

Note from the Attorney General's Office:

1950 Op. Att'y Gen. No. 50-2616 was modified by 1969 Op. Att'y Gen. No. 69-108.

2616

1. SALARY—COUNTY SECRET SERVICE OFFICER—LIABILITY FIXED BY LAW.
2. COUNTY COMMISSIONERS—AUTHORIZED TO APPROPRIATE UNEXPENDED BALANCES IN GENERAL FUND—ACCUMULATED IN OR REVERTED TO FUND—END OF ANY PRIOR FISCAL YEAR—SALARIES OF COUNTY OFFICERS OR EMPLOYES WHOSE SALARIES ARE FIXED BY LAW AND HAVE ACCRUED IN SUCH PRIOR FISCAL YEAR—UNEXPENDED BALANCE REMAINS IN GENERAL FUND UNEXPENDED OR UNENCUMBERED IN SUBSEQUENT YEARS.
3. COUNTY COMMISSIONERS—NO AUTHORITY TO MAKE APPROPRIATIONS FOR SALARIES FIXED BY LAW—ACCRUED IN PRIOR YEARS FROM OTHER FUNDS THAN THOSE DESIGNATED IN NEXT PRECEDING PARAGRAPH AS MORAL OBLIGATIONS.

SYLLABUS:

1. The salary of a county secret service officer is a liability fixed by law.
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.

Columbus, Ohio, December 14, 1950

Hon Marvin A. Kelly, Prosecuting Attorney
Scioto County, Portsmouth, Ohio

Dear Sir:

You have requested my opinion in your recent letter reading as follows:

“Pursuant to G. C. 2915-1, the Prosecuting Attorney of Scioto County appointed a Secret Service Officer for the year

of 1945. The county commissioners made a temporary appropriation for all offices covering the month of January, 1945. Later appropriations were made for the remainder of the year, but the county commissioners failed to make any appropriation to pay for the services of the Secret Service Officer. A mandamus action was filed by the Prosecutor against the commissioners to compel them to appropriate and the commissioners defended on the grounds of 'no funds'.

"The Court of Appeals of this district found that in effect 'the commissioners could only be compelled to appropriate in case of funds available,' which finding was announced from the bench on or about the 15th day of November 1945 and journalized later.

"The Secret Service Officer performed services of his position as such officer for the months of January, February, March, April, May, June, July, August, September, October, up to the 15th day of November, 1945, but upon learning the decision of the Court of Appeals in the mandamus action, he left his job on November 15th, 1945.

"At the termination of employment of said Secret Service Officer a certain sum was paid from Sec. 3004 to apply upon the salary of the Investigator for the period from January to November 1945. There remains unpaid several hundred dollars, representing the salary of the Investigator, which is ordinarily paid from the general fund.

"We would like to see this claim paid because the services were rendered and if it is not a legal obligation, it most certainly is a moral obligation and this has been our position right along.

"Under date of September 26th, 1950, this office was requested by the commissioners to render an opinion whether or not claim may be paid.

"In view of the fact that this office instituted the mandamus action we feel that we should have your opinion on the matter as to whether or not this claim as presented to the commissioners, covered as above, may be paid either as a legal or as a moral obligation."

Provisions for the appointment and compensation of a county secret service officer are contained in Section 2915-1, General Code, referred to in your letter, which reads as follows:

"The prosecuting attorney may appoint a secret service officer whose duty it shall be to aid him in the collection and discovery of evidence to be used in the trial of criminal cases and matters of a criminal nature. Such appointment shall be made for such term as the prosecuting attorney may deem advisable,

and subject to termination at any time by such prosecuting attorney. The compensation of said officer shall be fixed by the judge of the court of common pleas of the county in which the appointment is made, or if there be more than one judge, by the judges of such court in such county in joint session, and shall not be less than one hundred and twenty-five dollars per month for the time actually occupied in such service nor more than one-half of the official salary of the prosecuting attorney for a year, payable monthly, out of the county fund, upon the warrant of the county auditor."

It will be noted that the secret service officer is appointed by the prosecuting attorney but his compensation is fixed by the Court of Common Pleas and payable from the general fund of the county. Your communication does not clearly indicate that the Court of Common Pleas fixed the salary of the secret service officer about whom inquiry is made, however, from the context it appears that in the mandamus action referred to the failure to so fix the salary was not used as a defense. It will be assumed, therefore, that his salary was so fixed.

It is a general principle 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.”

