

COUNTY HIGHWAY ENGINEER - Right to appoint assistant.

COUNTY COURT - Right to fix compensation of assistant appointed by County Highway Engineer; right to reimburse County Highway Engineer for gasoline and oil purchased by him and used in performing his duties; right to pay County Highway Engineer monthly sum for use of his privately owned auto- September 12, 1934 mobile in performing his duties.

Honorable John S. Phillips,
Prosecuting Attorney, Butler County,
Poplar Bluff, Missouri.



Dear Sir:

A request for an opinion has been received from you under date of August 20, 1934, such request being in the following terms:

"I am writing your office for an opinion as to the authority of the County Court.

Now sometime ago there was filed in the Circuit Court of Butler County, Missouri, a lawsuit upon the petition of one hundred and ninety-eight, (198), taxpayers of Butler County against the County Court and Highway Engineer charging various violations, and requesting the Circuit Court to restrain them from further performance of such acts.

One of the counts in the petition charged that they were wrongfully and illegally paying for a stenographer in the County Highway Engineer's office. Also, that they were wrongfully and illegally paying to the County Highway Engineer \$30.00 monthly for the use of his privately owned automobile. Also, furnishing gas and oil for the use of said automobile.

Among a number of other counts, which are not in issue at this time, this was submitted to the Circuit Court for trial, and after hearing the testimony the Court found as to each of the above items that no order of the County Court had ever been made authorizing or approving the appointment of any stenographer, nor fixing the salary of same, and the Court therefore found and restrained the further payment of any moneys out of the public funds of Butler County for this purpose until such time as a proper and LEGAL order had been made by the County Court approving the appointment and fixing the salary.

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"Now the Court also found that no County Court order had ever been made authorizing the spending of \$30.00 per month for the use of the County Highway Engineer's privately owned automobile and restraining the County Court from the further payment of this item until such time as the County Court had made a proper and LEGAL order authorizing the payment of this amount.

The above opinion was handed down on August 1st, 1934, by the Circuit Court and properly served upon the defendants. On the 8th day of August, 1934, the County Court in regular session met and made two orders a copy of each is hereto attached. One applying to the appointment of a stenographer which they term in their order as an 'Assistant' claiming for authority under Section 8011 R.S. 1929. The other order refers to the \$30.00 for the use of car and includes gas and oil.

I am requesting that you give to me at your earliest date an opinion as to whether or not the County Court has authority to make these orders, or either of them."

The orders of the County Court enclosed with your request are as follows:

"Now at this time J. F. Carey, County Highway Engineer, having submitted to the Court in writing his appointment of Claudia Harrington as one of his assistants under the provisions of Section 8011 R. S. Missouri, 1934, and the Court being of the opinion that the duties of the said office of County Highway Engineer cannot be properly performed without the aid of an assistant, it is therefore ordered by the Court that the appointment of Claudia Harrington as an assistant be approved and the Court fixes her compensation at the sum of \$2.00 for each day so employed in said office."

"The Court being of the opinion that the County Highway Engineer in order to properly perform the duties of his office requires the use of an automobile and the finances of the County being such that an expenditure for the purchase of said automobile would not be justified and it further appearing that the County Highway Engineer, F. J. Carey, is the owner of an automobile suitable for the use of said official, therefore, it is ordered by the Court that, in lieu of the purchase of a car for the use of the said Highway Engineer, the Court pay to said Highway Engineer the sum of \$30.00 monthly for the use of said official's privately owned automobile in connection with the duties of his office together with the gas and oil

"used in said car while being operated for County Highway work."

I

RIGHT TO APPOINT ASSISTANT.

Revised Statutes Missouri 1929, Section 8011, provides in part as follows:

"In the event that the county highway engineer cannot properly perform all the duties of his office, he shall, with the approval of the court, appoint one or more assistants, who shall receive such compensation as may be fixed by the court."

There is nothing in such statutory provision which imposes any particular qualifications on such assistant and therefore the County Highway Engineer would seem to be justified in appointing an assistant to assist him by performing clerical and stenographic work to the same extent that he would have authority to appoint an assistant to do any other type of work for him. That part of the statute above quoted authorizes the engineer to appoint and the County Court to fix the compensation of the appointee, and the order which has been made by the Court as furnished by you seems to follow the statutory procedure.

II

RIGHT TO PAY COUNTY HIGHWAY ENGINEER FOR USE OF HIS AUTOMOBILE AND FOR GAS AND OIL CONSUMED THEREIN.

