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COUNTY OFFICERS ENUMERATED IN SECTIONS 2637, 2981 G.C. INCLUDING COUNTY TREASURER, AUTHORIZED TO APPOINT AND EMPLOY CERTAIN DEPUTIES AND EMPLOYEES — COUNTY COMMISSIONERS MAY NOT LAWFULLY INTERFERE WITH OR LIMIT SUCH OFFICERS IN SELECTION AND APPOINTMENT OF SUCH DEPUTIES AND EMPLOYEES — RESOLUTION TO DIMINISH COMPENSATION OF DEPUTY OR EMPLOYEE WHO IS SPOUSE OR MEMBER OF APPOINTING OFFICER'S FAMILY, NOT LAWFUL — REMEDY WHERE SUCH RESOLUTION PASSED — COURTS INTERFERE ONLY WHERE COUNTY OFFICERS USURP OR EXERCISE UNLAWFUL POWER, FRAUD OR ABUSE OF DISCRETION WHICH AMOUNTS TO FRAUD.

SYLLABUS:

1. *Under the provisions of Sections 2637 and 2981, General Code, the county treasurer, as well as the other county officers enumerated in Section 2981, is authorized to "appoint and employ necessary deputies, assistants, clerks, bookkeepers and other employees" and fix their compensation, provided, however, that such compensation shall not exceed in the aggregate "the amount fixed by the commissioners for such office." The county commissioners may not lawfully interfere with or limit the county treasurer, or other county officers enumerated in Section 2981, General Code, in the selection and appointment of his deputies and employees, by providing by resolution that the appropriation for deputy and clerk hire shall be reduced to the extent of fifty per centum of the amount appropriated for any deputy or employee appointed who is the spouse or a member of the appointing officer's family.*

2. *In case such a resolution be passed, a county treasurer, or other county officer, may continue to pay the salary or compensation fixed by him for his deputies and employees; provided, the compensation of such deputies and employees may not exceed in the aggregate "the amount fixed by the commissioners for such office;" and provided, further, a county treasurer, or other county official may not, during the first six months of any year, expend for deputy and clerical hire more than six tenths of the annual appropriation made to his office for such purpose.*

3. *The courts will not attempt to control the discretion of county commissioners, and other officers, boards and commissions having quasi-judicial or discretionary powers and authority, and will interfere only where there is an usurpation or unlawful exercise of power, fraud or such gross abuse of discretion as amounts to fraud.*

Columbus, Ohio, March 24, 1941.

Honorable Erwin L. Clemens, Prosecuting Attorney,
Defiance, Ohio.

Dear Sir:

Your recent request for my opinion duly received, your letter reading as follows:

“Recently the county commissioners passed a resolution which provides as follows:

‘From and after January 6, 1941, the appropriation for any elected officer of Defiance County for the hiring of Clerks, Assistants, Stenographers, Deputies or other Employees, excepting the matron of county jail, or other county institutions, shall be reduced to the extent of 50% of the amount appropriated for any Clerk, Assistant, Stenographer, Deputy or other employee in the event said officer employs or hires his or her spouse or any other member of said officer’s family as a Clerk, Assistant, Stenographer, Deputy or other employee, and this reduction is to apply only to the respective position filled by a spouse of the officer or any other member of the officer’s family.’

The county treasurer employs his wife as his assistant and deputy and has demanded of me an answer on the following questions:

1. Exactly what legal status does the above resolution carry?
2. In case said resolution is without statute support, may I legally continue with the same pay basis for my deputies and clerks as heretofore?
3. In case the above mentioned Defiance County Commissioners shall, in attempting to enforce their resolution, limit my expenditure appropriation for the year 1941 to an amount insufficient to finish my elected term on the regular pay basis, and in case said appropriation so limited is exhausted prior to termination of my incumbency, then what procedure shall I follow in order to secure necessary funds to properly conduct my office

in respect to Ohio laws governing public offices, collection of legal taxes, issuance of sales stamps, etc.?

I would appreciate your opinion as to whether or not this resolution is valid as applied to the above designated questions."

Express authority for the appointment of one or more deputies and other employees by the county treasurer is contained in Sections 2637 and 2981, General Code. These sections read:

Section 2637:

"Each county treasurer may appoint one or more deputies, and he shall be liable and accountable for their proceedings and misconduct in office."

Section 2981:

"Such officers may appoint and employ necessary deputies, assistants, clerks, bookkeepers or other employees for their respective offices, fix their compensation, and discharge them, and shall file with the county auditor certificates of such action. Such compensation shall not exceed in the aggregate for each office the amount fixed by the commissioners for such office. When so fixed, the compensation of each duly appointed or employed deputy, assistant, bookkeeper, clerk and other employe shall be paid semi-monthly from the county treasury, upon the warrant of the county auditor. Each of such officers may require such of his employes as he deems proper to give bond to the state in an amount to be fixed by such officer with sureties approved by him, conditioned for the faithful performance of their official duties. Such bond with the approval of such officer, indorsed thereon, shall be deposited with the county treasurer and kept in his office." (Emphasis mine.)

