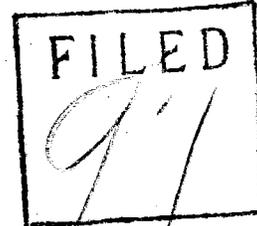


COUNTY HIGHWAY ENGINEER: Compensation and when same may be withheld.

3-16

March 10, 1937.



Hon. W. P. Wilkerson,
Prosecuting Attorney,
Sikeston, Missouri.

Dear Sir:

We wish to acknowledge your request for an opinion under date of February 19th, wherein you state as follows:

"It has recently come to light that our Scott County has been paying the County Surveyor and ex-officio Highway Engineer \$3,000.00 per year, ostensibly under authority of Section 8006. It appears, however, that the County Highway Engineer Law was suspended as provided in Section 8019, if the elections held for that purpose were legal. It appears by an order of the County Court on October 4, 1910, that the proposition was ordered submitted to the voters at the general election of November 8, 1910 and on that date there were cast 810 votes for the proposition and 1162 against the County Highway Engineer Law. It further appears from the records of the County Court that on October 24, 1912, the question was ordered submitted again and was submitted in that year with 773 votes for the proposition and 1279 against it.

"Afterwards, and on February 8, 1913, the County Court fixed the salary of the Highway Engineer at \$5.00 per day for each and every day he actually worked.

"In this state of affairs I would be very much pleased to have you advise me

1. Whether the elections held in 1910 and 1912, under the provisions of Section 8019, were sufficient to suspend the provisions of the Highway Engineer Law inasmuch as that section provides at the present time, that this proposition shall be submitted at a special election not to be held within ninety days of any general election. I do not have the statutes of 1909 available and it may be possible that this provision for the special election was not present in the statute at that time.
2. I would be pleased to have you advise me whether the County Highway Engineer is, in your opinion, liable to the County General Revenue Fund for the excessive salary he has drawn in the three years last past.
3. Inasmuch as this Highway Engineer is broke and nothing substantial can be collected from him, in the event of his liability for the excessive amount of salary drawn, is it in your opinion right and proper to instruct the County Court to pay him nothing by way of salary until such time as he may have this matter straightened up? In fact, he probably cannot straighten it up because he has nothing to pay with and to refuse to pay him anything simply means he must quit and another man be hired.

"In connection with the above, I have tentatively advised the Court that this Highway Engineer is liable for the excessive salary drawn by him. I reached this conclusion chiefly on account of the rulings in State ex rel. vs. Adams, 172 Mo. 1; and Jackson County vs. Stone, 168 Mo. 577; as well as the text in 46 CJ, page 1030, although it appears

from the annotations that the cases cited therein do not bear out the statement in the text.

"There is also another angle to this case, in that the County Highway Engineer, while being paid \$250.00 per month out of the County General Revenue Fund did a great deal of very valuable engineering work for and on behalf of certain County Drainage Districts which are being administered in our County in connection with certain refinancing and refunding operations of these said Districts, for which he was paid nothing. In other words, the County General Revenue Fund was burdened with this expense and the Drainage Districts obtained the benefit of it. I do not know the value of this work but am advised that it will run between \$2,000.00 and \$3,000.00, and it is probably worth \$2,500.00.

"After talking with Bill Dorsey, a representative of the State Auditor's Office, we have decided we would recommend to the Court that they pay the reasonable value of these services into the General Revenue Fund of the County and credit that amount on the delinquencies of the Highway Engineer. This the County Court agreed to do but subsequently called a meeting of the landowners in the different districts, and the landowners refused to sanction the payment in excess of \$500.00 for all the districts, and consequently the County Court refused to make the required payment.

"In this state of affairs, I would be glad to have you advise me whether, in case you hold the Highway Engineer liable to the County for the excessive salary drawn, we can sue these drainage districts and compel them to pay into the General Revenue Fund the reasonable value of this engineer's services. There is no question in my mind but that the Highway Engineer, individually, can sue and compel these districts to pay him the reasonable price of his work, but whether the State has any right to compel

such a payment is another matter, and I'm afraid a tough one.

"I can clear up this last point by taking an assignment from him and suing on the assignment in the name of the State."

I.

