20.00 for each day of such assignment.

5. A common pleas judge, assigned by the Chief Justice by virtue of Section 1469, General Code, to aid in disposing of the business of some county other than that in which he resides, and who elects to go back and forth from his residence to the county of assignment each day of such assignment, is authorized by Section 2253, General Code, upon the approval of the county commissioners, to receive "his actual transportation expenses," and "his actual and necessary expenses incurred in holding court under such assignment" not in excess of \$10.00 per day. Such judge is also entitled to receive \$20.00 per day for each day he engages in the judicial business of such other county pursuant to such assignment.

Columbus, Ohio, December 27, 1951

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen :

I have before me your request for my opinion, reading in part as follows :

"1. Assume it is necessary for such judge to leave his place of residence on the day preceding the day and time set for holding court pursuant to his assignment by the Chief Justice of the Supreme Court of Ohio, pursuant to the provisions of Article IV, Section 3 of the Constitution of the State of Ohio, and Section 1469, General Code. Do the provisions of Section 2253, General Code, authorize the payment for that day of -

- (a) Transportation expenses.
- (b) Actual and necessary expenses incurred in holding court.
- (c) The per diem amount of \$20 per day.

"2. Assume that such common pleas judge goes to a county in which he does not reside, pursuant to an assignment made by the Chief Justice of the Supreme Court of Ohio, as in question 1 above, and after the hearings and proceedings in open court finds that he has certain matters submitted to him which require some considerable time for study, research and the preparation of decisions and opinions. Under this state of facts the common pleas judge returns with the papers of the case, pleadings, briefs, etc. to his county of residence and there works out the solutions of the problems involved, comes to his conclusions and prepares his decisions and opinions. Is such judge entitled to the per diem amount of \$20 per day for each day so spent in such work?

"3. If the judge so assigned is required for any reason connected with the matters pending before him to return to the county and court where the same were tried before and submitted to him for the purpose of presiding in open court, do the provisions of Section 2253, General Code, authorize the payment of his 'transportation expenses,' 'actual and necessary expenses incurred in holding court' and 'the per diem amount of \$20 per day' for such days? If travel is necessary on the preceding day may such judge receive 'transportation expenses,' 'actual and necessary expenses incurred in holding court' and 'the per diem amount of \$20 per day' for that day?

"4. When, as frequently occurs, a common pleas judge is assigned by the Chief Justice of the Supreme Court to aid in the disposition of the business of the court of common pleas of an adjoining county, not of residence, the visiting judge elects to go back and forth from his home to the neighboring court each day, is he entitled under Section 2253, General Code, to 'transportation expenses' and his 'actual and necessary expenses incurred in holding court' as well as 'the per diem amount of \$20 per day' for each such day?"

Prior to the adoption on September 3, 1912 of Article IV, Section 3 of the Constitution of Ohio, a judge of the Court of Common Pleas had authority to hear and decide cases only within the territorial limits of the county or district of his residence. This section of the Constitution authorized any judge of a Court of Common Pleas to temporarily preside and hold court in any county and authorized the Chief Justice of the Supreme Court to assign any such judge to any county to hold court therein.

Pursuant to such constitutional authority, the General Assembly then enacted Section 2253 of the Ohio General Code. This section, as last amended, effective August 27, 1947, reads as follows:

“In addition to the annual salary and expenses provided for in sections 1529, 2251, 2252, 2252-1, each judge of the court of common pleas while holding court in a county in which he does not reside, by assignment of the chief justice under section 1687 of the General Code, or without any assignment, shall receive his actual and necessary expenses incurred while so holding court in a county in which he does not reside, to be paid from the treasury of such county upon the warrant of the county auditor, issued to such judge; each judge of the court of common pleas who is assigned by the chief justice by virtue of section 1469 of the General Code, to aid in disposing of business of some county other than that in which he resides shall receive twenty dollars per day for each day of such assignment and the sum of not more than ten dollars per day for his actual and necessary expenses incurred in holding court under such assignment, together with his actual transportation expenses, to be paid from the treasury of the county to which he is so assigned upon the warrant of the auditor of such county.”