Section 2981, *supra*, was enacted in the act of February 4, 1920, 83rd General Assembly (108 V. Pt. 2, 1203, 1216), the same act containing Section 2978, General Code, and the words "such officers" in Section 2981 refers to the county officers enumerated in Section 2978, including the county treasurer.

You will observe that not only is the county treasurer specifically authorized and empowered to appoint and employ the necessary deputies and other employees in the treasurer's office in the two sections of the General Code above quoted, that is, authorized and empowered to select such persons to be deputies and employees as he deems suitable and proper, but by the express terms of Section 2981, *supra*, he is also invested

with the power to "fix their compensation," with the limitation that such compensation "shall not exceed in the aggregate for each office the amount fixed by the commissioners for such office."

The law is stated thus at pages 299, 300, 442 and 443 of 11 Ohio Jurisprudence:

"The statute authorizes the probate judge, auditor, treasurer, clerk of courts, sheriff, surveyor, and recorder of each county to appoint and employ necessary deputies, assistants, clerks, bookkeepers, or other employees for their respective offices, fix their compensation, and discharge them, filing with the county auditor certificates of such action." (p. 299)

"The present statute authorizes the particular officer appointing or employing a deputy or assistant to fix his compensation, subject only to the limitation that the compensation of all the deputies, assistants, etc., in each office, shall not exceed, in the aggregate, the amount fixed by the county commissioners for such office. Under this scheme the board of county commissioners has nothing to do with the number of deputies, etc., to be appointed or employed, or with the amount to be paid any individual appointee or employee. These questions are left wholly to the several officers who make the appointments. On the other hand, the appointing officer can create no liability against the county for any compensation to his deputies, etc., except within the limits of the appropriation made by the commissioners. The county commissioners thus have power indirectly to regulate and limit the employment of deputies, etc., and it is undoubtedly their duty to exercise a sound discretion in allowing such amount as the public service requires, and at the same time restricting the expenditure of the public funds within reasonable limits." (p. 300)

"A county treasurer may appoint one or more deputies. Such a deputy is in no sense a public officer, but is a mere agent of the treasurer, and holds his position only during the pleasure of that officer. The treasurer is liable and accountable for the proceedings and misconduct in office of his deputies. For his own protection against loss arising from this cause, he must look to such assurance as he can obtain from them." (pp. 442-443)

In Opinion No. 3429, Opinions, Attorney General, 1926, p. 253, it was held as stated in the second branch of the syllabus:

"The county commissioners have no authority to fix the compensation of deputies, assistants, clerks and other employees of the officers mentioned in Section 2978, except that they may limit the aggregate amount which may be expended for such purpose."

In the opinion proper the cases of *In Re Application of Diemer for An Additional Allowance for Clerk Hire*, 17 O.N.P. (N.S.), 369, 25 O.D. (N.P.) 517 (1915); *County Commissioners of Henry County v. Rafferty, as County Auditor, and Fisk as County Treasurer*, 19 O.N.P. (N.S.) 97, 27 O.D. (N.P.) 47 (1916), and *Theobald v. The State of Ohio ex rel.*, 10 O.C.C. (N.S.) 175, 30 O.C.D. 414 (1907); affirmed without opinion, 78 O.S. 426 (1908), were cited and at page 256 it was said as follows:

“From the above cases and the sections relating to the appointment and compensation of deputies, etc., the conclusion follows that the duties and powers conferred upon the county commissioners authorize and require them to allow or disallow, regulate and limit the employment of deputies, etc., and the expenditure of public funds therefor to the actual requirements of the public service. The duties and powers so conferred on the board of county commissioners are not arbitrary and they must be used by such board of county commissioners with legal and not arbitrary discretion.

The officers mentioned in Section 2978 are authorized to employ necessary deputies, etc., to fix their compensation and to discharge them, and the authority of the county commissioners is limited to fixing the aggregate amount of money which shall be expended by such officers for deputies, etc. No authority is given to the county commissioners to say who shall be employed or how such aggregate amount shall be apportioned among the deputies, etc., or what the monthly salary of any deputy shall be.

* * * the total amount that may be expended for employes of the officers mentioned in section 2978 is limited to the aggregate amount which is appropriated by the county commissioners.
* * *

The headnote in the Henry County case is as follows:

“County commissioners are without power to fix the compensation of deputies and assistant clerks of county auditor, treasurer, probate judge and recorder. The authority to fix such compensation is vested in these several officers, with the limitation that the aggregate compensation to be paid in each office shall not exceed the amount allowed by the county commissioners for such offices.”