Section 8019, R. S. No. 1929, provides the manner in which the County Highway Engineer Law may be suspended, thus:

"Whenever a petition, signed by at least ten per cent. of the taxpaying citizens and voters representing at least two-thirds of the townships of any county in this state, shall be presented to the county court thereof asking that a proposition be submitted to the qualified voters of the county, to determine whether or not the provisions of this article shall continue to apply to such county, the court, after due consideration, may order that a proposition for the approval or rejection of the provisions of this article be submitted to the qualified voters of the county at any general election held for the purpose of electing county officers, or upon a petition, signed by at least fifteen per cent. of the taxpaying citizens and the voters representing at least two-thirds of the townships of any county in this state asking that such proposition be submitted, at a special election, the county court shall call the special election for the submission of such proposition within ninety days from the filing of such petition: Provided, such special election shall not be held within ninety days of any general election. The county court shall give notice of such election by publishing the same in some newspaper published in the county. Such notice shall be published for at least two consecutive weeks, the last insertion to be within ten days next before such election, and such other notice may be given as the

court may deem proper. The proposition so submitted shall be printed on the ballots in the following form: 'For county highway engineer law,' 'Against county highway engineer law,' with the direction 'Mark out the clause you do not favor.' If a majority of those voting at such election upon the proposition vote for the county highway engineer law, then this article shall remain in full force and effect in such county, but if a majority of those voting at such election upon the proposition vote against the county highway engineer law, then this article and the provisions of the law relating to the appointment and duties of a county highway engineer shall not be enforced in such county."

Under the above provision, the voters may petition the county court that the proposition be submitted without specifying the time it is to be voted on, and in such instance the court may order that it be submitted at any general election held for the purpose of electing county officers, or the voters may petition the county court, designating that such proposition be submitted at a special election. If the latter be the case, then the county court must call the special election within ninety days from the filing of the petition, and it must not be held within ninety days of any ^{general} election.

You state in your letter that the court ordered the proposition be submitted to the voters at the general elections in 1910 and 1912, and ask whether, under the provisions of Section 8019, supra, they were sufficient to suspend the provisions of the County Highway Engineer Law, inasmuch as it provides that the proposition be submitted at a special election not to be held within ninety days of any general election.

The provisions of Section 8019, supra, and Section 10571, R. S. No. 1909, are identical, and since, as pointed out, Section 8019, supra, provides that where the voters petitioning the court fail to specify the time for voting on the proposition, the court may order that it be submitted at any general election, we are of the opinion that there was no breach of the statute, assuming that the petition was signed by at least ten per cent of the taxpaying citizens and voters representing at least two-thirds of the townships of the county.

II.

You state that at the general election held November 8, 1910, there were 810 votes cast for the proposition and 1162 against it. Therefore, by virtue of Section 8019, supra, the County Highway Engineer Law was suspended.

Section 8021, R. S. Mo. 1929, provides that where the County Highway Engineer Law has been suspended, the question may be resubmitted after the expiration of one year, thus:

"If any county shall have voted to suspend the county highway engineer law as provided in section 8019, the question may be resubmitted after the expiration of one year, upon the petition of two hundred resident taxpaying citizens and voters representing not less than two-thirds of the townships of the county, at the ensuing election held for the purpose of electing county officials, and if a majority of the qualified votes cast upon the proposition be for the adoption of the county highway engineer law, it shall again become effective and be in force in such county from and after the February term of court following such election. The form of the ballot at such election shall be as follows: 'For county highway engineer law,' 'Against county highway engineer law,' with the direction 'Mark out the clause you do not favor.'"

This, we understand, was done in the instant case in the year 1912, when a vote was recorded of 773 votes for the proposition and 1279 against it. The County Highway Engineer Law remained suspended, and we assume remains so today.