The first half of Section 2253 deals with a situation in which a judge of the Common Pleas Court is holding court in a county in which he does not reside “by assignment of the chief justice under Section 1687 of the General Code, or without any assignment.” Section 1687 applies to a situation where such judge is disqualified by reason of bias, prejudice, etc. Since all four of your questions deal with cases where a common pleas judge is assigned by the Chief Justice pursuant to Section 1469, General Code, we need concern ourselves, in this opinion, only with the second half of Section 2253.

Your first question involves a consideration of the case of a common pleas judge assigned by the Chief Justice pursuant to Section 1469, when it is necessary for such judge to leave his place of residence on the day preceding the day and time set for holding court. You inquire as to whether for such day the judge is entitled to “transportation expenses,” “actual and necessary expenses incurred in holding court,” and “the per diem amount of \$20.00 per day.”

I find that these same three questions were considered by my immediate predecessor in office. In Opinion No. 2142, Opinions of the Attorney General for 1950, page 551, the questions under consideration read as follows:

“Assuming that it is necessary for a Common Pleas Judge to leave his place of residence on the day preceding his assignment by virtue of G. C. 1469,

“1. Does 2253 G. C. authorize the payment of expenses for that day?”

“2. Does it authorize the payment of per diem for that day?”

The holding of the then Attorney General, as stated in the syllabus of such opinion, was as follows :

“1. Section 2253 of the General Code does not authorize the payment of expenses, other than transportation expenses, for a judge who finds it necessary to leave his place of residence on the day preceding his assignment to another county. Expenses as provided by this section cover only the days of holding court under the assignment.

“2. Section 2253 of the General Code does not authorize per diem for any days other than days of assignment for a judge holding court pursuant to Section 1469 of the General Code in a county other than his place of residence.”

I am in full agreement with the conclusion of my predecessor in office that a judge, who finds it necessary to leave his place of residence on the day preceding his assignment to another county, is entitled to his transportation expenses, or, stated in the words of the statute, “his actual transportation expenses.”

I do not agree, however, with the conclusion of my predecessor that such judge is not entitled to “his actual and necessary expenses incurred in holding court under such assignment,” not in excess of \$10.00 per day, for the day preceding such assignment. Regarding such expenses, the statute reads :

“* * * each judge of the court of common pleas who is assigned by the chief justice by virtue of Section 1469 of the General Code, to aid in disposing of business of some county other than that in which he resides shall receive * * * the sum of not more than ten dollars per day for his actual and necessary expenses incurred in holding court under such assignment, * * *.”

Regarding this language, the former Attorney General stated :

“It seems clear that the words ‘while holding court’ limits expenses to those incurred on days when the judge is actually holding court. His transportation expenses are provided for in the same section, and it can be inferred from that fact that had the legislature intended that other expenses should be provided for traveling days, it would have so specified.”

I am not unmindful of the well settled rule of construction that statutes relating to the fees and compensation of public officers must be strictly construed in favor of the government and that such officers are entitled only to what is clearly given by law, this rule having been recently quoted and approved by Zimmerman, J. in the case of *State, ex rel. Leis v. Ferguson*, 149 Ohio St., 555. Another well established rule of statutory construction, however, is that a statute should not be so strictly construed as to defeat the apparent legislative purpose.

There are many sections of the General Code, which provide in one form or another, for the payment of actual and necessary expenses of public officials and employes of the state when engaged in carrying out their official duties away from their place of residence. It is not necessary to set forth in detail these sections of the General Code, but, suffice it to say, for many years the practice of the state has been to reimburse such officials for such moneys so expended upon the rendition of an account therefor, this being true whether or not expenses were incurred going to the place of the performance of official duties or at the place and during performance of official duties. The expenses so allowed have never been limited to the actual place and time of the official duty. All this the Legislature must have known at the time of the enactment of Section 2253, General Code.

In many such statutes no separation is made between transportation and other expenses. This is true, incidently, in the first half of Section 2253. In the case of *State, ex rel. Leis v. Ferguson*, supra, the court held that, as commonly understood and accepted, the expression "traveling expenses" comprehends *transportation costs* and other charges reasonably incident thereto incurred while on journey, including lodging, food and kindred expenses. By way of contrast, the second half of Section 2253 provides specifically for "actual transportation expenses," plus "actual and necessary expenses incurred in holding court" of "not more than ten dollars per day." It is quite apparent that the General Assembly employed "transportation expenses" in its restricted sense and intended that food and lodging should be included within the ten dollars per day limitation for "actual and necessary expenses incurred in holding court."