In considering a question of whether or not the county commissioners could curtail the expenses of the Common Pleas Court by omitting to appropriate the fund from which the compensation of a law librarian is paid the then Attorney General in 1941 Opinions of the Attorney General, No. 3681, held that the compensation of such law librarian when fixed by a court of Common Pleas, under authority of Section 3054, General Code, creates a fixed liability upon the county and one for which an appropriation must be made. (Also see 1941 Opinions of the Attorney General, No. 3721; 1937 Opinions of the Attorney General No. 1246.) Section 2915-1, *supra*, is similar to that of said Section 3054 in that the compensation of both the secret service officer and law librarian are provided by the respective legislative enactments to be fixed by the common pleas court and both are appointed by an authority other than the court. It follows that the compensation of the secret service officer is an expenditure that is, in the words of the Jenkins case, *supra*, “made imperative by statute”. The doctrine in said case, however, is limited in that county commissioners may not appropriate from the general fund in excess of the total of the estimated revenue as certified by the budget commission or, in case of appeal, by the Board of Tax Appeals. (1941 Opinions of the Attorney General, No. 3681; 1933 Opinions of the Attorney General, No. 974.)

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 At-

torney 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. Commencing on page 69 of the report of the opinions for that year I said:

“Section 5625-32, General Code, provides among other things, as follows:

‘ * * * At the close of each fiscal year, the unencumbered balance of each appropriation shall revert to the respective fund from which it was appropriated and shall be subject to future appropriations; provided, however, that funds unexpended at the end of such fiscal year and which had theretofore been appropriated for the payment of performance of obligations unliquidated and outstanding, shall not be required to be reappropriated, but such unexpended funds shall not be included by any budget making body or board or any county budget commission in estimating the balance or balances available for the purposes of the next or any succeeding fiscal year.’

“This section, which is contained in the Uniform Tax Levy Law, commonly called the Budget Law, together with Section 5625-29, would appear to prevent an appropriation by the taxing authority for the purpose of paying compensation to a county officer for any previous year. I am not of the opinion, however, that such a broad conclusion could be reached in every instance. The question of the effect of the reversion of unencumbered balances of funds appropriated for the common pleas court of Marion county, Ohio, was raised in the justice case, *supra*, and the court at page 258 say:

‘We are of the opinion that the reverting of the unencumbered balances would not in itself prevent the granting

of the relief prayed for by the relator. It is probable that the balance of more than \$200, which the record disclosed was unexpended in the general fund, has reverted to that fund, and that there is no other claim against it.'

"While the foregoing action involved the question of an appropriation for a county employe and did not involve the question of the authority or power of the taxing authority to appropriate money for a county officer's salary for a prior fiscal year, it indicates, when taken in connection with the duty imposed upon the county commissioners that they must provide for the fixed salaries of such officers that in certain situations such appropriations may be authorized."

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 the context of your letter it would appear that no unexpended or unencumbered funds remained or reverted to the credit of the general fund of your county at the end of the fiscal year 1945, or if any so remained they have since been expended or encumbered. Section 2460, General Code, suggests itself as a possible authority for the making of an appropriation to pay the claim of the former secret service officer. This section reads as follows:

"No claims against the county shall be paid otherwise than upon the allowance of the county commissioners, upon the warrant of the county auditor, except in those cases in which the amount due is fixed by law, or is authorized to be fixed by some other person or tribunal, in which case it shall be paid upon the warrant of the county auditor, upon the proper certificate of the person or tribunal allowing the claim. No public money shall be disbursed by the county commissioners, or any of them, but shall be disbursed by the county treasurer, upon the warrant of

the county auditor, specifying the name of the party entitled thereto, on what account, and upon whose allowance, if not fixed by law.”

However, this section was under consideration in the Justice case, supra, and the Court, at page 253, said, with respect thereto :

“The exception, it will be noted, includes both those cases where the amount is fixed by law or where it is authorized to be fixed by law.”

It follows that said section is not available to authorize an appropriation for payment of the claim of the secret service officer.

With reference to the suggestion that said claim may be allowed as a moral obligation I am apprised of no provision of law which would authorize appropriations for such purposes. County commissioners are creatures of statute and as such are limited in their powers to those expressly delegated to them by statute or necessarily implied therefrom. I am not unmindful of the recognition of the principle of a moral obligation as applied in the case of County Commissioners v. Hunt et al., 5 O. S. 488, however, this case not only was decided prior to the tightening of the laws relating to budgetary procedures but involved claims which today could only be considered under authority of the above quoted Section 2460.

In arriving at the conclusions hereinbefore expressed I have not been unmindful of the language in the Jenkins case, supra, at page 315, which reads as follows :

“* * * 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. * * *”

(Emphasis added.)

If they are fixed and inescapable liabilities at the time they accrue it seems that their character could not be changed at any subsequent date merely by the passage of time, except in so far as they may be barred by a statute of limitations. The point which I wish to stress is that the conclusions reached herein are necessarily based upon the lack of power vested in the county commissioners and not upon the nature or validity of the claim. Consequently this opinion is limited to the power of the

commissioners to make an appropriation therefor upon their own initiative and is not to be construed to bar an appropriation to pay any final judgment which might be recovered thereon in a court of law.

In conclusion, therefore, you are advised, in the light of the foregoing, that it is my opinion that :

1. The salary of a county secret service officer is a liability fixed by law.
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.

Respectfully,

HERBERT S. DUFFY,
Attorney General.