

2169.

APPROVAL, CONTRACTS AND FINAL RESOLUTIONS FOR ROAD IMPROVEMENTS IN CUYAHOGA, JEFFERSON, AND SUMMIT COUNTIES.

COLUMBUS, OHIO, July 28, 1930.

HON. ROBERT N. WAID, *Director of Highways, Columbus, Ohio.*

2170.

TRAVELLING EXPENSES—DEPUTY COUNTY SURVEYOR AND COUNTY COMMISSIONERS ON BUSINESS TRIP—WHETHER A PROPER CHARGE AGAINST COUNTY DISCUSSED.

SYLLABUS:

1. *The actual and necessary traveling and personal expenses of a deputy county surveyor incurred on a trip outside his county, necessarily made in furtherance of his duties as such deputy surveyor and at the instance of the county commissioners, may be allowed to him upon the approval of the county surveyor.*

2. *In the absence of statutory or charter provision prohibiting or limiting such action, a public officer or public employe may lawfully be reimbursed from public funds for traveling and other personal expenses actually and necessarily incurred by him in the performance of a public duty in furtherance of a definite project or undertaking then under way or in immediate prospective contemplation, provided in the exercise of a sound and proper discretion, it appears that the incurring of said expenses is necessary for the benefit of the political subdivision which the officer or employe serves, and in the performance of a duty enjoined or authorized by law. If by statute or charter provision such expenses are limited the officer or employe may be reimbursed within the limitations allowed by such law only.*

3. *Keeping in mind the rule of law stated in the second branch of this syllabus, the determination of the lawfulness of the allowance of traveling and other personal expenditures of a public officer or employe when in the performance of his public duties requires consideration of pertinent questions of fact, and is thereby reduced to a pure question of auditing.*

COLUMBUS, OHIO, July 29, 1930.

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

GENTLEMEN:—I am in receipt of your recent communication wherein is enclosed a letter to you from the county surveyor of Ross County, by which he seeks to be informed as to his duty in approving an expense account tendered by one of his

deputies, which account purports to set forth a list of expenses incurred by the county commissioners and said deputy while on a trip to Cleveland for the purpose of holding a conference with Mr. O. P. Van Swearingen, President of the C. & O. Railroad, relative to certain railroad crossings in Ross County. His letter to you is as follows:

"The board of commissioners of this county made a trip to Cleveland recently, accompanied by deputy surveyor, Frank L. Haynes, to hold a conference with O. P. Van Swearingen, President of the C. & O. Railroad, with reference to certain road crossings, etc., in this county. Are the commissioners entitled to traveling expenses for this trip? They demand that I approve bill for same.

Please inform me as to my duty in this matter."

From other data enclosed with your communication, it appears that the journal of the commissioners of Ross County shows under date of May 12, 1930, the adoption of the following resolution:

"WHEREAS, it is the opinion of the board of county commissioners of Ross County, Ohio, that the C. & O. R. R. Company is not making the proper endeavor to complete its contract and agreement with the board of county commissioners of Ross County, Ohio, with reference to various roads, particularly the Narrows Road in Springfield Township, now

THEREFORE, BE IT RESOLVED, that the board of county commissioners and county engineer wait upon Mr. O. P. Van Swearingen at his convenience with reference to the fulfillment of said contract and agreement and that an endeavor be made to have a conference with Mr. Van Swearingen regarding these matters."

Pursuant to said resolution, the commissioners of Ross County and a deputy county surveyor went to Cleveland and conferred with Mr. Van Swearingen, president of the C. & O. R. R. Company, relative to the road crossing in question.

Some time later the said deputy surveyor presented to the county surveyor his expense account, showing expenditures incurred on said trip to Cleveland, for meals and lodging for four persons, garage bill, gas, oil and service on car enroute, amounting in all, to \$28.52.

Without reviewing in detail, the duties of railroad companies with reference to the construction and maintenance of railroad crossings over public highways, and of county commissioners and county surveyors in the maintenance of roads, it is sufficient, for the purposes of this opinion, to note that railroad companies are charged by law with certain duties with respect to the construction and proper maintenance of crossings where their tracks cross public highways either at grade or by means of overhead or underground crossings, and with the duty of cooperating with state and county authorities in the construction and maintenance of such crossings.

It is the duty of the county commissioners to maintain and keep in proper repair and in safe condition the county roads in their respective counties. Oftentimes it becomes necessary for the county commissioners to prevail upon a railroad company to do its proper share in the maintenance of its highway crossing and it no doubt is frequently necessary that the county commissioners themselves, or through the county

surveyor or his deputies confer with the duly authorized representative of a railroad company as to the proper method and detailed manner of maintaining such railroad crossing.

Assuming for the moment that it was necessary for the county commissioners, in the proper performance of their duty to make this trip to Cleveland, and that it was also necessary that they be accompanied by the deputy surveyor, the cost of the trip if chargeable to the county at all, can not all be said to be proper expenses of the deputy county surveyor.

