

PENITENTIARY: Officers and employees of the Missouri State Penitentiary, and superintendents of institutions under department of penal institutions are not entitled to subsistence.

December 30, 1936.

Hon. S. B. Hunter,
Director
Department of Penal Institutions
Jefferson City, Missouri



Dear Sir:

This department acknowledges your request for an opinion under date of December 19th as follows:

"From the investigation that has been going on and some of the questions asked, the Board is constrained to believe it should have a written opinion from you regarding the whole question of subsistence:-

- "1. Who is entitled to subsistence at the Penitentiary?
- "2. Does the Board have the right to allow subsistence to the superintendents of the several penal institutions?

"The present Penal Board, finding no statutes prohibiting the allowance of subsistence, has approved subsistence want lists submitted by the superintendents of the penal institutions.

"It will be appreciated if you will go into this matter at your earliest opportunity and furnish the Board an opinion."

I.

Officers and employees of Missouri State Penitentiary are not entitled to any subsistence.

Laws of Missouri, 1933, Section 8319, page 328, provides the compensation of the Director, and members of the department of penal institutions, as follows:

"The director of penal institutions shall receive an annual salary of not more than thirty-six hundred dollars, and such railroad fare and other traveling expenses as may be incurred while traveling in the discharge of official duty. Each member of the commission of the department of penal institutions other than the chairman thereof, shall have and receive an annual salary of not more than thirty-two hundred dollars, and in addition thereto shall be reimbursed for all railroad fare and other expenses incurred while traveling in the discharge of official duty."

Laws of Missouri, 1931, Section 8391, page 284, provides the compensation of the Warden of the penitentiary, as follows:

"It shall be the duty of the commission of the department of penal institutions, by and with the consent and approval of the governor, to appoint a warden of the Missouri state penitentiary at an annual salary not in excess of three thousand dollars, and a physician of said institution at an annual salary not in excess of four (five) thousand dollars, said salaries to be paid in equal monthly installments as the salaries of other employees of the Missouri state penitentiary are now required by law to be paid. ****

Section 8394, R. S. Mo. 1929, provides the compensation of the Assistant Warden, and other penitentiary employees, as follows:

"Said board shall have power to appoint one deputy warden, two chaplains and one matron ****. The board shall also appoint such number of turnkeys, guards and other assistants as may be necessary, who shall at all times be subject to its orders as may be required of them. The deputy warden shall receive for his services the sum of twenty-five hundred dollars per annum, and shall reside in a house provided as his official residence; the matron shall receive for her services the sum of ten hundred twenty dollars per annum. All

turnkeys and guards shall receive for their services the sum of one hundred thirty-five dollars per month, provided that guards and turnkeys who are on duty not more than eight hours per day shall receive one hundred and fifteen dollars per month. All other officers and employees shall receive such compensation as may be agreed upon between them and said board. All salaries shall be paid in monthly installments. The board shall make a pay roll containing the names of every officer and employe, with the amount due each, which shall be kept at the penitentiary and a certified copy thereof filed in the office of the state auditor. Such salaries shall be paid out of the fund appropriated for the pay of civil officers: Provided, that if at any time the appropriation shall be exhausted, such salaries shall be paid out of the earnings of the penitentiary appropriated for that purpose. The chaplains and matron shall perform such duties as are herein provided."

In none of the above sections, do we find any provision made for "subsistence" for the officers or employes of the state penitentiary. Provision is made only for compensation or salary.

In the case of Windmiller v. The People, 78 Ill. App. 273, l. c. 276, the Court defined the term "salary" in the following language:

"The term 'salary' means a reward or recompense paid for personal service. As applied to a public officer it means the compensation paid him for the personal service in the discharge of the duties of his office."

And, in the case of Commonwealth v. Bailey, 3 Ky. Law Reports, 110, l.c. 114, the Court defined the term "salary" as follows:

"Or, in other words a salary is 'an annual or periodical payment for services' (Webster), or 'an annual or periodical payment for services; a stipulation, periodical recompense' (Worcester). 'A fixed sum paid

to a person for his services yearly, half-yearly, or quarterly; stipend, wages; (Store-mouth)."

In the ordinary popular sense, it is "certain fixed and periodical remuneration for services".

In re Chancellor (Md), 1 Bland 595, 1. c. 630, the Court said:

"A salary is a compensation for services rendered; it is the periodical payment of a certain value, in money, for work and labour done."

Thus it may be said that the term "salary" means a fixed and periodical remuneration for services in money, and we are of the opinion that such is the meaning of the term as it is used in Sections 8319, 8391, and 8394, supra.

In the Laws of Missouri, 1935, Section 1, subsection "D", at page 72, we find the following provision in the appropriation act for the Missouri State Penitentiary:

"D. Operations:

"General expense; including communication, printing and binding, regulative, transportation of things, travel, and other general expense; material and supplies, consisting of household supplies, subsistence, clothing, rewards, discharged inmates, bonds, insurance..... \$740,000.00"

60 Corpus Juris, Section 1170, cites cases to the effect that "subsistence" is synonymous with the term "support" (Majors v. Lewis and Clark County, 201 P. 268, 269), and that "support" includes something more than mere food (Board of Com'rs for Caldwell County v. Sidney Spitzer & Co., 91 S. E. 707, 708).

Thus we find a provision made in an appropriation act for subsistence or food for the governing staff and employees of the penitentiary, but no provision is made for same by statute. The question then to be determined is whether the Legislature can legislate by an appropriation act.

