

2100.

VILLAGES—LEGAL COUNSEL—COMPENSATION, HOW FIXED—PREPARATION OF TRANSCRIPTS OF BOND ISSUES, DUTY OF VILLAGE CLERK—WHEN LEGAL COUNSEL AUTHORIZED TO ASSIST CLERK—WHEN AND HOW STENOGRAPHER TO ASSIST LEGAL COUNSEL MAY BE EMPLOYED.

1. *Compensation of the village legal counsel should be fixed by ordinance or resolution and may be a salary, or part salary and part for extra or additional services, at the direction of council, paid on itemized statements approved by council.*

2. *Certifying assessments to the county auditor, under section 3892 and 3905 G. C., and the preparation of transcripts of bond proceedings, under section 2295-3 G. C., are by law made duties of the village clerk, and payment to legal counsel for such services is unauthorized, but compensation for needed legal assistance in such duties may be provided.*

3. *Under section 4219 G. C. a village council may employ a stenographer to assist the legal counsel when in its judgment such services are needed, but such employment must be by resolution or ordinance, properly passed.*

COLUMBUS, OHIO, May 24, 1921.

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

GENTLEMEN:—Acknowledgment is made of the receipt of your letter and statement of facts, which are as follows:

“We are requesting your written opinion upon the following matters, and in view of the fact that the conditions herein described are in several villages which are now under examination we would appreciate an early reply.

We are enclosing herewith copy of Resolution No. 411 covering the employment of legal counsel for the village of Bedford, Ohio. You will note that the general compensation fixed is very small; and we respectfully advise that the miscellaneous work, which is paid under separate bills approved by council, runs into good money. We are respectfully asking the following questions:

QUESTION 1. Is the second provision of said resolution in so far as it provides such additional reasonable compensation as may be approved by council upon bills duly rendered, a legal conformity with the provisions of section 4220 of the General Code?

QUESTION 2. In view of the provisions of section 2295-3 G. C., may the village solicitor legally receive payments for services consisting of preparation of the transcript in the sale of bonds, such payments being special payments under the second provision of the resolution?

QUESTION 3. In view of the provisions of section 3892 and 3905 G. C., may the village solicitor receive payments for the preparation of the certifications of special assessments to be sent to the county auditor by the clerk, such payments being special payments under the second provision of the resolution?

QUESTION 4. May the village legally pay stenographer of the law firm with which the solicitor is connected for doing the stenographic work in connection with matters set forth in the preceding two questions, together with the stenographic work for other services which are special under the second provision of the resolution when there is no such position

provided for by the village council and no compensation fixed by the village council?"

"RESOLUTION: A resolution providing for legal counsel for the village of Bedford, for a period of one year.

Section 1. That L. R. Landfear be, and he is hereby employed as legal counsel of the village of Bedford, for the year 1920, upon the following terms and conditions, to-wit:

It shall be the duty of such counsel to attend all meetings of the council of the village; to prepare all resolutions and ordinances, contracts, bonds, transcripts of proceedings for the issuance of bonds, and all other instruments in writing in which the village may be concerned; to prosecute and defend all court proceedings, civil or criminal in which the village shall be either plaintiff or defendant; to prepare, on or before the second Monday in September, certificates to the county auditor, for the signature of the village clerk, of all the assessments levied by the council of said village; to act as legal adviser of the various officials, and to furnish to the village, or to such officials, legal opinions on such matters as may pertain to the affairs of the village, or to the powers or duties of such officials when requested in writing so to do.

Such legal counsel shall receive compensation for the performance of such services as follows:

First: For the preparation of resolutions, ordinances, bonds, certificates and other official documents, attendance at regular meetings of the council, advice and legal opinions, the sum of three hundred dollars (\$300.00) per year.

Second: For all other services, including attendance at special or adjourned meetings of council; preparation of transcripts of proceedings in the matter of the issuance of bonds; preparation of certificates of assessments, and all other proceedings in court, such additional reasonable compensation as may be approved by the council upon bills duly rendered.

Compensation herein provided shall be payable quarterly."

Section 4220 G. C. reads:

"When it deems it necessary, the village council may provide legal counsel for the village, or any department or official thereof, for a period not to exceed two years, and provide compensation therefor."