It is provided in Section 2786, General Code, that a county surveyor and each assistant and deputy shall be allowed his reasonable and necessary expenses incurred in the performance of his official duties. If it can be said that this deputy surveyor was in the performance of his official duties when on the trip to Cleveland, he should be allowed his actual and necessary expenses and the proper method of securing such allowance is upon presentation of his expense account to the county surveyor for approval. Even so, however, it can not be said in the instant case, that the expenses of the meals, lodging and other items incurred by the commissioners themselves are a proper expense of the deputy surveyor. If the commissioners were in the performance of their duty in making this trip to Cleveland and authority exists for reimbursing them, it does not require the approval of the county surveyor, nor should such expense be charged to the county surveyor's expense account.

If it was necessary for the commissioners to make this trip and if it was also necessary that the deputy surveyor accompany them, he should be allowed his expenses by virtue of the statutory provision above noted. Whether or not the commissioners themselves may be reimbursed for necessary expenses incurred on said trip raises a somewhat different question.

There is no specific statutory authority for the payment from county funds of expenses necessarily incurred by county commissioners in the performance of their duties. The question of whether or not necessary expenses may be allowed to a public officer under such circumstances has been the subject of a large number of opinions of this office. The purport of these opinions is that in the absence of statutory or charter provision prohibiting or limiting such action, a public officer or public employe may lawfully be reimbursed from public funds for traveling and other personal expenses actually and necessarily incurred by him in the performance of a public duty in furtherance of a definite project or undertaking then under way or in immediate prospective contemplation, provided, in the exercise of a sound and proper discretion, it appears that the incurring of said expenses is necessary for the benefit of the political subdivision which the officer serves and the expenses are incurred in the performance of a duty enjoined or authorized by law. If, by statute or charter, such expenses are limited, the officer may be reimbursed only within the limitation allowed by such law.

Keeping in mind the above rule of law, the determination in any case of whether or not traveling and other personal expenses of an officer may be allowed, reduces itself to a matter of auditing, and involves the consideration of questions of fact available to an auditor on the ground.

In the instant case I would be unable to say that it was or was not necessary for the commissioners of Ross County, in the proper performance of their duties, to make this trip to Cleveland, or whether if a conference with the president of the railroad company was really necessary, it was necessary for all the commissioners to go or that they take with them the deputy surveyor. The determination of this question involves the consideration of questions of fact which are not available to me.

The commissioners themselves are judges in the first instance of what is neces-

sary to properly carry on the functions of their position and having been authorized by the electorate to determine in the first instance the manner of performing their public duties, their determination of the necessity for any course of action should be given considerable weight. Should they abuse the discretion thus vested in them their judgment should, of course, be overruled. In doing so however, consideration should be given to the fact that where by law discretion is vested in a public officer, that discretion will not be interfered with except in case of its abuse, and the burden of showing abuse of authority in a public officer is on one who asserts the abuse.

In the determination of matters of this kind consideration must be given to the fact that because of the complexity of our civilization and modern methods of doing business, the incurring of expenses by public officers in the performance of their public duties will now oftentimes be considered necessary, whereas in former times such expenses would have been considered improper.

On other occasions I have observed that the remedy for extravagance in the use of public funds for traveling expenses is political. Officers who embark on unnecessary junkets should be held responsible at the polls. It is perhaps better that the check be political in character rather than to enact prohibitory sections which might result in hamstringing honest and efficient public officials in their sincere efforts to perform their official duties.

Respectfully,
GILBERT BETTMAN,
Attorney General.

2171.

STENOGRAPHIC FEES—COST OF BILL OF EXCEPTIONS FOR CRIMINAL NOT PAYABLE BY COUNTY—COST OF TRANSCRIPT OF TESTIMONY FOR CRIMINAL PAYABLE BY COUNTY IN C. P. COURT BUT NOT IN J. P. COURT—WHEN PROSECUTOR'S STENOGRAPHER MAY SERVE AS SHORTHAND REPORTER BEFORE GRAND JURY.

SYLLABUS:

1. *No authority exists for the payment of compensation to a stenographer for the preparation of a bill of exceptions in a criminal case, nor for the payment of a stenographer for making a transcript of testimony for a defendant in a criminal case in the court of a justice of peace. However, under the provisions of Section 1552 of the General Code, a stenographer who makes a transcript of the testimony in a criminal case in the court of common pleas at the request of a defendant receives compensation out of the county treasury.*

2. *A stenographer appointed by the prosecuting attorney, under the provisions of Section 2915 of the General Code, may lawfully serve as a reporter appointed by the court, providing it is physically possible to properly perform the services of both positions, and may lawfully receive, in addition to compensation as prosecuting attorney's stenographer, per diem compensation for each day such stenographer is engaged in taking shorthand notes of the testimony before a grand jury.*

COLUMBUS, OHIO, July 30, 1930.

HON. EARL D. PARKER, *Prosecuting Attorney, Waverly, Ohio.*

DEAR SIR:—I am in receipt of your letter of recent date which is as follows:

"I desire your opinion on the following propositions:

No. 1. Could a person who has been convicted in a justice of the peace