

767.

STENOGRAPHER FOR GRAND JURY MUST BE PAID OUT OF COUNTY TREASURY AND NOT FROM PROSECUTOR'S SPECIAL FUND—SECTIONS 1547 AND 1550, GENERAL CODE, ALSO SECTION 3004, GENERAL CODE.

SYLLABUS:

A stenographer called into the grand jury at the request of the prosecuting attorney to make up a transcript is to be paid from the county treasury as provided for in General Code Sections 1547 and 1550, and not from the special fund allowed the prosecutor under General Code 3004.

COLUMBUS, OHIO, June 23, 1937.

HON. ROY L. HENRY, *Prosecuting Attorney, Ironton, Ohio.*

DEAR SIR: This will acknowledge receipt of your recent communication which reads in part as follows:

"In this instance the State Examiner has ruled that where the prosecuting attorney calls the court reporter into the grand jury to take testimony and make up a transcript for him that, that pay or compensation would according to this section (Sec. 1552 G. C.) come out of the general funds of the County Treasury.

The Clerk of Courts refuses to certify to the County Auditor saying that such compensation and for such work should be paid out of the prosecutor's section of 3004, which is his half salary allowance.

Would you please furnish me with your opinion as to whether the stenographer that is called into the grand jury to make up a transcript is to be paid from the county treasury or out of the prosecutor's section 3004."

Section 1552, General Code, referred to by you reads as follows:

Sec. 1552. "The compensation of shorthand reporters for making such transcripts and copies shall be not more than twelve cents per folio of one hundred words, to be fixed by the common pleas judges of the subdivision. Such compensation shall be paid forthwith by the party for whose benefit a transcript is made. The compensation for transcripts made in crim-

inal cases, by request of the prosecuting attorney or the defendant and transcripts ordered by the court in either civil or criminal cases, and copies of decisions and charges furnished by direction of the court shall be paid from the county treasury, and taxed and collected as other costs. The clerk of the proper court shall certify the amount of such transcripts or copies, which certificate shall be a sufficient voucher to the auditor of the county, who shall forthwith draw his warrants upon the county treasurer in favor of such shorthand reporters."

This section appears under the Chapter dealing with the Common Pleas Court and by its terms relates specifically to the making of transcripts and copies in civil and criminal cases before that court.

The facts presented in your letter reveal that the matter before us relates to grand jury investigations where the prosecuting attorney calls a court reporter into the grand jury room to take testimony and make up transcripts. Procedure by and before the grand jury is provided for in the General Code and under these provisions stenographers or reporters who may take testimony before a grand jury are limited by Section 13436-8, of the General Code:

Sec. 13436-8. "*The official shorthand reporter of the county, or any shorthand reporter designated by the court, at the request of the prosecuting attorney, or any such reporter designated by the attorney general in investigations conducted by him, may take shorthand notes of the testimony, and furnish a transcript to the prosecuting attorney or the attorney general, as the case may be, and to no other person; but such reporter shall withdraw from the jury room before the jurors begin to express their views or take their vote on the matter before them. Such reporter shall take an oath to be administered by the judge after the grand jury is sworn, imposing an obligation of secrecy to not disclose any testimony taken or heard except to such jury or prosecuting attorney or attorney general, as the case may be, unless called upon in a court of justice to make disclosures.*" (Italics the writer's.)

It can be seen that the duties of a reporter before the grand jury are distinct from those of a regular stenographer employed by the prosecuting attorney under Section 2915, of the General Code, which reads:

Sec. 2915. "The prosecuting attorney may appoint such assistants, clerks and stenographers as he deems necessary for the proper performance of the duties of his office, and fix their compensation, not to exceed in the aggregate the amount fixed by the judge or judges of the court of common pleas. Such compensation after being so fixed shall be paid to such assistants, clerks and stenographers monthly from the general fund of the county treasury upon the warrant of the county auditor."

The distinction herein presented was clearly discussed in an opinion of the Attorney General for 1930 (Vol. II, No. 2171) as follows:

"It will be noted that only an official shorthand reporter or a shorthand reporter designated by the court at the request of the prosecuting attorney, or any such reporter designated by the attorney general in investigation conducted by him, may take shorthand notes before a grand jury.