Section 8020, R. S. Mo. 1929, provides that where the county highway engineer has been dispensed with, as provided by Section 8019, supra, the county surveyor is ex officio county highway engineer, and receives compensation as may be allowed by the county court, of not less than three dollars nor more than five dollars for each day actually employed as such county highway engineer, thus:

"In all counties in this state that may vote against the county highway engineer law in the manner prescribed in section 8019 of this article, all matters relating to roads and highways and the expenditures of the public funds thereon shall be governed by the laws then in force in such counties, except that part of the law pertaining to the appointment of the county highway engineer. In all counties wherein the services of a county highway engineer are dispensed with, as provided by section 8019 of this article, the county surveyor shall be ex officio county highway engineer, and, as such, shall perform such services pertaining to the working, improvement, repairing and maintenance of the roads and highways, and the building of bridges and culverts as provided by this article to be done and performed by the county highway engineer, or as may be ordered by the county court; and for his services as ex officio county highway engineer he shall receive such compensation as may be allowed by the county court, of not less than three dollars nor more than five dollars for each day he may be actually employed or engaged as such county highway engineer. The county court may empower the county highway engineer, or the county surveyor when acting as county highway engineer, to employ such assistants as may be deemed necessary to carry out the court's orders and at such compensation as may be fixed by the court, not to exceed the sum of four dollars per day for deputy county highway engineer nor more than three dollars per day for each other assistant for each day they may be actually employed."

It is our opinion that, under the above circumstances, if the county surveyor and ex officio county highway engineer is receiving and has received more than the amount allowed by the county court, which cannot be less than three dollars nor more than five dollars for each day actually employed as such county highway engineer, he is liable to the county general revenue fund for the excess salary he has drawn.

III.

You next inquire, in the event it is the opinion of this department that the county surveyor and ex officio county highway engineer has received in excess of the amount of salary due him, whether it is right and proper to instruct the county court to pay him nothing by way of salary until such time as he may have this matter straightened up?

We have been unable to find any decisions directly in point on this question in the State of Missouri, but it appears to be a well established rule of law that any compensation paid to a public official by a governmental body not authorized by law or in excess of the compensation authorized by law, may be recovered back without suit by holding back the future salary of the officer. Thus in the case of Price v. Lancaster County, 24 Pa. County Court, l. c. 235, the court said:

"Conceding, therefore, that the plaintiff did receive from the county the above illegal payments, can they be recovered back into the county treasury, or used by way of set-off? The answer to this proposition is fully contained in County of Allegheny v. Grier, 179 Pa. 639. Suit was brought by the county of Allegheny to recover from the controller of that county \$1,290.32, alleged to have been paid to him by mistake in excess of his salary as fixed by law. Among other defenses, it was urged that the payments made to the defendant and sued for were voluntary payments. The court below entered judgment in favor of the county, and this decision was affirmed by the Supreme Court. The late Chief Justice Sterrett, in delivering the opinion of the court, said: 'The act of 1864 being in force, the amount received by the controller in excess of the salary there fixed was, therefore, illegal. So, on the grounds of public policy, the court was right in holding that the maxim volenti non fit injuria has no application to the illegal payment of public funds to a public officer, more especially, where, as here, it is the peculiar function of that officer to guard the public treasury. Public revenues are but trust funds, and officers

but trustees for its administration for the people. It is no answer, to a suit brought by a trustee to recover private trust funds, that he has been a party to the devastavit. There could be no retention by color of right: *Abbot v. Reeves*, 49 Pa. 494. With much the stronger reason is this doctrine applicable where the interests of the whole people are involved, and the authorities are, accordingly, numerous to this effect: *New Orleans v. Finnerty*, 27 La. Ann. 681; *Com. v. Field*, 84 Va. 26; *Day Land and Cattle Co. v. State*, 68 Texas, 526; *Am. Steamship Co. v. Young*, 89 Pa. 191; *Taylor v. Board of Health*, 31 Pa. 73; *Smith v. Com.*, 41 Pa. 335. It is obviously immaterial whether the illegal payment be through design or mistake, for, in either event, the result must be not only misuse of trust funds, but, what is of far more importance, demoralization in the service. The only practical difference lies in this, that one makes a criminal and the other a trustee. So it is immaterial by what officer the funds are had and received. Fidelity to the government which he represents and is sworn to support makes restitution a duty. He can plead neither laches nor estoppel in pais to a suit for malversation. Public office is a public trust, the sanctity of public property is essential to its due administration, and necessarily implies a remedy for any diversion from legitimate use."

From the foregoing, we are of the opinion that the county court can legally withhold the amount it may owe the county surveyor and ex officio county highway engineer by way of salary, and the same may be treated as a counterclaim or setoff.

Hon. W. P. Wilkerson

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March 10, 1937

We note that you have cleared up the last point in your letter, hence we will not pass on same.

Respectfully submitted,

WM. ORR SAWYERS,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

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