Since it is the customary practice of the Common Pleas Courts to begin their sessions at 9:00 A. M. or 9:30 A. M. each day, and since in many cases it is impracticable, if not impossible, for a judge of another

county to leave his place of residence and proceed to the assigned county before such time, it is often necessary for such judge to travel to the assigned county the day before the court hearing. In addition to his actual transportation expenses," in the sense of railroad fare, bus fare or a mileage allowance for driving his own car, such judge necessarily incurs "actual and necessary expenses" for meals and lodging. Are such expenses "incurred in holding court under such assignment" within the purview of Section 2253, General Code? Clearly, the statutory language does not limit such expenses to those incurred while actually holding court. If it did, even on days of holding court, the judge would not be entitled to meals or lodging since the meals would not be consumed while actually holding court and he would not actually be holding court during his stay in a hotel. Clearly, what the Legislature intended was that such judge should be paid his actual transportation expenses and, in addition thereto, his actual and necessary expenses for lodging and meals, not in excess of \$10.00 per day, to the extent that such was necessary in order to hold court in the county of assignment. Such expenses necessarily incurred the day before are incurred in order to hold court and, thus, are "incurred in holding court under such assignment."

Having so concluded, I find it necessary to overrule Opinion No. 2142, Opinions of the Attorney General for 1950, to the extent that it holds that Section 2253 of the General Code does not authorize the payment, not to exceed \$10.00 per day, for a judge's "actual and necessary expenses" incurred by a judge who finds it necessary to leave his place of residence on the day preceding his assignment to another county.

In so far as the per diem payment of \$20.00 per day is concerned, Section 2253, provides "each judge of the court of common pleas who is assigned by the Chief Justice by virtue of section 1469 of the General Code, to aid in disposing of business of some county other than that in which he resides shall receive twenty dollars per day for each day of such assignment * * *." What is meant by "each day of such assignment?" It is my opinion that by such language the Legislature intended that such judge would be paid \$20.00 for each day of work in aiding in disposing of business of such county. In other words, the judge is entitled to such payment only for those days in which he is performing the official duties of such assignment and is not entitled to such payment for days in which he is engaged only in travel. In such conclusion, I am in agreement with the opinion expressed by my predecessor in the second paragraph of the

syllabus of said Opinion No. 2142, Opinions of the Attorney General for 1950.

Your second question is whether a judge assigned to a county in which he does not reside, pursuant to Section 1469, General Code, may receive the per diem amount of \$20.00 per day for days physically spent in his own county of residence in arriving at his conclusions and preparing his decisions and opinions. I understand that, based on the 1950 opinion of my predecessor, your office has taken the position that the per diem payment of \$20.00 can not be paid for such days of service. From an examination of this 1950 opinion, however, I do not find that such question was considered by the then Attorney General.

An examination of Section 1469, General Code, reveals that the Chief Justice is authorized to "assign a judge or judges from another county or counties in the state to aid in the disposition of such business." Likewise, it will be noted that Section 2253 used the words, "to aid in the disposition of such business" and provides for the payment of "twenty dollars per day for each day of such assignment."

The answer to your question appears to lie in the determination as to whether such judge is still on "assignment" and is aiding "in disposing of business of some county other than that in which he resides."

No one can deny that research, study and preparation of opinions and decisions by such judge in or out of his home county on matters submitted to him as a judge of the Court of Common Pleas in a county in which he does not reside and to which he has been assigned is an aid in the disposition of such other county's business. The clear meaning of the statutory provision is that such assigned judge is to be paid for judicial services rendered for such other county. I find nothing in the statute providing that such services must be rendered within the geographical confines of the county of assignment. Aside from personal reasons, there may well be official reasons for a judge to follow this course. He may have a better research library in his home county or at least one with which he is more familiar, thus expediting his work. By remaining in his home county he may desire to lessen the expenses of transportation, meals and lodging which would otherwise have to be paid by the county of assignment.