The duties of a shorthand reporter before the grand jury are not part of the duties of a stenographer appointed by the prosecuting attorney under the provisions of Section 2915 of the General Code. The appointment of a stenographer to take notes of the testimony before the grand jury, other than an official reporter, may be made under the provisions of Section 1547 of the General Code which provides as follows:

'When the services of one or more additional shorthand reporters are necessary in a county, the court may appoint assistant shorthand reporters, in no case to exceed ten, who shall take a like oath, serve for such time as their services may be required by the court, not exceeding three years under one appointment, and may be paid at the same rate and in the same manner as the official shorthand reporter. Such shorthand reporters when so appointed shall be ex-officio shorthand reporters of the insolvency and superior courts, if any, in such county.'

If the appointment of an additional shorthand reporter is made for a term of less than one year the court may allow per diem compensation. (See Sec. 1550). Therefore, if a stenographer appointed by a prosecuting attorney under the provisions of Section 2915 of the General Code is also appointed by a court under the provisions of Section 1547 of the General Code for the purpose of taking shorthand notes before a grand

jury, such stenographer would be entitled to per diem compensation, if the appointment is for less than one year, for each day such reporter is actually engaged in the taking of testimony before the grand jury”

Hence the appointment and compensation of a reporter or stenographer for services in a grand jury hearing becomes a matter of special provision coming under Sections 13436-8, 1547 and 1530, as hereinabove discussed.

Section 5004, of the General Code, the other section to which you refer, creates a special fund for the prosecuting attorney and limits its use by express provision to official expenses “not otherwise provided for.”

Sec. 3004. “There shall be allowed annually to the prosecuting attorney in addition to this salary and to the allowances provided by Section 2914, an amount equal to one-half the official salary, to provide for expenses which may be incurred by him in the performance of his official duties and in the furtherance of justice, not otherwise provided for. Upon the order of the prosecuting attorney the county auditor shall draw his warrant on the county treasurer payable to the prosecuting attorney or such other person as the order designates, for such amount as the order requires, not exceeding the amount provided for herein, and to be paid out of the general fund of the county.

Provided that nothing shall be paid under this section until the prosecuting attorney shall have given bond to the state in a sum not less than his official salary to be fixed by the court of common pleas or probate court with sureties to be approved by either of said courts, conditioned that he will faithfully discharge all the duties enjoined upon him, by law, and pay over, according to law, all moneys by him, received in his official capacity. Such bond with the approval of such court of the amount thereof and sureties thereon and his oath of office inclosed therein shall be deposited with the county treasurer.

The prosecuting attorney shall annually before the first Monday of January, file with the county auditor an itemized statement, duly verified by him, as to the manner in which fund has been expended during the current year, and shall if any part of such fund remains in his hands unexpended, forthwith pay the same into the county treasury. Provided, that as

to the year 1911, such fund shall be proportioned to the part of the year remaining after this act shall have become a law."

The limitation upon use of this fund is a matter which has been often before this office. Strict construction has been the rule in interpreting the phrase "not otherwise provided for." Accordingly it has been held that compensation for assistants, clerks and stenographers used by the prosecuting attorney cannot come out of this fund as such compensation is otherwise provided for in various sections of the General Code. (1933 O. A. G., Vol. II, page 1142).

In an opinion of the Attorney General for 1928, Vol. I, page 384, the following discussion on General Code, 3004 appears:

"Section 3004, supra, provides a fund different and in addition to all other funds to be used by the prosecuting attorney for expenses incurred by him in the performance of his official duties and in the furtherance of justice, the expenses therefor not being otherwise provided for by law."

Other opinions sustaining and applying such construction may be found in 1919 O.A.C., Vol I, page 597, 1917 O.A.G., Vol. I, page 478, 1916 O. A. G., Vol. I, page 118.

In view of these facts it is my opinion that a stenographer called into the grand jury at the request of the prosecuting attorney to make up a transcript is to be paid from the county treasury as provided for in General Code Sections 1547 and 1550, and not from the special fund allowed the prosecutor under General Code 3004.

Yours truly,

HERBERT S. DUFFY,
Attorney General.

768.

APPROVAL, BONDS OF CITY OF PORTSMOUTH, SCIOTO
COUNTY, OHIO—\$5,000.00.

COLUMBUS, OHIO, June 23, 1937.

State Employes Retirement Board, Columbus, Ohio.

GENTLEMEN :

RE: Bonds of City of Portsmouth, Scioto County, Ohio,
\$5,000.00.