

**OPINION NO. 69-108****Syllabus:**

The county auditor is not precluded from making payments of salary to the humane society agents, pursuant to Chapter 1717, Revised Code, when such salary is in arrears for prior years, but rather, is obligated by Section 1717.07, Revised Code, to make such payments, when funds have been properly appropriated for such purpose by the county commissioners.

To: Fred V. Skok, Lake County Pros. Atty., Painesville, Ohio  
By: Paul W. Brown, Attorney General, August 27, 1969

I have before me your request for my opinion which asks:

"Is the County Auditor precluded from making payments of salary to the Humane Society employees under Chapter 1717, when such salary is in arrears for prior years?"

You have also informed me that the money for these salary payments had been appropriated by the county commissioners in the respective prior years, and that such salary amounts had been approved by the county probate judge in those years, pursuant to Section 1717.07, Revised Code. However, the funds appropriated for such salaries had been exhausted prior to full payment. You mention, finally, that the county commissioners have reappropriated the money this year, and the county auditor doubts the legality of the payment of such arrearages.

Section 1717.07, Revised Code, regarding the salaries of humane society agents, reads:

"Upon the approval by the mayor of a municipal corporation of the appointment of an agent under section 1717.06 of the Revised Code, the legislative authority of such municipal corporation shall pay monthly to such agent, from the general revenue fund of the municipal corporation, such salary as the legislative authority deems just and reasonable. Upon the approval by the probate judge of a county of such an appointment, the board of county commissioners of such county shall pay monthly to such agent, from the general revenue fund of the county, such salary as the board deems just and reasonable. Such board and such legislative authority may agree upon the amount each is to pay such agent monthly. The salary to be paid monthly to such agent by the legislative authority of a village shall be not less than five dollars; by the legislative authority of a city, not less than twenty dollars; and by the board of county commissioners of a county, not less than twenty-five dollars. Not more than one such agent in each county shall receive remuneration from the board under this section."

Section 319.16, Revised Code, which generally prescribes the functions of the county auditor regarding the outlay of county funds, provides:

"Except as to moneys due the state which shall be paid out upon the warrant of the auditor of state, the county auditor shall issue warrants on the county treasurer for all moneys payable from the county treasury, upon presentation of the proper order or voucher for the moneys, and keep a record of all such warrants showing the number, date of issue, amount for which drawn, in whose favor, for what purpose, and on what fund. The auditor shall not issue a warrant for the payment of any claim against the county, unless it is allowed by the board of county commissioners, except where the amount due is fixed by law or is allowed by an officer or tribunal so authorized by law."

The courts have long considered the above delineated duties of the county auditor as being ministerial, or nondiscretionary, in character. Putnam County v. Allen County, 1 Ohio St. 322 (1853); Kloeb v. Mercer County, 4 C.C. (N.S.) 565, 26 C.C. 152 (1904). Although the auditor is permitted to exercise reasonable judgment and prudence in issuing warrants, he cannot lawfully refuse to issue a warrant which has been duly and legally allowed and authorized by the county commissioners because he disagrees with the board making the allowance or with the propriety of it. State, ex rel. Manix v. Auditor, 43 Ohio St. 311 (1885); Hoel v. Goubeaux, 110 Ohio St. 287 (1924).

Section 5705.46, Revised Code, authorizes funds to be paid by the county for current payrolls only, and no explicit statutory authority exists for payment of salary arrearages for prior years. But the question of the payment of salary arrearages has been considered by my predecessors. The text of Opinion No. 2616, Opinions of the Attorney General for 1950, accurately summarizes the thought on this problem as expounded by my predecessors until 1950, at pages 835-836.

"It is a general principal of law that public funds can be disbursed only by clear authority of law and upon compliance with statutory provisions relating thereto. (32 O. Jur. 734, Public Funds § 11.) On this premise, as then embodied in Article X, Section 5, of the Constitution of Ohio, the then Attorney General expressed his opinion in 1931 Opinions of the Attorney General, No.

3729, that the salary of a secret service officer appointed under Section 2915-1, General Code, cannot be paid out of the general fund of the county on the warrant of the county auditor when there has been no appropriation made for his salary by the county commissioners.

In the case of *Jenkins v. The State, ex rel. Jackson County Agricultural Society*, 40 O. App. 312, the Court of Appeals for Jackson County, in considering a question involving the benefits accorded to an agricultural society by Section 9894, General Code, held as disclosed by the third branch of the syllabus as follows:

"'In preparing an appropriation measure under Section 5625-29, General Code the taxing authority is bound to provide first for all those expenditures made imperative by statute.'"

