

STATE BUDGET DEPARTMENT - Charles F. Carter not entitled to
back pay for services as Chief Clerk.

March 3, 1938

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Honorable Clarence Evans, Chairman
State Tax Commission
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your letter of February 15, 1938, in which you request the opinion of this office as to whether you could lawfully pay the claim of Charles F. Carter for back pay for a period of January 1 to June 10, 1937, as Chief Clerk, said claim being set forth in the letter of Mr. Carter to you which you enclosed and which reads as follows:

"Complying with your request permit me to submit the following statement in reference to my salary from January 1, 1937 to June 10, 1937 as your Budget Officer.

"First, I am asking for this back pay for the reason that the law and custom provides for readjustment of salaries during the early months of each biennium, it has always been done and it is necessary in order to have the salaries conformed to the appropriation.

"Second, I was paid \$300.00 per month during the biennium of 1933-1934 and the title for two months was known as 'Budget Commissioner' later, on opinion given by the Attorney General's office to the State Auditor, I was paid this \$300.00 per month but designated as 'Chief Clerk' for the remainder of that biennium, all of which the records will show.

"Third, During the early months of the 1935 Biennium I was still paid the \$300.00 per month but when the Legislature cut the appropriation my salary was readjusted to conform to the appropriation act and for the month of May 1935, I did not receive any salary and for the month of June I received \$198.98, all the while the records show I was designated as Chief Clerk of the Department of Budget.

"Fourth, On September 27, 1933, the Attorney General, Roy McKittrick, gave a written opinion to the Auditor. After discussing the law and the Constitution at length in his last paragraph he used this language. 'It is our opinion the Governor may also fix the amount of compensation to all employees hired by virtue of this act. While the administration of this act is left entirely to the discretion of the Governor as to hiring and fixing the amount of compensation of the employees, yet, he is limited to \$10,000.00 during the biennium for the payment of all salaries.' This opinion was accepted by the Auditor and salaries were paid accordingly.

"Fifth, The language of the appropriation act of 1937, so far as the Budget is concerned, is identical with the language of the appropriation act in 1933. The language of the 1935 act is not quite the same is the reason that the salary was cut during that biennium.

"Sixth, Mr. McGregor, the present Budget Officer, is paid \$300.00 per month, and properly so under the appropriation act. I am informed that he is designated as Assistant Director and Accountant, which title of course conforms with the opinion

of the Attorney General in 1933, in other words, since neither the law creating the Budget Department nor the appropriation act specifies exactly what shall be paid these employees it is left to the discretion of the Governor and the Director of the Budget to fix the salaries of these employees and to give them whatever title they wish, keeping in mind that they cannot exceed the department appropriation for personal service.

"Seventh, Mr. Wilcox compiled this section on the Budget, he not only approved it in conference with the Governors but Governor Park and Governor Stark likewise approved Mr. Wilcox's recommendation. The present Tax Commission and Governor Stark have also given approval to my request for this back pay, so according to the appropriation act and in conformity with the opinion of the Attorney General as above cited, I respectfully submit my claim to you for \$355.58."

It will be noted that the first three paragraphs of Mr. Carter's letter give a history of his connection with the Budget Department, and in the fourth paragraph he says: "Third, During the early months of the 1935 biennium I was still paid the \$300.00 per month but when the Legislature cut the appropriation my salary was readjusted to conform to the appropriation act **."

The appropriation act of 1935, to which he makes reference, provides for a salary of a Chief Clerk of \$2800.00 per annum (L. 1935, p. 36), and therefore, when he says his salary was readjusted to conform to that appropriation act, we take it his salary was set at \$2800.00 per annum. No further reference is made in his letter to any other determination or setting of his salary, and

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we therefore assume that he continued to work over into the year 1937 and up until June 10th of that year without any further adjustment or setting of his salary, and that over that period of January 1 to June 10, 1937, he was paid a salary at the rate of \$2800.00 per annum.

While Mr. Carter's letter does not set out exactly what his claim is, we infer that it is this: That since he had, during the years 1933-1934, been paid a salary as Chief Clerk at the rate of \$3600.00 per year, and since the man who succeeded him after June 10, 1937, is being paid a salary at the rate of \$3600.00 per annum, he should now be paid such an amount of money as back pay as will make his salary over the period of January 1 to June 10, 1937, have amounted to \$300.00 per month.

As stated by Mr. Carter in his letter, this office ruled, under date of September 27, 1933, in an opinion addressed to the State Auditor, that the Governor had the authority to hire the employees of the Budget Department and fix their compensation. That being true, Mr. Carter will have to show that his salary over the period in question, viz: January 1 to June 10, 1937, had been set at the rate of \$300.00 per month by the Governor, for, as was said in the case of State ex rel. Buder vs. Hackmann, 305, Mo. l.c. 351:

"Before the State can be held liable for the payment of a fee or expense incurred in its behalf, the person or officer claiming such fee or expense must be able to point out the law authorizing such payment."

We think the foregoing rule requires Mr. Carter to show that his salary had been set for the period of January 1 to June 10, 1937 at \$300.00 per month. If it was not set at that figure for said period, then he has no lawful right to such salary. Nothing in Mr. Carter's letter indicates that his salary for that period had been set at \$300.00 per month. The statutes governing the Budget Department do not set the salary of the Chief

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Clerk, and, as heretofore pointed out, this office has ruled that the Governor has the authority to set such salary. The appropriation act of 1937, p. 49, L. 1937 does not set apart any definite amount for the salary of the Chief Clerk of this department. Therefore, Mr. Carter has not pointed out the law authorizing payment of the amount claimed by him, and we are unable to find any such law.

The fact that Mr. McGregor received \$300.00 per month over the remainder of the biennium in which Mr. Carter served, presumably for doing the same work as Mr. Carter did, does not render any assistance in determining our question. Evidently, Mr. McGregor's salary has been set at \$300.00 per month by the proper authority. If it has not, then he would not be entitled to such salary. We think the question is not what title an employee served under, or what work he did, or what would have been fair compensation, nor what his predecessor or successor received for the same work. It is purely a question of whether the salary claimed has been set or established by the proper authority.

CONCLUSION

It is, therefore, the opinion of this office that the claim of Mr. Charles F. Carter for back pay for services as Chief Clerk of the Budget Department for the period of January 1 to June 10, 1937, as set forth in the foregoing letter of his dated February 15, 1938, cannot be legally paid.

Yours very truly,

HARRY H. KAY
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

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