A. Whether or not the duties of the County Highway Engineer reasonably require automobile travel by him is a question of fact and it would seem that the determination by the County Court that an automobile is necessary to the County Highway Engineer "in order to properly perform the duties of his office", if supported by evidence, would be proper and final in the absence of an appeal. The duties of a County Highway Engineer would seem to furnish a justification for such finding. Thus Revised Statutes Missouri 1929, Section 8014, provides as follows:

"The county highway engineer shall personally, or by deputy, inspect the condition of the roads, culverts and bridges of each district as often as practicable, and, upon the written complaint of three freeholders in any such district, of the bad or dangerous condition of the roads, culverts or bridges of such district, or of the neglect of

"duty, by any road overseer of any such district, or of neglect of any contractor on roads let by contract, it shall be the duty of the county highway engineer to at once visit said road and investigate the complaint, and, if found necessary, to at once cause such road to be placed in good condition."

and Section 8009 provides in part as follows:

"If any county highway engineer shall fail, refuse or neglect to visit and inspect, in person or by deputy, the roads, bridges and culverts in each road district in the county, at frequent and regular intervals, * * * he may be removed from office by the county court,"

In view of these statutes and the facts as furnished in your letter including the absence therefrom of any intimation that the use of an automobile is not reasonably necessary for the County Engineer to perform properly his duties, it may be assumed that the necessity for automobile transportation for the County Highway Engineer does exist.

B. The County Court by statute (Section 2078) is given the "control and management of the property, real and personal, belonging to the County * * *" and the County Court in the case of *Kansas City Disinfecting and Manufacturing Co. v. Bates County*, 273 Mo. 300, 201 S. W. 92 (1919), is called "the general statutory contracting, auditing and fiscal agency of the County". (273 Mo. 306). Revised Statutes Missouri 1929, Section 12107, provides that "the county court may, by an order entered of record, appoint an agent to make any contract on behalf of such county for erecting any county buildings or for any other purpose authorized by law." While the County Court is a statutory body with no powers except those conferred upon it by statute (State ex rel, and to Use of *Broughton v. Oliver*, 202 Mo. App. 527, 208 S. W. 112 (1919)), nevertheless where a duty is delegated by statute to a county officer, such statute impliedly authorizes the County to pay the expenses necessary to the performance of such duty. In the case of *Blades v. Hawkins*, 133 Mo. App. 328, 112 S. W. 979, affirmed 240 Mo. 137, 144 S. W. 1198 (1911), it was held that a County Court was authorized to employ and pay an accountant to audit the public records of the County, even though there was no statute authorizing specifically such employment or audit. The Court at 240 Mo. 135-6 stated the problem as follows:

"public corporations never have been deemed to possess authority to contract, or do any other act, unless the power was granted by statute or could be implied because necessary and incidental to the due performance of powers granted or duties enjoined. This doctrine applies to county

courts and commissioners, as well as to the governing bodies of other subordinate political corporations. There is in our statutes no grant of authority to a county court to employ an expert to audit and examine the books and accounts of the county and its officers. Hence, if this authority existed in the present instance, it was because the law implied it as essential to the due exercise of powers specifically vested in the county court by statute or the performance of a duty specifically required of said tribunals. The courts are conservative in implying powers not expressly given. One limitation imposed by law on these implications is that no power will be implied to belong to a public corporation unless it is cognate to the purpose for which the corporation was created. Therefore, in determining whether or not the county court of Stone County had authority to employ an expert to look over official books and accounts, we must call to mind the duties of such a court. A county court is the general fiscal agent of the county, and is possessed of a supervisory power over the collection and preservation of its funds."

and at page 197 expounded the reasons for implying this power as follows:

"responsibility for the safety of public moneys, the accuracy and honesty of the accounts and settlements of officials, and the collection of defalcations, is imposed on county courts. The question for decision is whether the express delegation of these powers and duties by the Legislature carried with it the authority to employ an expert to look over books and documents in order to ascertain whether officials and other persons chargeable with public moneys had rendered correct and faithful accounts, and had made just settlements with the court. In our opinion this question ought to be answered in the affirmative. While it is true the law is strict in limiting the authority of these courts, it never has been held that they have no authority except what the statutes confer in so many words. The universal doctrine is that certain incidental powers germane to the authority and duties expressly delegated, and indispensable to their performance, may be exercised."

