

PROSECUTING ATTORNEY: Mandamus not proper proceeding to compel county court to allow stenographic fees to prosecuting attorney.

June 23rd, 1939.



Honorable Fred C. Bollow,  
Prosecuting Attorney,  
Shelby County,  
Shelbina, Missouri.

Dear Sir:

This is to acknowledge receipt of your letter of June 14th, 1939, in which you request an opinion from this office on various questions set forth therein. Your letter is as follows:

"Some two or three years ago your office handed down an opinion to the effect that the office of Prosecuting Attorney was entitled to Stenographic hire; that the Prosecuting Attorney might employ a stenographer and be re-embursed by the County for such sums as were expended by him. I presume that the rate of pay would have to be a reasonable rate of pay under the circumstances and could not be fixed either arbitrarily by the prosecutor or arbitrarily by the County. After such opinion was rendered by your office I employed a stenographer and have been regularly re-embursed by the County for such sums as I have expended for the past two or three years. At the beginning of the year 1939 I made up my budget and included therein an item of \$35 per month for stenographic

hire. This budget was approved by the County Court, then the entire county budget was approved by the office of the State Auditor. Thereafter I expended such sum of \$35 per month regularly and the bills for the same were honored by the County Court during the months of January, February, and March; but said Court has refused to honor said bills for the months of April and May. I have in fact paid out said sums for said months and since I believe your opinion to be sound and well reasoned, I propose to continue employing a stenographer for my office. I find it to be an absolute necessity.

"My question to you now is what is the proper remedy for me to pursue in order to enforce the payment by the County Court of these bills; whether an ordinary suit against the County or an action of mandamus against the County Court.

"Also I was notified the middle of May by the County Court that the stenographic hire was cut to \$25 per month and that that was the only amount they would pay from thereon. This notice of course came to me after I had expended \$35 per month for April and agreed to spend such sum for the month of May. It is my opinion that since I budgeted for \$35 and this budget was approved by the County Court, that the County Court is not in any position to at this date attempt to arbitrarily reduce

June 23rd, 1939.

the rate of pay. I should like to have your opinion on this matter also."

We are herewith enclosing copy of an opinion rendered by this department to Honorable Forrest Smith, State Auditor, under date of April 24th, 1936, in which it was held that "if it is necessary for the prosecuting attorney to hire a stenographer, or other clerical assistants, to perform certain necessary duties in his office, and he thereby is compelled to pay such expenses out of his pocket, he is entitled to reimbursement from the county in reasonable and necessary amounts."

We are also enclosing a copy of an opinion rendered to the prosecuting attorney of Boone County, Missouri, dated September 16, 1937, construing the Budget Act as pertaining to question as set forth in your letter.

In the second paragraph of your letter you inquire as to which is the proper remedy to pursue in order to enforce payment by the County Court of necessary sums expended by you for stenographic hire in connection with your office as prosecuting attorney, whether an ordinary suit shall be brought against the County or a mandamus suit against the County Court.

We refer you to Section 2093, R. S. Mo., 1929, which provides as follows:

"If any account shall be presented against a county, and the same, or any part thereof, shall be rejected by the county court, the party aggrieved thereby may prosecute an appeal to the circuit court in the same manner as in other cases of appeal from the county to

the circuit court; and the circuit court shall proceed to hear, try and determine the case anew, without regarding any error, defect or other imperfections in the proceedings of the county court."

It is our opinion that you may present the amount of your claim to the County Court, and if same is disallowed, proceed under this section and appeal from the action of the county Court to the Circuit Court. We do not think that mandamus is the proper proceeding under the authority of the following cases - State ex rel. Carroll v. County Court of Cape Girardeau County, 109 Mo. 248, l. c. 252, wherein it is said:

"The statutory provisions quoted gave the relator a specific remedy, to wit, by appeal; and when this is the case the extraordinary remedy by mandamus cannot successfully be invoked. State ex rel. v. Lubke, 85 Mo. 338; Blecker v. Commissioner, 30 Mo. 111; State ex rel. v. Marshall, 82 Mo. 484; Mansfield v. Fuller, 50 Mo. 338; State ex rel. v. County Court, 39 Mo. 375.

"The position here taken that there being a specific legal remedy provided in this class of cases, and, therefore, that mandamus cannot be employed to give relief, is distinctly recognized in State ex rel v. County Court, Mo. 475, and in the more recent case of Railroad v. St. Louis, 92 Mo. 160."

And the case of State ex rel Mitchell v. Rose, 313 Mo. 1. c. 373, where it is said:

"We are of the opinion that mandamus is not the proper remedy to compel the payment of the fees claimed by relator. Mandamus is an extraordinary legal remedy and cannot be invoked if relator has an adequate remedy at law, Cases cited."

And this case further holds that a claim may be filed with the County Court and in case of an adverse decision, appeal may be had to the Circuit Court and a trial de novo as appeals from the Justices of the Peace. We cite further the case of State ex rel. Case v. Seehorn, 283 Mo. 508, 1. c. 519, and Perkins vs. Burks, 336 Mo. 248, 1. c. 253. In view of these cases wherein it is held that under the statutes it is the duty of the County Court to look after the public funds, examine, audit, adjust and settle all accounts to which the County shall be a party and to pay out of the county treasury funds to be due by the county on such claims, that the County Court has certain discretionary powers in auditing the accounts and that mandamus will not lie to compel the payment of same. There are cases which hold that mandamus is the proper remedy to compel the County Court to pay an officer's salary where the salary is definite and fixed by the statute, but these cases are not applicable to the facts as stated in your letter.

We are of the further opinion that the fact that the sum of Thirty-five (\$35.00) Dollars was budgeted for the payment of stenographic hire for the prosecuting attorney does not, of itself, create a liability against the county to pay that sum. However, if you, as Prosecuting Attorney, expend for stenographic hire the sum of Thirty-five (\$35.00) Dollars per month and it can be shown that the same was expended by you, and that it was a reasonable amount and necessary for

Hon. Fred C. Bollow

-6-

June 23rd, 1939

the proper functioning of your office, under those facts it should be allowed by the County Court. But since these are facts to be passed on by the County Court, it has certain discretionary duties in examining into the reasonableness of the claim, and if disallowed, you may appeal to the Circuit Court as above stated.

Very truly yours,

COVELL R. HEWITT,  
Assistant Attorney General.

APPROVED:

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J. E. TAYLOR  
(Acting) Attorney General.

CRH:RV

Encls.