

Code, may be either fixed at a lump sum in advance, or as I view it, the more proper way by fixing the compensation after the services are performed."

In the case of *Board of County Commissioners of Butler County et al. vs. The State, ex rel. Primmer, City Solicitor, Etc.*, 93 O. S., page 42, the court held it to be the mandatory duty of the county commissioners to make an allowance to city solicitors and their assistants for the prosecution of State cases in police or mayor's courts. In the course of the opinion, after referring to Section 4307, General Code, the court said:

"The first sentence of the section imposes a duty upon the prosecuting attorney of such court.

The second sentence designates, first, who that prosecuting attorney shall be, to-wit, the city solicitor or assistants. The latter part of the second sentence provides for the compensation of such prosecuting attorney, the evident purpose being that the city shall compensate him for the prosecution of city cases, upon allowance of council, and the county, as a subdivision of the state, shall compensate him for services rendered in state cases, upon the allowance of the county commissioners.

The amount allowed by the council and the amount allowed by the county commissioners is wholly in their judgment, but the statute makes it mandatory upon them to allow something.

In the case about which you inquire it appears that the county commissioners made no allowance to the city solicitors in question for prosecuting State cases during the years 1926, 1927 and 1928 nor did they make an appropriation therefor as they were required to do, according to the Supreme Court. It would seem, therefore, that the present board of county commissioners may now perform the duty which should have been performed during the previous three years, and it is very probable that they might be required to do so.

The board having now determined what is a proper allowance for the services of the solicitor during the years 1926, 1927 and 1928 and having made an appropriation therefor, it is my opinion that these allowances may now lawfully be paid from the current appropriation.

Respectfully,

GILBERT BETTMAN,

*Attorney General.*

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297.

TOWNSHIP TRUSTEES—COMPENSATION GIVEN TO PROSECUTING ATTORNEY TO PREPARE LEGISLATION FOR ROAD CONSTRUCTION, ILLEGAL—BUREAU CAN MAKE FINDING FOR RECOVERY.

*SYLLABUS:*

1. *The trustees of a township may not legally pay additional compensation to the prosecuting attorney of the county to prepare legislation for the construction of a township road.*

2. *In the event the trustees of a township pay extra compensation for legal ad-*

*vice to a prosecuting attorney for such services, the same forms a proper basis for a finding of recovery by the Bureau of Inspection and Supervision of Public Offices.*

COLUMBUS, OHIO, April 12, 1929.

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

GENTLEMEN:—Your recent communication reads:

“You are respectfully requested to render your written opinion upon the following:

Section 2917, G. C., requires the prosecuting attorney to be the legal adviser for all township officers and no such officer may employ other counsel or attorneys except on the order of the township trustees duly entered upon their journal in which the compensation to be paid for such legal services should be fixed.

Question 1. Under the provisions of this section may the trustees of a township legally employ the prosecuting attorney of the county to prepare the necessary legislation for the construction of a township road and pay such prosecuting attorney for his services out of the general township fund?

Question 2. If your opinion is that the prosecuting attorney may not be employed and paid for this purpose, may an examiner from this department make a finding for recovery for the same?”

Section 2917, General Code, to which you refer, provides:

“The prosecuting attorney shall be the legal adviser of the county commissioners and all other county officers and county boards and any of them may require of him written opinions or instructions in matters connected with their official duties. He shall prosecute and defend all suits and actions which any such officer or board may direct or to which it is a party, and no county officer may employ other counsel or attorney at the expense of the county except as provided in Section Twenty-four hundred and twelve. He shall be the legal adviser for all township officers, and no such officer may employ other counsel or attorney except on the order of the township trustees duly entered upon their journal, in which the compensation to be paid for such legal services shall be fixed. Such compensation shall be paid from the township fund.”

In analyzing the provisions of the section above quoted, it appears to be clear that the prosecuting attorney shall be the legal adviser for township officers, as well as the county officers therein mentioned. It further appears from said section that the township trustees may, by legislation duly adopted and entered on their minutes, employ an attorney to represent them, other than the prosecutor. Such resolution shall fix the compensation that such attorney is to receive.

It is a well established rule of law in this State that a public officer may not receive dual compensation for a service which he is required by law to perform. Section 2917, supra, expressly makes it the duty of the prosecuting attorney to advise the board of township trustees. It follows that any services that he renders to them in a legal capacity are performed in accordance with his duties.

Section 3003, General Code, fixes the rule upon which the salary of the prosecuting attorney shall be determined, which is based upon the population of the county as shown by the federal census next preceding his election. After providing for the salary said section further reads:

"Such salary shall be paid in equal monthly installments, from the general fund, and shall be in full payment for all services required by law to be rendered in an official capacity on behalf of the county or its officers, whether in criminal or civil matters."

In view of the provisions of the section last quoted, it is clear that the prosecuting attorney may not receive compensation for any services which he is required by law to render in an official capacity on behalf of the county or its officers whether in criminal or civil matters. It is possible, of course, to argue that the section above quoted does not purport to relate to services performed by the prosecutor for township officers. However, I am inclined to the view that a proper construction of this section does include subdivisions of the county and officers thereof. Irrespective of whether the inhibitions of Section 3003, supra, prevent the prosecutor from receiving compensation from township trustees, the fact does remain that Section 2917, supra, does not authorize the trustees to employ and pay compensation to a prosecuting attorney. Said section does authorize the employment of *other* counsel.

It has frequently been judicially determined in this State that funds may not be drawn from a public treasury except in pursuance of express provisions of law. There is no authority for the township trustees to pay for legal advice excepting in pursuance of Section 2917, supra, and it is clear that the attorney who may receive such compensation must be other than the prosecuting attorney. Furthermore, as hereinbefore stated, it is a cardinal rule of this State that a public officer may not receive double compensation. When the salary of a public official is fixed and the duties which he is required to perform are specified, he may not receive extra compensation for that which he is by law required to perform under the salary fixed.

There being no authority for the employment of the prosecuting attorney, it is believed that such an attempted employment is void from the beginning. In this connection, however, it may be pointed out that in the event the prosecuting attorney should incur expenses on behalf of the trustees in connection with such bond legislation, the expenses so incurred should be borne by the township, and under such circumstances, it is believed that he should be properly reimbursed for such expenditures. However, as above stated, he may not legally receive compensation for his legal advice or services.

Based upon the foregoing, and in specific answer to your inquiry, it is my opinion that:

First, the trustees of a township may not legally pay compensation to the prosecuting attorney of the county to prepare legislation for the construction of a township road.

Second, in the event the trustees of a township pay extra compensation for legal advice to a prosecuting attorney for such services, the same forms a proper basis for a finding for recovery by your Bureau.

Respectfully,  
GILBERT BETTMAN,  
*Attorney General.*