Thus, if the purchase of an automobile by the County and the purchase by the County of gas and oil to operate such automobile was found to be reasonably necessary to enable the County Highway

Engineer to carry out properly his official duties, it would seem that the County Court would be authorized to make such purchase with County funds. In *Scott County v. Advance-Rumley Thresher Co.*, 288 Fed. 739 (Circuit Court of Appeals, 8th Ct. 1923) the Court held that the County Court as a part of its duty and right to keep up the roads of the County was impliedly authorized to purchase the machinery reasonably necessary for such maintenance.

C. It has been demonstrated above that the statutes of Missouri would justify a finding by a County Court that the use of an automobile was necessary for the County Highway Engineer in order properly to perform his duties and that the County Court, if it made such a finding, would be authorized to purchase such an automobile and to buy gas and oil to be used therein. Assuming that the County Court did not buy such an automobile, it would seem that a County Court which had found that automobile travel by the County Highway Engineer was necessary, would be warranted in paying expenses for automobile transportation actually paid out by the County Highway Engineer in the necessary performance of his duties and that his expenses for gasoline and oil used in an automobile on exclusively county highway business could be refunded to him. If the County Court could purchase directly the gasoline and oil, it would seem to be equally authorized to reimburse the County Highway Engineer for money spent on gasoline and oil used solely in performing the duties of his office, providing the price at which such gasoline and oil was purchased by him was reasonable. Where a statute imposes certain duties on a public officer he is impliedly authorized to spend his own money insofar as it is necessary properly to perform such duties and to be reimbursed by the state or municipality of which he is an officer. Thus in the case of *State ex rel Bradshaw v. Hackman*, 276 Mo. 600, 208 S. W. 445 (1918) the Court, although it held that the State Warehouse Commissioner could not recover moneys spent by him in traveling on official business outside of the state on the ground that his statutory duties did not authorize him to go outside of the State, indicated that if his traveling expenses had been incurred while traveling in the State in carrying out the duties imposed upon him by statute, that such expenses could be recovered. The Court said:

"Looking then to the above act to ascertain the duties incumbent on the Warehouse Commissioner and his official family, we note that it is only pursuant to Sections 33, 37, 41, 51 and 52 thereof that duties are prescribed which, either expressly or by implication, require the incurring of expenses for travel. Examining the above sections seriatim (but with an eye single to the facts before us in this case) it will be seen that Section

"§3, supra, Laws 1913, p. 365, permits, and whenever necessary requires, the examination of 'all property in any public warehouse or elevator in this State.' Travelling expenses may of course be incurred whenever in the opinion of the Warehouse Commissioner it is necessary to the performance of the above duty."

The principle of State ex rel Bradshaw v. Hackmann, supra, is limited to reimbursement for out of pocket expenses and is the only principle which we have been able to discover which might authorize the payments here in question. Such principle could not apply to sums paid out monthly to the County Highway Engineer for the use of his private automobile. As appears from Revised Statutes Missouri 1929, Section 12107, quoted above, the contracts which the County Court may make are limited to contracts for purposes "authorized by law" and we find no legal justification or authorization for a County Court entering into a contract with a county official by which it pays him a regular fixed sum for the use of his own property and we believe that a statute would be necessary for such authorization. A statute of the United States has been discovered presenting an analogous situation, this being "an act to authorize the Postmaster General to hire vehicles from village delivery carriers", approved June 18, 1930 (46 Stat. 782; U.S.C., Supp. VI, Title 39, Section 52) as amended by Public No. 452, 73rd Congress, approved June 22, 1934, which contains the following:

"Provided, That beginning with the fiscal year 1928, and thereafter, the Postmaster General may hire vehicles from postal employees, not filling supervisory positions, for use in the city delivery and collection service, and in the village delivery and collection service, either under an allowance or on a contract basis."

This statute would seem to indicate that Congress felt that a specific statute was necessary to authorize the hiring of a vehicle from one of its employees.

In conclusion, it is our opinion that the order of the County Court set out above which fixes the compensation of an assistant to the County Highway Engineer appointed by him, is valid, and that the other order of the County Court above set out is valid insofar as it authorizes payment to the County Highway Engineer of sums actually expended by him for gasoline and oil consumed solely in performing the duties of his office, to the extent that such use was necessary in properly performing the duties of his office, provided that the gasoline and oil is pur-

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chased at reasonable prices, but that such order is invalid as a matter of law to the extent that it authorizes a payment of \$30.00 per month to such County Highway Engineer for the use of his automobile.

Very truly yours,

EDWARD H. MILLER

ASSISTANT ATTORNEY GENERAL

APPROVED:



(ACTING) ATTORNEY GENERAL