

OPINION NO. 73-113**Syllabus:**

1. A municipality has authority to provide by ordinance for compensation of counsel assigned to represent indigents accused before the municipal court of violations of municipal ordinances;

2. Where the jurisdiction of the municipal court extends beyond the territorial limits of the municipality, the municipality has authority to compensate counsel assigned to represent indigent defendants only in cases involving violations of municipal ordinances.

To: David A. Cutright, Ross County Pros. Atty., Chillicothe, Ohio
By: William J. Brown, Attorney General, November 14, 1973

Your request for my opinion reads in pertinent part as follows:

Under the home rule powers as provided by the Constitution of the State of Ohio, Article

XVIII, Section 3, does a statutory form of city government have the authority to provide a fund for assigned counsel in misdemeanor cases under the Argersinger v. Hamlin Decision, 407 US 25 in the municipal court with county wide jurisdictions out of the general fund of the city. This inquiry seeks further clarification of recent Attorney General 72-095 where the syllabus precludes "other state fiscal officers" appropriating funds for this purpose.

In Opinion No. 72-095, to which you refer, the question was whether a board of county commissioners, or any other state fiscal officer, had emergency powers to meet the situation created by the decision of the United States Supreme Court in Argersinger v. Hamlin, 407 U.S. 25 (1972). That case held that, absent an intelligent waiver, no person can be convicted of any offense, whether felony or misdemeanor, which may result in a jail sentence, unless he has been represented in the proceeding by counsel. The General Assembly has made provision for payment of fees to counsel assigned to represent indigents in felony cases. R.C. 2941.50 and 2941.51. But there is no such provision for representation in those misdemeanor cases which may result in incarceration, and the Constitution of Ohio forbids the appropriation of money in the treasury except when specifically authorized by law. Accordingly, I concluded that

* * *until such time as legislation is enacted providing for the payment of counsel to represent indigents charged with crimes which could result in a jail sentence, neither the county commissioners nor a state fiscal officer can provide for such payments under emergency or any other powers. To do so would be to expend public monies without legislative authority.

Such legislation has been introduced in the form of bills creating the offices of county and state public defenders. Both are presently pending before committees. H.B. Nos. 106 and 107. Your question, however, has to do with proceedings in the municipal courts, and with the payment of assigned counsel out of the general fund of the municipality.

You ask whether, under its constitutional powers of home rule, a statutory form of city government has authority to pay assigned counsel in misdemeanor cases from its general fund. The Home Rule Amendment, Article XVIII, Section 3, granted to municipalities the "authority to exercise all powers of local self-government", and the Supreme Court has frequently held that this power extends to all matters which are, by nature, local and municipal in character and do not infringe upon that which is of general and state-wide concern. Perrysburg v. Ridgway, 108 Ohio St. 245, 250-259 (1923); Beachwood v. Board of Elections, 167 Ohio St. 369, 371 (1958); Cleveland Electric Illuminating Co. v. Painesville, 150 Ohio St. 2d 125, 129 (1968); Leavers v. Canton, 1 Ohio St. 2d 33 (1964); State, ex rel. Canada v. Phillips, 168 Ohio St. 191, 194-200 (1958); see also, State, ex rel. Toledo v. Lynch, 88 Ohio St. 71, 97 (1913), and Vaubel, Of Concern to Painesville - Or only to the State: Home Rule in the Context of Utilities Regulation, 33 Ohio St. L.J. 257, 259 (1972). The test to be applied was set forth in the Beachwood case in the following language (167 Ohio St. at 371):

To determine whether legislation is such

as falls within the area of local self-government, the result of such legislation or the result of the proceedings thereunder must be considered. If the result affects only the municipality itself, with no extraterritorial effects, the subject is clearly within the power of local self-government and is a matter for the determination of the municipality. However, if the result is not so confined it becomes a matter for the General Assembly.

It is true that the Constitution grants to the General Assembly the right to set limits on the authority of municipalities to levy taxes and to borrow money. Article XIII, Section 6; Article XVIII, Section 13. But the Supreme Court has pointed out that this gives the General Assembly no right to dictate to a municipality how it shall spend the money in its treasury for purely local purposes. In State, ex rel. Mullin v. Mansfield, 26 Ohio St. 2d 129, 132 (1971), the Court said:

The powers of the city council of a non-charter city to establish the number of employees to be employed in any city department and the pay scale classification of such employees is a basic and fundamental power of local government.

And in State, ex rel. Cronin v. Wald, 26 Ohio St. 2d 22, 27 (1971), the Court said:

Although the General Assembly can, under the provisions of Section 13, Article XVIII, and Section 6, Article XIII, of the Ohio Constitution, limit a municipality's aggregate indebtedness, it may not, under these sections, prescribe the manner and method which a municipal corporation must follow in setting the actual monetary amount of expenditures which could be made without councilmanic authorization.
* * *

Consequently, Opinion No. 72-095 is not controlling in the situation you present. In the two statutes upon which that opinion relied, R.C. 2941.50 and 2941.51, the General Assembly limited to felony cases alone the right of the counties and the state to compensate counsel appointed for indigent defendants. But this does not limit the power of a municipality to provide by ordinance for compensation of counsel in purely local misdemeanor cases.

Furthermore, in the light of the requirements of the Argensinger case, such an ordinance would obviously provide for the expenditure of public funds for a public purpose. And even if the ordinance were to be considered an exercise of the police power, which is highly doubtful in view of the language of State, ex rel. Canada v. Phillips, supra, 168 Ohio St. at 197, it would simply be complementary to the general provisions of state law in R.C. 2941.50 and 2941.51 rather than in conflict with them. Cleveland v. Raffa, 13 Ohio St. 2d 112, 115 (1968); Opinion No. 73-039, Opinions of the Attorney General for 1973; Opinion No. 73-098, Opinions of the Attorney General for 1973. Finally, I see no basis for a contention that such an ordinance would constitute an improper interference by the municipality with the jurisdiction of the courts. See State, ex rel. Cherrington v. Hutsinpiller, 112 Ohio St. 468, 474 (1925); State,

ex rel. Ramey v. Davis, 119 Ohio St. 596, 602-603 (1929); Cupps v. Toledo, 170 Ohio St. 144 (1959); Akron v. Smith, 14 Ohio St. 2d 247 (1968).

You note, however, that your municipal court has county wide jurisdiction. R.C. 1901.02. The court has jurisdiction over both state and municipal offenses, R.C. 1901.20, and the judge's compensation is paid in part by the city, and in part by the county, R.C. 1901.11. In the light of the test announced in the Beachwood case, supra, I conclude that the city may provide by ordinance that assigned counsel be compensated only in cases involving violations of municipal ordinances. The distinction between state and local offenses is carefully preserved in the Revised Code. See e.g., R.C. 1901.25 and R.C. 1901.31(F).

In specific answer to your question it is my opinion, and you are so advised, that:

1. A municipality has authority to provide by ordinance for compensation of counsel assigned to represent indigents accused before the municipal court of violations of municipal ordinances;
2. Where the jurisdiction of the municipal court extends beyond the territorial limits of the municipality, the municipality has authority to compensate counsel assigned to represent indigent defendants only in cases involving violations of municipal ordinances.