Under authority of this statute a village council may provide legal counsel for the village and its officers, for a term not longer than two years, and provide compensation therefor. The attorney-at-law thus selected becomes an employe of the village. He is not an elective officer. His compensation may be a certain stipulated salary, or he may be paid *per diem* for the work generally, on an itemized statement rendered by him, subject to the approval of the council. The manner in which payment for services rendered is made is discretionary with the council, since the law simply says "may provide compensation therefor."

Under the provisions of section 3809 G. C., the Burns law certificate is not required before contract is made with legal counsel. No reason is seen why an ordinance or resolution, such as your statement furnishes, may not be passed, stating the duties or services for which the salary shall be paid and stating those services for which extra compensation may be asked and allowed, on approval of council.

In *State vs. Commissioners*, 13 O. D. (N. P.) 97, the court says:

"Certainty as to the amount to be paid an officer for services is the

distinguishing feature of a salary. Compensation based upon a method of ascertainment producing different amounts at different times is not salary."

Thus it will be seen, *salary* and *compensation* have different legal significance, and it is believed a council may pay its legal adviser for certain services extra or additional compensation. Hence your first question is answered in the affirmative.

Your second and third questions may be considered together.

Section 2295-3 G. C. provides that "it shall be the duty of the clerk, or other officer having charge of the minutes of the council of any municipality * * * to furnish * * * a true transcript * * *," section 3892 G. C., that "the clerk of the council * * * shall certify such assessments to the county auditor * * *," and section 3905 G. C., that "the council may order the clerk or other proper officer of the corporation to certify any unpaid assessments or taxes to the auditor of the county in which the corporation is situated * * *"

Manifestly these statutes state duties to be performed by the clerk or other proper officer of a municipal corporation for the faithful performance of which such officer takes oath and receives pay.

In *State vs. Philbrick*, 13 O. D. (N. P.) 158, the court says:

"To entitle a person to salary he must actually perform duties; reporting for duty is not performing duty. Accordingly, an ordinance authorizing the payment of the salaries of certain officers who were laid off, but retained their badges, and performed no duty, merely reporting for duty, is invalid."

Again, these statutes are mandatory in form, and prescribe the duties of an elective officer of the municipality and as such they may not be delegated to another, at least, not to another who is merely an employe—an appointive officer of the village.

The village clerk may seek and obtain the advice of legal counsel in the preparation of transcripts of bond proceedings and in certifying assessments, because the ordinance contained in your statement so provides, salary being paid legal counsel for services of this character; but the legal counsel may not be paid to do and perform statutory duties imposed upon the clerk. Certain new duties may be imposed upon an officer or employe by ordinance or resolution, but in placing them upon an officer it has been held such duties must be appropriate and pertinent to the office. See *St. Marys vs. Rowe*, 2 O. N. P. (n. s.) 645. Transcribing a record or certifying an assessment is a clerical duty. Originally the facts of these statements were a part of the minutes of the council, written out by the clerk, and if the legal counsel may be required to prepare transcripts and certificates for the signature of the clerk, these being mere copies of the record, as well may he be required to keep the minutes of each meeting of the council, which is a plain duty of the clerk.

Village of Maple Heights vs. Holtz, Clerk, 100 O. S. 264, is a cause brought to compel the village clerk to certify certain assessments, he having refused to do so because affected lot and land owners had not been notified of such assessments. A writ of mandamus was refused in this case. Clearly, certifying assessments is the duty of the village clerk.

In *Gas and Water Company vs. Elyria*, 57 O. S. 374, the court says:

"Council has only the powers granted, and no others; its proceedings must be within the powers conferred and in substantial conformity to the statutes regulating it."

It is herein held, in answer to your first question, that the contract is for serv-

ices permitted by law and one that must be construed as a contract for legal services. The ordinance inaptly expresses its intention to employ legal service, not clerical service. It does not intend to say that the mere clerical work of the village clerk is to be imposed upon the legal counsel. To illustrate, in the paragraph reciting the duties of the legal counsel is found, "It shall be the duty of such counsel to attend all meetings of the council," while in the second clause, stating extra services for which additional compensation shall be paid on bills rendered, "attendance at special or adjourned meetings" is mentioned. *All meetings* include special and adjourned meetings, but for the latter extra pay is intended and allowed. Again, it is required that the legal counsel shall prepare all instruments in writing for the village, to-wit, resolutions, ordinance, contracts, bonds, transcripts of bond issue proceedings, certificates of all assessments to be sent to the county auditor, and pleadings in civil and criminal cases. For the preparation of transcripts of bond issue proceedings, certificates of assessments and other documents in court proceedings he is to receive extra pay. This evidently means the legal work in the preparation of them. It is intended in these matters that they shall be over the signature of the clerk when such signature is a requirement of the statute.