In the concurring opinion of Judge Wilson in the case of *Theobald v. State, ex rel.*, supra, it was said at page 181:

“* * * If, under the law, an officer should make application

to the board for assistance in the prescribed way, and be refused, then should he be physically unable himself to perform all the duties of the office because of their magnitude, the default would be not his, but that of the board. *It must act with legal, not arbitrary, discretion, in the bestowal or refusal of the fund.*

The public have a right to expect and demand a reasonable and proper regard, both by the officer and the board, for the amount of labor necessary to be performed in each office.

** * * It must not be overlooked that the officer fixes the compensation of each particular employe, as well as the number of employes. With that the board has nothing to do, save that it may limit the aggregate that may be thus expended. * * ** (Emphasis mine.)

Two opinions of like tenor and conclusions to Opinion No. 2429 (1926), *supra*, are Opinions Nos. 59 and 1339, Opinions, Attorney General, 1927, Vol. I, page 78, and Vol. IV, page 2432.

From the above discussion and authorities referred to, the following principles are clearly deducible.

1. Under the provisions of Sections 2637 and 2981, General Code, the county treasurer, as well as the other officers enumerated in Section 2981, "may appoint and employ necessary deputies, assistants, clerks, bookkeepers or other employes" and fix their compensation, provided, however, that such compensation may not exceed in the aggregate the amount fixed by the commissioners for the county treasurer's office, or for each of the other offices concerned.

2. The county commissioners are without authority to name the deputies and other employes in the office of the county treasurer and the other county offices enumerated in Section 2981 of the General Code; nor may they limit or abridge the duly vested appointing power of the proper officer.

3. It logically follows that they may not by indirection do what they are not directly authorized to do, and that the resolution set forth in your request is consequently invalid. The commissioners are required to act in a reasonable manner on the question of compensation for county deputies and employes and they are without authority to provide that if a county officer appoints persons of a certain class the appropriation for his office shall be automatically reduced. Certainly the commissioners may not by the method described in your communication limit or in

anywise take from the county treasurer, or other county officer, any of the appointing power vested in such officers by the Legislature.

In connection with the question of continuing to pay on the same pay basis that existed prior to the passage of the resolution effective January 6, 1941, your attention is invited to Opinion No. 1923, issued under date of February 27, 1940, to the Prosecuting Attorney of Vinton County, in which it was held:

“A county official, under the provisions of section 5625-38, General Code, may, during the first six months of any year, expend for deputy and clerk hire six-tenths of the annual appropriation made to his office for such purpose.”

Subject to this limitation and to the further limitation that the salary or compensation of all deputies and employees may not exceed in the aggregate the amount fixed by the commissioners for such office, the county treasurer may continue to pay the deputies and employes in his office such compensation as he may, in the sound exercise of his discretion, have determined to be reasonable and proper.

Finally, it is so well settled that it is unnecessary to cite authority to the effect that the courts will not attempt to control the discretion of county commissioners, and officers, boards and commissioners of like character exercising quasi-judicial or discretionary powers, although they will intervene in case of usurpation of authority, fraud or gross abuse of discretion tantamount to fraud. Where the commissioners have acted lawfully and reasonably, the county treasurer may not pay to his deputies and employees more by way of compensation than has been appropriated in the aggregate to his office. As suggested in the concurring opinion of Judge Wilson in the case of *Theobald v. State of Ohio ex rel.*, above quoted from, the “public have a right to expect and demand a reasonable and proper regard both by the officer and the board” and if the conduct of either does not measure up to the standard demanded, resort must be had to the tribunal of public opinion as expressed in the ballot box.

In view of the foregoing, and in specific answer to your questions, it is my opinion that:

1. Under the provisions of Sections 2637 and 2981, General Code, the county treasurer, as well as the other county officers enumerated in Section 2981, is authorized to “appoint and employ necessary deputies,

assistants, clerks, bookkeepers and other employees” and fix their compensation, provided, however, that such compensation shall not exceed in the aggregate “the amount fixed by the commissioners for such office.” The county commissioners may not lawfully interfere with or limit the county treasurer, or other county officers enumerated in Section 2981, General Code, in the selection and appointment of his deputies and employees, by providing by resolution that the appropriation for deputy and clerk hire shall be reduced to the extent of fifty per centum of the amount appropriated for any deputy or employee appointed who is the spouse or a member of the appointing officer’s family.

2. In case such a resolution be passed, a county treasurer, or other county officer, may continue to pay the salary or compensation fixed by him for his deputies and employees; provided, the compensation of such deputies and employees may not exceed in the aggregate “the amount fixed by the commissioners for such office”; and provided, further, a county treasurer or other county official may not, during the first six months of any year, expend for deputy and clerical hire more than six-tenths of the annual appropriation made to his office for such purpose.

3. The courts will not attempt to control the discretion of county commissioners and other officers, boards and commissions having quasi-judicial or discretionary powers and authority, and will interfere only where there is an usurpation or unlawful exercise of power, fraud or such gross abuse of discretion as amounts to fraud.

Respectfully,

THOMAS J. HERBERT,

Attorney General.