Your third question is whether the judge so assigned is authorized to receive the payment of his "transportation expenses," "actual and neces-

sary expenses incurred in holding court," and "the per diem amount of twenty dollars per day" if, for any reason, connected with the matters pending before him, he is required to return to the county of assignment. Under such situation, you also request my opinion as to whether such judge may receive the same payment on the day preceding such hearing. I can see no distinction between the right of such judge to receive such payment for his first travel to the county of assignment and any subsequent return to such county required to dispose of the matter pending before him or of those matters later assigned to him and my answer to your first question applies equally to your third question.

Your last question relates to the payment to be made to a common pleas judge assigned by the Chief Justice to aid in the disposition of the business of the Court of Common Pleas of a county not his residence when the visiting judge elects, instead of remaining in such assigned county during his full period of assignment, to go back and forth to his place of residence.

In such instance, of course, the judge necessarily would reside within a comparatively short distance from the county of assignment and would not incur any expense for lodging. Having each day performed the judicial business of the county of assignment as an aid in disposing of business of such county, he obviously would be entitled to receive his per diem of \$20.00. If approved by the county commissioners as to amount, I know of no reason why he would not be entitled to his "actual transportation expenses" and his "actual and necessary expenses incurred in holding court under such assignment" which, in this case, would be limited basically to his meals.

In connection with all four of your questions, it should be pointed out that the expenses of such judge, both his "actual transportation expenses," and his "actual and necessary expenses incurred in holding court under such assignment" not to exceed \$10.00 per day, must be allowed by the county commissioners under Section 2460, General Code, before they are paid. In Opinion No. 3451, Opinions of the Attorney General for 1931, page 1004, it was held, as stated in the syllabus:

"1. The twenty dollars per day allowed to a common pleas judge under Section 2253, General Code, for services in a county other than his residence, is fixed by law, and does not require the commissioners to allow same under Section 2460, General Code.

“2. The expenses of such judge are not fixed by law or by any person or tribunal, and therefore should be allowed by the county commissioners under Section 2460, General Code, before they are paid.”

I am in full agreement with the conclusions there reached.

Since all such expenses are subject to the approval of the county commissioners before payment, it would appear that such county commissioners are in the position of checking any possible abuse of this privilege of the judge to go back and forth each day to his place of residence. In the exercise of their sound discretion, such commissioners could withhold their approval where such daily travel would unduly increase the total expense to the county of assignment.

In conclusion, it is my opinion that :

1. Where a common pleas judge, assigned by the Chief Justice by virtue of Section 1469, General Code, to aid in disposing of the business of some county other than that in which he resides, finds it necessary to leave his county of residence on the day preceding the day set for holding court pursuant to such assignment, Section 2253, General Code, authorizes the payment of “his actual transportation expenses,” upon approval by the county commissioners.

2. Where on such preceding day such judge has incurred expenses for meals and lodging while absent from his county of residence, Section 2253, General Code, authorizes the payment of not more than \$10.00 per day for such meals and lodging as “his actual and necessary expenses incurred in holding court under such assignment,” upon approval of the county commissioners. Opinion No. 2142, Opinions of the Attorney General for 1950, page 551, overruled in part.

3. Under such circumstances, such judge is not entitled, by Section 2253, General Code, to per diem compensation of \$20.00 for days of travel in which he is not actually engaged in judicial duties in aiding in disposing of the business of the county of assignment.

4. A common pleas judge, assigned by the Chief Justice by virtue of Section 1469, General Code, to aid in disposing of the business of some county other than that in which he resides, is aiding in disposing of the business of such other county on all days when, pursuant to such assignment, he is engaged in the judicial business of such other county, whether

or not such be performed within the geographical limits of such other county, and, thus, is entitled, pursuant to Section 2253, General Code, to receive \$20.00 for each day of such assignment.

5. A common pleas judge, assigned by the Chief Justice by virtue of Section 1469, General Code, to aid in disposing of the business of some county other than that in which he resides, and who elects to go back and forth from his residence to the county of assignment each day of such assignment, is authorized by Section 2253, General Code, upon the approval of the county commissioners, to receive "his actual transportation expenses," and "his actual and necessary expenses incurred in holding court under such assignment" not in excess of \$10.00 per day. Such judge is also entitled to receive \$20.00 per day for each day he engages in the judicial business of such other county pursuant to such assignment.

Respectfully,

C. WILLIAM O'NEILL
Attorney General.