

1912.

APPROVAL, CONTRACT BETWEEN THE STATE OF OHIO AND THE JOS. L. SKELDON ENGINEERING COMPANY, TOLEDO, OHIO, FOR THE CONSTRUCTION OF ENGINE AND GENERATOR, FOR OHIO PENITENTIARY, COLUMBUS, OHIO, AT AN EXPENDITURE OF \$68,056.00—SURETY BOND EXECUTED BY THE UNITED STATES FIDELITY AND GUARANTY COMPANY.

COLUMBUS, OHIO, March 29, 1928.

HON. JOHN E. HARPER, *Director of Public Welfare, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval a contract between the State of Ohio, acting by the Department of Public Welfare, (Ohio Penitentiary) and the Jos. L. Skeldon Engineering Company of Toledo, Ohio. This contract covers the construction and completion of 1-2000 KW Engine and Generator complete with 36 x 60 x 48 Hamilton Corliss direct connected to a 40° Westinghouse Generator at 100 R. P. M., complete with switchboard, and calls for an expenditure of sixty-eight thousand and fifty-six dollars (\$68,056.00).

You have submitted the certificate of the Director of Finance to the effect that there are unencumbered balances legally appropriated in a sum sufficient to cover the obligations of the contract. Inasmuch as the engine and generator covered by this contract do not constitute a public building or structure within the purview of Section 12 of House Bill No. 502, the consent of the Controlling Board to the expenditure is unnecessary. In addition, you have submitted a contract bond upon which the United States Fidelity and Guaranty Company appears as surety, sufficient to cover the amount of the contract.

You have further submitted evidence indicating that plans were properly prepared and approved, notice to bidders was properly given, bids tabulated as required by law and the contract duly awarded. Also it appears that the laws relating to the status of surety companies and the workmen's compensation have been complied with.

Finding said contract and bond in proper legal form, I have this day noted my approval thereon and return the same herewith to you, together with all other data submitted in this connection.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

1913.

COUNTY COMMISSIONERS—AUTHORITY TO APPROPRIATE FOR SALARY OF COURT CONSTABLE AND COURT BAILIFF—ABUSE OF DISCRETION.

SYLLABUS:

*A court constable appointed under authority of Section 1692, General Code, or a criminal bailiff appointed under the authority of Section 1541, General Code, can not be paid a salary in excess of the amount appropriated therefor; nor may the discretion of the board of county commissioners in fixing the amount of the appropriation for the*

*payment of the salaries of such employes be controlled so long as its discretion be exercised in such a manner as not to amount to an abuse thereof.*

COLUMBUS, OHIO, March 30, 1928.

*Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.*

GENTLEMEN:—This will acknowledge receipt of your communication as follows:

“We respectfully request you to furnish this department your written opinion on the following:

Under the provisions of Section 1693, General Code, the common pleas judge in a county where but one judge holds court is authorized to fix the compensation of the court constable appointed by him in a sum not exceeding \$1300.00 per year. Section 1541, G. C., authorizes such court to appoint a criminal bailiff, who shall receive such compensation as may be fixed by the judge. The Attorney General in his 1921 Opinions at page 317, holds that the two positions of court bailiff and court constable may be held by the same person.

Question: When the compensation of the person occupying the two positions has been fixed by the judge of the Common Pleas Court at \$175.00 per month and the county commissioners of the county have appropriated for such compensation \$150.00 per month, does the appropriation made by the commissioners govern or may they be required to appropriate the amount fixed by the court?”

By the terms of Sections 1692, 1693 and 1541, General Code, judges of Courts of Common Pleas in any county are authorized to appoint court constables and criminal bailiffs and fix their compensation to be paid from the county treasury, within certain limits, dependent on the number of judges that regularly hold court in the particular county.

As you state, it was held by this department, in an opinion reported in Opinions of the Attorney General for 1921, page 317, that the position and duties of a court constable and criminal bailiff may be held and performed by the same person, and that he may receive the salary for both positions, provided he is not paid twice for the same services.

The question arises whether or not the authority reposed in common pleas judges to fix the salary for the positions of court constables and criminal bailiffs is absolute, in the sense that the mere fixing of the salary entitles the incumbent, or incumbents, to receive it, regardless of whether or not money has been appropriated for its payment, and whether, if it has not been appropriated, the appropriating authority may be required to appropriate sufficient funds to cover these salaries, as fixed by the judges.