Improper certifying of assessments for public improvements upon benefited lots and lands is a fruitful source of litigation and correct procedure in that respect is not usually an accomplishment of village clerks, but falls within the ken of a legal adviser because of his skill in such matters.

The importance of transcripts of proceedings for the issuance of bonds is well stated in an opinion of a former attorney-general—Opinions of the Attorney-General, 1914, Vol. II, p. 1434—which says:

"As to bonds issued and sold since the date when this act became effective, which would be some time in July, 1913, it is clear that the act has a powerful influence upon the rights of the original purchasers. On the one hand, should they accept the issue without any transcript at all, they would buy at their peril and could not be bona fide holders; again, if the information is sufficient to 'show whether or not such a bond issue is within any debt or tax limitation imposed by law,' and itself discloses the invalidity of the bonds, the original purchasers cannot have the status of bona fide holders, and while the bonds were in their hands they could not be regarded as valid obligations of the municipality.

On the other hand, if the transcript should be false and should show that an issue of bonds, in point of fact invalid because of the violation of the debt limit, was valid, then, in my judgment, such a recital, except possibly as to the facts described in the former opinion (as being those, with notice of which all persons are charged) would be one upon which the original purchaser could rely."

Such transcript is of the utmost importance to the village. Improperly prepared, it may be fruitful of grave consequences. The council in its contract with the legal adviser of the village had not in mind simply the doing of the clerical work, but intended rather the legal work in preparing the transcripts, and the ordinance sufficiently expresses that idea.

Our information in this matter does not show any attempt on the part of either officer to assume the duties of the other, and, construing the ordinance alone, to make a finding against the legal adviser for the return of compensation paid for the matter you inquire about in the second and third questions would be in violation of a legal agreement under which he has rendered services for which it is intended that he shall be paid; and paid, not for actually doing the clerk's work, but for doing work in special matters requiring a knowledge of the law.

Bond issues are of infrequent occurrence, and the same may be said of the certifying of assessments, in each of which skill and knowledge of the law are necessary. Usually the clerk is not equipped to prepare such documents in a legal way.

The conclusion, therefore, in answer to your second and third questions, is that the performing of statutory duties of the clerk may not by ordinance be required of the legal counsel, nor are such duties those for which additional reasonable compensation may be paid him, or duties that are proper to be imposed upon him as such legal counsel, but for the legal directions necessary to prepare or in preparing them compensation may be paid, and such the ordinance intends.

Under section 4219 G. C., it is believed a village council has authority to employ a stenographer just as it has power in the conduct of the affairs of the village to employ needed clerks, etc. Where the legal counsel requires the assistance of a stenographer in doing the work for which he may receive extra compensation, under the second provision of the ordinance in your statement of facts, such services should be included by him in the bill rendered to the council just as the costs of such services are included by him in bills rendered to his clients. Unless the terms of his employment plainly state that compensation shall be paid for the services of a stenographer in preparing his work generally, at the direction of the council, a bill for such services should be rejected.

Section 4224 G. C. provides that "the action of council shall be by ordinance or resolution." Other sections provide for semi-annual appropriations for the expense of maintaining village government, and still another section provides that orders shall not be drawn for the payment of claims against the village when the amounts appropriated have become exhausted. It is the evident intention of these provisions of the law that the affairs of the village shall be conducted in a business-like way and with as much economy as efficiency permits.

The roundabout manner which you describe of paying for the services of a stenographer, though done in good faith, is a method of obtaining funds from a public treasury that the sections of the law to which reference has just been made are intended to safeguard, and such method has not the sanction of law or public policy and so should not be looked upon with favor.

If the services of the stenographer mentioned in your question are to be paid for by the village, an ordinance to that effect should be passed, in the absence of which your fourth question must be answered in the negative.

Respectfully,

JOHN G. PRICE,
Attorney-General.

2101.

APPROVAL, BONDS OF CITY OF DELPHOS, OHIO, IN AMOUNT OF \$5,000
FOR FUNDING DEFICIENCIES IN OPERATING REVENUES.

COLUMBUS, OHIO, May 24, 1921.

Industrial Commission of Ohio, Columbus, Ohio.