In the case of State v. Thompson, 289 S. W. 338, 1.c. 341, 316 Mo. 272, the Court, in holding that the Legislature cannot legislate by an appropriation act, said:

"As has been observed in well-reasoned cases, if the practice of incorporating legislation of general character in an appropriation bill should be allowed, then all sorts of ill conceived, questionable, if not vicious, legislation could be proposed with the threat, too, that, if not assented to and passed, the appropriations would be defeated. The possibilities of such legislation and this court's condemnation thereof are well illustrated in the case of State ex rel. Tolerton v. Gordon, 236 Mo. 142, 139 S. W. 403, as well as the following cases from other states: State ex rel. v. Carr, 129 Ind. 44, 28 N. E. 88, 13 L. R. A. 177, 28 Am. St. Rep. 163; Com. v. Gregg, 161 Pa. 582, 29 A. 297."

Providing for "subsistence" in the appropriation act, supra, is tantamount to an attempt at legislation by an appropriation act, and therefore void. If the governing staff of the penitentiary and the employees are entitled to subsistence they must look to the statutes, and here we find no provision for same.

Section 8419, R. S. Mo. 1929, provides that no products are to be sold to officers or employees of the penitentiary except for the use and benefit of the State and is as follows:

"Neither the warden nor the superintendent of industries shall sell or give to any of the officers or employes of the prison any fuel, forage, pro-

visions or manufactured articles under his charge, nor permit such things to be taken or used except for the use and benefit of the state. Any alleged violation of this provision may be examined into by said board, and if found to be true, shall be held to be just cause for the removal of the warden or superintendent of industries, or both, as the case may be."

Section 11406, R. S. Mo. 1929, provides in part as follows:

"Every employe or official of the state of Missouri, who is on a regular salary or per diem, shall have a designated place as headquarters and no such official or employe shall be entitled to, or receive, any compensation or reimbursement for any subsistence expense, (meals or lodging) while at headquarters. ****"

Section 8419, supra, in clear and unambiguous language prohibits the selling or giving away of any subsistence such as fuel, forage, provisions or manufactured articles belonging to the penitentiary to any officer or employee of the prison, and Section 11406, supra, prohibits them from receiving such subsistence by virtue of the fact that they have their headquarters in Jefferson City.

From the foregoing sections, we are of the opinion that no officer or employee of the Missouri State Penitentiary is entitled to any subsistence.

II.

Superintendents of institutions under department of penal institutions are not entitled to subsistence.

Section 8373, R. S. Mo. 1929, provides for the appointment of a superintendent for the State Industrial Home for Girls, as follows:

"The board shall appoint a superintendent of said industrial home, said superintendent to hold office at the pleasure of said board, The said board shall also appoint a sufficient number of employes to carry on the institution under the provisions of this article in the most economical manner."

Section 8386, R. S. Mo. 1929, provides for the appointment of a superintendent for the State Industrial Home for Negro Girls, as follows:

"The board shall appoint a superintendent of said industrial home to hold office at the pleasure of said board. The said board shall also appoint a sufficient number of employes to carry on the institution under the provisions of this article in the most economical manner."

Section 8471, R. S. Mo. 1929, provides for the appointment of a superintendent of the Intermediate Reformatory, as follows:

"The commissioners of the department of penal institutions shall appoint a superintendent for said institution, who shall be selected with a view to his educational training, experience, general fitness and special interest in the reformation of offenders. Before entering upon the duties of his office said superintendent shall give a bond to the state, with sufficient surety, in the sum named by said commissioners and shall be sworn to a faithful performance of his duties."

Section 8346, R. S. Mo. 1929, provides for the appointment of a superintendent at the Missouri Training School for Boys, as follows:

"The state prison board shall have full control and management of said reformatory and shall, from time to time, adopt such by-laws, rules and regulations, not inconsistent with law, as may be deemed best for the management of said institution; said board shall elect a superintendent and such other officers and em-

ployes as may be necessary for properly conducting said institution, who shall hold their offices during the pleasure of the board, and shall fix the salaries of such officers and employes, which shall be paid monthly."

We have searched the statutes as to what compensation the superintendents of the State Industrial Home for Girls, State Industrial Home for Negro Girls, and Intermediate Reformatory, may receive and have not found any statutory authority authorizing any salary. The only mention of a salary of a superintendent is that of the Missouri Training School for Boys, but that is not fixed.

The Appropriation Act, found in the Laws of Missouri, 1935, pages 74 and 75 (Intermediate Reformatory), p. 76 (Missouri Training School for Boys), p. 78 (State Industrial Home for Girls), p. 80 (State Industrial Home for Negro Girls) authorizes the payment of moneys for salaries for superintendents.

The commissioners of the department of penal institutions evidently fix compensation for superintendents by virtue of Section 8394, R. S. Mo. 1929, which provides in part:

"**** all other officers and employees shall receive such compensation as may be agreed upon between them and said board."

The terms "compensation" and "salary" are used interchangeably in our statutes with respect to payment (State v. Farmer 196 S. W. 1108, l.c. 1108, 271 Mo. 306) and we are of the opinion that the term as used in Section 8394, supra, is synonymous with the term salary.

As we have pointed out, the term "salary" doesn't include "subsistence", and we are therefore of the opinion that the department of penal institutions (board) have no authority to agree with superintendents of the respective penal institutions under their supervision, for any other thing than payment of money for services rendered.

You state in your letter that the present penal board

12/30/36

"finding no statutes prohibiting the allowance of subsistence has approved subsistence want lists". As heretofore pointed out, the rule is that the board must point to a statute to authorize subsistence and, if there be no statute, then the board cannot grant or allow subsistence. The penal board is governed by statute and said board must therefore look to its statutory authority to allow subsistence. You have the rule reversed. The rule is that when there are no statutes prohibiting the allowing of subsistence then the board cannot allow same.

Respectfully submitted,

James L. HornBostel
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General

MW/JLH/afj