"The holding in the *Jenkins* case, *supra*, was in harmony with the case of *State, ex rel. Justice v. Thomas*, 35 O. App. 250, wherein a distinction was drawn with regard to the appropriation for compensation of employes appointed or employed by county auditors, county treasurers, probate judges, sheriffs, clerks of courts, surveyors, and recorders on the one hand, and that of a criminal court bailiff and court constable of the Common Pleas Court who is appointed and whose compensation is fixed by the Common Pleas Court judge. At page 256 of the aforesaid report the court say:

"\* \* \* 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 a parity with a fixing by law.'"

(Emphasis added.)

I am of the opinion that the payment of the salary for a county humane society agent pursuant to Section 1717.07, Revised Code, would be "made imperative by statute" as the phrase is used in the above-emphasized portion. It should also be noted at this

point, that the phrase "taxing authority" with respect to the county means the board of county commissioners, pursuant to Section 5705.01 (C), Revised Code.

It is subsequently stated in Opinion No. 2616, supra, at pages 836-838:

"With respect to the problem of the authority of county commissioners to appropriate funds for payment of compensation of county employes for prior years your attention is called to 1927 Opinions of the Attorney General, No. 76; 1933 Opinions of the Attorney General, No. 956; 1939 Opinions of the Attorney General, No. 798 and 1949 Opinions of the Attorney General, No. 290. Each opinion expressed the view that such appropriation could not be made to cover compensation for prior years. In the first three opinions the facts presented for consideration indicated that appropriations had been made to the respective offices for the purposes required during the prior years but that the sums so appropriated had been exhausted prior to the end of the fiscal year and no additional appropriations made. In the latter opinion I was confronted with the factual situation that the sum appropriated had not been used but had reverted to the general fund and had been reappropriated for another purpose. Common to each factual situation, however, was the fact that none of the expenditures sought to be made to cover such prior years were expenditures made imperative by statute.

"In the 1949 Opinion, just referred to, I indicated the possibility of an appropriation for expenditures made imperative by statute which accrued but were not paid in prior years.

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"In view of the determination in that opinion that the compensation of the coroner under consideration was not an expenditure made imperative by statute and the assumption that the amounts appropriated in prior years had been reappropriated after reverting to the general fund it was not necessary for me to express a definite opinion on the point. Upon further consideration of this

question at this time, particularly in view of the language employed in the Justice case, I am of the opinion that county commissioners are authorized to appropriate unexpended balances in the general fund which have accumulated in or reverted to that fund at the end of any prior fiscal year for salaries of county officers or employes whose salaries are fixed by law and have accrued in such prior fiscal year when such unexpended balance remains in the general fund unexpended or unencumbered in subsequent years."

From this rationale, the conclusion reached is stated in the second and third branches of the syllabus of Opinion No. 2616, supra:

"2. County commissioners are authorized to appropriate unexpended balances in the general fund which have accumulated in or reverted to that fund at the end of any prior fiscal year for salaries of county officers or employes whose salaries are fixed by law and have accrued in such prior fiscal year when such unexpended balance remains in the general fund unexpended or unencumbered in subsequent years.

"3. County commissioners have no authority to make appropriations for salaries fixed by law, which accrued in prior years, from other funds than those designated in the next preceding paragraph, as moral obligations."

In Opinion No. 472, Opinions of the Attorney General for 1952, after consideration of the rationale and holding of Opinion No. 2616, supra, it was stated at page 473:

"I am unable to agree with the conclusion that the taxing authority of a subdivision lacks the power to make an appropriation for a fixed liability of this character on their own initiative. It seems to me that the nature and validity of the claim is determinative of the power of the taxing authority in such a case. To hold otherwise would mean that an obligation fixed by statute was subject to the action or no action of the township trustees, the very effect condemned in the case of Jenkins v. The State, ex rel. Jackson County Agricultural Society, supra.

"The compensation of a township clerk being a liability fixed by law, I see no legal reason why such compensation, unpaid in prior years, cannot be paid in a current year by a board of township trustees out of funds not otherwise earmarked."

I am in full agreement with the above modification of the holding in Opinion No. 2616, supra. Relating this modification to the instant situation, I must necessarily conclude that the compensation of a county humane society agent is a liability fixed by law, and should be paid in a current year out of county funds "not otherwise earmarked."

Therefore, it is my opinion, and you are advised that the county auditor is not precluded from making payments of salary to the humane society agents, pursuant to Chapter 1717, Revised Code, when such salary is in arrears for prior years, but rather is obligated by Section 1717.07, Revised Code, to make such payments, when funds have been properly appropriated for such purpose by the county commissioners.