

Note from the Attorney General's Office:

1922 Op. Att'y Gen. No. 22-3210 was overruled in part by 2003 Op. Att'y Gen. No. 2003-027.

Relative to your second question, as to whether or not a corporation or partnership may act in the capacity of the "competent sanitary engineer" indicated by section 6602-1 G. C., attention is chiefly directed to the limited authority expressed by the words used in the phrase "a competent sanitary engineer", and it is to be concluded that the language employed does not authorize the employment of a number of sanitary engineers, but contemplates merely one "competent sanitary engineer", hence it would follow that a partnership or corporation of engineers would not meet the requirements of this section and it would seem apparent that only an individual under the circumstances may act in such capacity.

Respectfully,

JOHN G. PRICE,
Attorney-General.

3210.

COUNTY SURVEYOR—SALARY—LEAVE OF ABSENCE TO ENTER
MILITARY SERVICE—ENTITLED TO SALARY DURING SUCH
LEAVE.

1. *A County surveyor is a public officer whose salary is fixed by statute (Sec. 7181 G. C.). Therefore, the salary is to be treated as an incident to the office itself, and not to the performance of the duties of the office (Opinion Vol. 1, p. 970, Opinions of Attorney-General, 1918, adhered to).*

2 *Where a county surveyor in the year 1918, filed application with the board of county commissioners for leave of absence without pay while in the military service of the United States, and the county commissioners passed a resolution purporting to grant such leave, and the county surveyor entered such military service and remained therein for the last six months of 1918 following his application for leave of absence, such county surveyor is not now barred from asserting a claim to payment of such salary. Accordingly, the salary for said period of six months constitutes a claim against the county, of which the surveyor is entitled to payment without reference to allowance or disallowance by the board of county commissioners.*

COLUMBUS, OHIO, June 12, 1922.

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

GENTLEMEN:—You have requested the opinion of this department as to the following matter:

On June 17, 1918, the board of county commissioners of a certain county took action as shown by the following resolution appearing on their journal:

"Whereas, request has been made to the board of county commissioners of _____ county, by County Engineer _____, for leave of absence for an indefinite period of time (perhaps for remainder of term) or until his return from the United States service, the same to be without pay from and after July 3, 1918, until his return.

Therefore, it was moved by _____, seconded by _____, that the request of County Engineer _____, as stated in the foregoing be granted.

On roll call all voted aye."

The county surveyor named in said resolution is now asking the county to make payment to him of an amount equal to the salary of the county surveyor of said county for the last six months of 1918, during which time he was in the military service of the United States. He held the office of county surveyor from September, 1917, to September, 1921.

In connection with the foregoing statement of facts, the surveyor in presenting his account refers to the opinion of this department dated July 13, 1918, directed to your bureau, and appearing in Opinions of Attorney-General for 1918, Vol. I, p. 970. The conclusions reached in that opinion, as summarized in the head-notes are as follows:

"1. The mere fact that a county surveyor enlists in the army and leaves the county to take training at Ft. Benjamin Harrison, does not *ipso facto* vacate the office.

2. Under the provisions of section 2785 G. C. the county commissioners have authority to fill a vacancy when a vacancy occurs; but they have no authority to declare and create a vacancy in the office of county surveyor.

3. County commissioners have no authority to attempt to fill a vacancy in the office of county surveyor unless a vacancy actually occurs either through the death or voluntary resignation of the county surveyor, or unless he is removed under the provisions of section 2790 G. C.

4. A county surveyor is entitled to the salary provided by law until he resigns or the office otherwise becomes vacant."

It is clear that if the conclusions of said opinion are correct then, in the present case, the county surveyor is entitled to payment of salary for the six months in question provided that his action in asking leave without pay and the action of the county commissioners on such request, all as disclosed by the above quoted resolution, did not amount to a waiver of or an estoppel against the payment of the salary in question.

This department is convinced, after careful review of the earlier opinion, that it is correct. The view was expressed therein at page 979, that the salary of a public officer is an incident to the office itself and not to the performance of the duties of the office. In support of that proposition an Iowa case was cited. Additional cases which further support the proposition are these:

State ex rel. Evans vs. Gordon, 245 Mo. 12;
Bates vs. City, 153 Mo. 18;
Sleigh vs. United States, 9 Court of Claims 369;
Leonard vs. City, 48 Ind., App. 104;
People vs. Bradford, 267 Ill. 486;
People vs. Miller, 24 Mich. 458;
People vs. Board, 75 N. Y. 38.

We are thus left with but one question in the present case, whether, as above suggested, the county surveyor is now barred from asserting claim to the six months' salary on principles of waiver or estoppel. The answer is clearly in the negative. The county surveyor had no legal right when entering the service of the United States to ask for leave of absence either with or without pay; nor were the county commissioners vested with power to grant such leave. The whole affair as disclosed by the resolution above quoted is a nullity from a legal standpoint.

See generally the reasoning of the previous opinion of this department. Any arrangement whereby an officer attempts to waive salary or to stipulate for the performance of the duties of the office at a less salary than is provided by law, is contrary to public policy and void.

A case which may be said to be almost squarely in point in this connection is that of *United States vs. Andrews*, 240 U. S., 90; 60 Law. Ed., 541.

In that case, an army officer had been granted six months' leave of absence to take effect January 1, 1907. This leave was later extended for the four months beginning July 1, 1907. On July 31, 1907, during the period of the extended leave, the adjutant-general sent a telegram to the officer to the effect that while his leave was not revoked, his further absence would be without pay. The officer did not request leave without pay from August 1, 1907, to October 31, 1907 (being the last three months of the extended leave), but he did not file a protest against the action of the adjutant-general in affixing a condition, and did not relinquish his leave and return to duty. The statute applicable to the case made provision for leave on half pay.

Under these facts, the supreme court, in an opinion by Mr. Chief Justice White, held that the right to half pay could not be defeated by the action of the military authorities in affixing a condition that the leave should be without pay; that the officer's failure to protest against the affixing of the condition did not estop him from claiming his pay; and that the absence of the officer in the face of the condition affixed did not amount to an absence without leave for which, under the statute, no pay could be allowed.

The briefs and opinion in the case contain a full citation of authorities, among which is the case of *Glavey vs. United States*, 182 U. S. 595; 45 Law. Ed. 1247, holding that certain inspectors were entitled to additional statutory compensation though their appointment was made on the express condition that they would not receive the additional compensation.

The theory underlying these cases is that the statutory compensation governs and that officers are not at liberty by executive action to change the terms of the statute.

In the case now under consideration, it cannot be said that the action of the county surveyor in asking that he be given leave of absence without pay is a waiver in a true sense. It was entirely without consideration. Moreover, on the score of estoppel, it does not appear from the facts as submitted, that the county took any action to its own detriment on the strength of the surveyor's request for leave without pay; indeed, it is difficult to perceive what action to its detriment the county could take, since on the one hand the county surveyor was in possession of his office while he was in the military service, and on the other hand the county commissioners were without authority to give legal sanction to the leave of absence.

In conclusion it is proper to note that the salary of county surveyors is fixed by law upon the basis of road mileage, population, and tax duplicate; and that the salary is payable monthly out of the general county fund upon the warrant of the county auditor (Sec. 7181 G. C.). This being true, the matter of allowance or disallowance of the salary claimed for the six months in question is not one of discretion with the county commissioners; the surveyor is entitled to payment as of right under the terms of the statute.

Respectfully,
JOHN G. PRICE,
Attorney-General.