In the recent case of *State ex rel. Hile vs. Zangerle, Auditor, et al.* 115 O. S. 32, it was held that court constables, (and the same may be said of criminal bailiffs) appointed under authority of Section 1692, General Code, are employes, and not “officers.” They therefore are on the same basis, so far as appropriations for their salaries are concerned, as are other employes whose compensation is paid from the county treasury. Nor does the fact that the obligation to compensate these employes is incurred by virtue of the action of a common pleas judge who is a state officer, change the situation, as was pointed out in my recent Opinion No. 1799 rendered under date of March 3, 1928, and addressed to your department, wherein it was held:

"A common pleas judge is without authority to incur obligations on behalf of the county without complying with the terms of Section 5625-33, General Code."

The Constitution of Ohio, in Article X, Section 5, provides:

"No money shall be drawn from any county or township treasury, except by authority of law."

Sections 5625-1, 5625-29 and 5625-33, General Code, read in part as follows:

Sec. 5625-1. " \* \* \* 'Subdivision' shall mean any county, school district, \* \* \*

'Taxing authority' \* \* \* shall mean in the case of any county, the county commissioners; \* \* \* "

Sec. 5625-29. "On or about the first day of each year, the taxing authority of each subdivision or other taxing unit shall pass an annual appropriation measure and thereafter during the year may pass such supplemental appropriation measures as it finds necessary, based on the revised tax budget and the official certificate of estimated resources or amendments thereof. \* \* \* "

Sec. 5625-33. "No subdivision or taxing unit shall:

\* \* \* (b) Make any expenditure of money unless it has been appropriated as provided in this act. \* \* \* "

It will thus be seen that in pursuance of the constitutional provisions above quoted, the Legislature has "provided by law" that before compensation can be paid to court constables or criminal bailiffs two requirements must be met: First, the salary must be fixed by a common pleas judge, or the several judges, who make the appointment, acting jointly, and second, appropriations must be made by the county commissioners, as the taxing authority of the county, to cover the salary so fixed by the judge or judges.

Neither would be operative without the other, that is to say, the court constable or criminal bailiff could not be paid a salary even though the commissioners specifically appropriated money for the purpose, unless an appointment had been made and a definite salary fixed by the judge or judges. Nor could either be paid, even though his salary had been fixed by the court, unless appropriations are made therefor. The constitutional inhibition upon drawing money from a county treasury except as provided by law can not be met unless there be a concurrence in both the fixing of the salary and the making of appropriations to meet the same.

Neither the appropriating authority nor the court has such control over the other as to invade the discretionary powers of each other, except that the court is the judge in the first instance of its needs and if it sees fit to appoint a court constable or criminal bailiff, or both, the county commissioners can not defeat the power of the court in this respect by arbitrarily refusing to make any appropriation for the purpose of meeting the salaries, or making an appropriation so disproportionate to the real needs of the situation as to amount to an abuse of discretion. It has been pointed out in a number of previous opinions of this department that the discretion vested in appropriating authorities is a sound discretion and can not be exercised capriciously or arbitrarily but must be exercised in such a manner as not to amount to an abuse thereof.

I direct your attention to an Opinion No. 1168, rendered under date of October 19, 1927, wherein a question very similar to this was considered. In this opinion the question considered had reference to the payment of the salary of a chief probation officer whose salary is fixed by the judge of a juvenile court under authority of Section 1662, General Code. A number of previous opinions relevant to the question were reviewed, and it was held:

"A chief probation officer can not receive a salary in excess of the amount appropriated as provided in Sections 5625-29 and 5625-32 of the General Code by the county commissioners."

I am therefore of the opinion that a court constable appointed under authority of Section 1692, General Code, or a criminal bailiff appointed under the authority of Section 1541, General Code, can not be paid a salary in excess of the amount appropriated therefor; nor may the discretion of the board of county commissioners in fixing the amount of the appropriation for the payment of the salaries of such employes be controlled so long as its discretion be exercised in such a manner as not to amount to an abuse thereof.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

1914.

#### ANNEXATION OF TERRITORY TO CITY OR VILLAGE—DISPOSITION AS TO SCHOOL DISTRICTS DISCUSSED.

##### *SYLLABUS:*

*When territory is annexed to a city or village it thereby becomes a part of the city or village school district; and the territory remaining in the school district, of which such annexed territory was formerly a part, remains and constitutes the same school district which had existed before the annexation, regardless of the area of the territory remaining.*

COLUMBUS, OHIO, March 30, 1928.

HON. J. L. CLIFTON, *Director of Education, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your recent request for my opinion as follows:

"Under Section 4687, when a village school district is created within the territory of a former rural school district and less than 16 square miles would thereby be left of the rural school district, that territory is attached also to the village school district which is being formed.

We now have the question whether in any way the principle of this statute applies when part of the territory of a rural school district is annexed to a city school district, thereby leaving less than 16 square miles in the rural school district. In such a case, does the rural school district of that diminished size continue to exist, or does it, with the rest of the rural district as it did exist, join the city school district?"