

4604.

COUNTY AUDITOR—MANDATORY DUTY TO COLLECT
PENALTIES ON DOG LICENSES UNDER SEC. 5652, G. C.

SYLLABUS:

The duty placed upon a county auditor to collect penalties on dog licenses as required by Section 5652, General Code, is mandatory and his failure to collect said penalties is a breach of his official bond conditioned on the faithful discharge of his duties as county auditor.

COLUMBUS, OHIO, September 3, 1935.

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

GENTLEMEN:—This will acknowledge receipt of your letter of recent date, requesting my opinion as follows:

“You are respectfully requested to furnish this department your written opinion upon the following:

Section 5652, General Code, requires each person who owns, keeps or harbors a dog, annually before the first day of January, to file, together with a registration fee of one dollar for each male or spayed female dog, and a registration fee for each female dog unspayed, in the office of the county auditor of the county in which such dog is kept or harbored, an application for the registration for the full year beginning the first day of January. This section also provides that if such application for registration is not filed and said fee paid on or before the 20th day of January of each year, the county auditor shall assess a penalty of one dollar upon such owner, keeper or harbinger, which must be paid with the registration fee.

In this connection, we call your attention to Section 3000, General Code, under which no county official shall make any reduction, abatement, remission of any fee, costs, percentages, penalties, allowances or perquisites required by law to be collected by him.

QUESTION: In the event the county auditor fails to collect the penalty provided for in Section 5652, General Code, from the persons owning dogs on January 1st of each year who does not pay the fee by January 20th, is the county auditor liable on his bond for the amount of such penalty and to pay the same into the county treasury to the credit of the Dog and Kennel Fund?”

Section 2559, General Code, which provides for the bond of the county auditor reads as follows:

“Before entering upon the discharge of the duties of his office, the county auditor shall give a bond signed by a bonding or surety company authorized to do business in this state, or, at his option, by two or more freeholders having real estate in the value of double the amount of the bond over and above all encumbrances to the state in sum of not less than five thousand dollars nor more than twenty thousand dollars, as the commissioners require, the surety company to be approved by the commissioners of the county, conditioned for the faithful discharge of the duties of his office. The expense or premium for such bond shall be paid by the county commissioners and charged to the general fund of the county. Such bond, with the oath of office and the approval of the commissioners endorsed thereon, shall be deposited by them with the county treasurer, who shall record and carefully preserve it.”

Section 5652, General Code, part of which is set out in your letter places a mandatory duty upon county auditors to collect penalties for dog licenses issued after January 20th. The entire section reads as follows:

“Every person who owns, keeps or harbors a dog more than three months of age, annually, before the first day of January of each year, shall file together with a registration fee of one dollar for each male or spayed female dog, and a registration fee of three dollars for each female dog unspayed, in the office of the county auditor of the county in which such dog is kept or harbored, an application for registration for the following year, beginning the first day of January of such year, stating the age, sex, color, character of hair, whether short or long, and breed, if known, of such dog, also the name and address of the owner of such dog. Provided that an affidavit shall be made to the county auditor and filed with application for registration of each spayed female dog, stating that said female dog has been effectively spayed. And provided further that if such application for registration is not filed and said fee paid on or before the twentieth day of January of each year, the county auditor shall assess a penalty of one dollar upon such owner, keeper or harborer, which must be paid with the registration fee. Provided, however, no person shall be charged a penalty where the dog is bought from outside of the state of Ohio or becomes three months of age after January twentieth of any year, and provided said license shall be applied for within thirty days after said dog is bought or becomes three months of age.”

Furthermore, Section 3000, General Code, the substance of which is

contained in your letter, specifically forbids an auditor from reducing, abating or remitting any penalty required by law to be collected by him. The duty of collecting a penalty is, therefore, a mere ministerial duty involving no discretion on his part.

A ministerial act is defined in *State, ex rel. vs. Nash*, 66 Ohio State, page 612 as follows:

“A ministerial act may be defined to be one which a person performs in a given state of facts in a prescribed manner in obedience to the mandate of legal authority without regard to the exercise of his own judgment upon the propriety of the act being done.”

The effect on the bond of the officer for negligently performing a ministerial duty is discussed in 46 *Corpus Juris*, page 1068 as follows:

“The condition of an official bond providing for the faithful discharge by the principal of his official duties is broken by the mere negligence, without corruption of the principal in the performance of a ministerial duty, which performance does not involve the exercise of discretion.”

In the case of *Richland County vs. American Surety Company*, 92 South Carolina, page 329, it is stated:

“Failure of an officer to obey the positive mandate of the statutes is misfeasance in office and a breach of his bond that he shall well and truly perform the duties of his office as required by law.”

In an opinion reported in Vol. II of *Opinions of the Attorney General for 1932*, page 890, the then Attorney General in discussing the liability of a county auditor in remitting a penalty required by law to be assessed for failure to pay real estate taxes when due, said at page 892:

“In reply to your second inquiry, as to whether the county auditor and his bondsmen are liable in the event that the county auditor illegally issues a certificate of abatement for tax penalties, it must be remembered that every illegal act performed by a public officer does not create a personal pecuniary liability against such officer. While it might be stated that the legal obligation of the county auditor is to faithfully perform each, any and all the duties imposed upon his office by law, a breach of this duty would only render him personally liable in the event that the county suffered

financial loss by reason of his unfaithful performance of his duties.

“The duty imposed upon the county auditor to place the penalty on the tax list and duplicate is definite, that is, he must place a penalty of ten percent, no more or no less, on the tax list and duplicate. It must be placed on all taxes that remain unpaid at the times of the February and August settlements. Nothing is left to the discretion of the county auditor; his sole duty with reference to the assessment of the penalty is clerical. He merely computes the amount of the penalty and inscribes it upon the proper list and duplicate.”

In the same opinion at page 894 it is further stated:

“* * * however, to the extent that the legislature has not provided a remedy and loss has been suffered by the county by reason of the illegal act of the county auditor, the auditor and his bondsman would be personally liable, because of his neglect to faithfully perform the duties of his office.”

Whether the auditor's failure to collect the penalties in the case you present is termed non-feasance for failure to perform the lawful duty provided by Section 5652, General Code, or whether it is termed malfeasance for remitting a penalty in violation of Section 3000, is immaterial. In either event he has failed to comply with the positive mandate of the statute and by virtue of said failure, has not faithfully performed the duties of the county auditor.

Therefore, in specific answer to your inquiry, it is my opinion that the duty placed upon a county auditor to collect penalties on dog licenses as required by Section 5652, General Code, is mandatory and his failure to collect said penalties is a breach of his official bond conditioned on the faithful discharge of his duties as county auditor.

Respectfully,

JOHN W. BRICKER,
Attorney General.