

PROSECUTING ATTORNEY: Prosecuting Attorneys in certain counties are entitled to additional pay for acting in juvenile cases, under 1939 Session Laws: COUNTY TREASURER: Treasurer in counties under township organization in certain counties is entitled to additional amount allowed under 1939 Session Law: COUNTY COURT: County Judges are entitled to mileage in certain counties under the 1939 Session Law: COUNTY CLERK: County Clerk in certain counties is allowed \$500.00 additional pay as budget officer, under the 1939 Session Law.

December 22, 1939

Mr. Henry N. Moore
Presiding Judge
Nodaway County
Maryville, Missouri



Dear Judge Moore:

We are in receipt of your request for an opinion, dated December 16, 1939, which reads as follows:

"I would like an opinion on the following officers as effected by the 1939 Session Acts, as it would seem to me that unless additional duties have been added that Article 14, Section 8 of the Constitution would preclude any increase in salary.

"The Prosecuting Attorney has no additional duties from the fact that Juvenile cases were handled by that office before his election. The Treasurer also has no additional duties. Is the mileage of the County Court considered additional to the salary and are we entitled to this mileage during our elected term? Also your opinion of the County Clerk's \$500.00 as Budget Officer, as this has been handled by former County Clerks and is not an additional duty."

In the above request you have asked the opinion of this Department as to additional compensation allowed the prosecuting attorney, county treasurer, county judges and the county clerk, under the 1939 Session Laws. We will attempt to answer this request separately as to each officer. Under the 1930 census the population of Nodaway County was 26371 and this opinion is based upon that bracket.

I

First, as to the prosecuting attorney, we find that Section 14164 R. S. Missouri, 1929 reads as follows:

"Any reputable person, being a resident of the county, having knowledge or information of a child, who appears to be a neglected or delinquent child, may file with the clerk of the circuit court a petition, in writing, setting forth the facts, verified by affidavit. It shall be sufficient that the affidavit be on information and belief."

It will be noticed under this section that any reputable person, a resident of the county, may file an information against a child with the clerk of the circuit court.

Section 14164, supra, was repealed, and a new section enacted, which appears at page 273, Laws of Missouri, 1939, and reads as follows:

"When any reputable person, being a resident of the county, shall file a complaint with the prosecuting attorney, stating that any child in the county appears to be a neglected or delinquent child, the prosecuting attorney shall thereupon file with the clerk of the juvenile court a petition in writing, setting forth the facts and verified by his affidavit. It shall be sufficient that the affidavit be on his information and belief. It shall be the duty of the prosecuting attorney immediately

thereafter to fully investigate all the facts concerning such neglected or delinquent child including its school attendance, home condition, and general environment, and to report the same in writing to the juvenile court, and upon hearing of such complaint to appear before the juvenile court and present evidence in connection therewith. The prosecuting attorney shall receive as compensation for the additional services and duties required under this act, in addition to the salary and fees now allowed prosecuting attorneys by law, an amount equal to 25% of the annual salary of such prosecuting attorney, per annum, to be paid in equal monthly installments upon the warrant of the county court issued in favor of the prosecuting attorney on the county treasurer for that purpose; Provided, however, that this section shall be applicable only to counties of less than 50,000 population."

It will be noticed under the above section that the word "shall" appears, it also included "shall file a complaint with the prosecuting attorney", and went on further to say that the prosecuting attorney shall thereupon file with the clerk of the juvenile court a petition which covers a different procedure than that set out in Section 14164, supra. It will also be noticed in the title of the act of 1939 that it specifically states "imposing upon the prosecuting attorney in the various counties the duty of filing petitions in the juvenile court * * * ." Under the old Section 14164, it was not the duty of the prosecuting attorney to file the complaint with the clerk of the circuit court. There is no question but that additional duties has been added to the prosecuting attorney and he should be allowed the additional fees allowed by the act of 1939. This section by imposing additional duties upon the prosecuting attorney and allowing additional compensation is not a violation of article 14, section 8, of the Missouri Constitution.

CONCLUSION

In view of the above authorities, it is the opinion of this department that the prosecuting attorney of Nodaway County should be allowed the additional salary and fees as set out in Section 14164, Session Laws of Missouri, 1939, from the time that the act went into effect.

II

As to the second inquiry in your request, concerning the county treasurer, I am enclosing an opinion rendered by this office, on December 13, 1939, and addressed to your county treasurer which held that section 12316, Laws of Missouri, 1939, page 386, was not a violation of Article 14, Section 8, of the Missouri Constitution. The reason why this additional limitation upon the pay of the county treasurer is not a violation of the Constitution is the fact that previous to the enactment of 1939 the salary of the county treasurer was not specifically set at any statutory amount, but remained in the discretion of the county judges of the county.

III

You also inquire as to the mileage of the county court, as set out in the 1939 act, for additional salary and whether or not it is a violation of Article 14, Section 8, of the Missouri Constitution if allowed.

Section 2092, Laws of Missouri, 1933, page 204, partially reads as follows:

"* * * In all counties of this state now or hereafter having less than seventy-five thousand inhabitants, the judges of the county court shall receive for their services the sum of five dollars per day

for each day necessarily engaged in holding court. In addition to the salaries herein authorized to be paid to judges of the county court in counties having seventy-five thousand inhabitants or more, and in addition to the per diem herein authorized to be paid to the judges of the county court in counties having less than seventy-five thousand inhabitants, said judges shall receive five cents per mile for each mile necessarily traveled in going to and returning from the place of holding county court, provided that such mileage shall be charged only once for each regular term, and no mileage shall be paid for any special or adjourned term."

The above section set out was amended by the Laws of 1939, page 332, is numbered the same and partially reads as follows:

"* * * In all counties of this state now or hereafter having less than seventy-five thousand inhabitants, the judges of the county court shall receive for their services the sum of five dollars per day for each day necessarily engaged in holding court. In addition to the salaries herein authorized to be paid to judges of the county court in counties having seventy-five thousand inhabitants or more, and in addition to the per diem herein authorized to be paid to the judges of the county court in counties having less than seventy-five thousand inhabitants, said judges shall receive five cents per mile for each mile necessarily traveled in going to and returning from the place of holding county court;
* * * * *"

It will be noticed in comparing the 1933 act, supra, and the 1939 act, supra, that there was no increase upon the amount per mile received by the county judge for mileage necessarily traveled in going to and returning from the place of holding county court.

The 1933 act, supra, restricted the trips made to one trip each regular term, while under the 1939 act this restriction was omitted, so that the county judge may collect the mileage for each trip to the place of holding court from his residence and return. Our first reason for holding that this act of 1939 is not a violation of article 14, section 8 of the Missouri Constitution, is, that the amount allowed per mile has not been increased, and further for the reason that the amount allowed each judge of the county court for mileage has not been specifically set by statute for the reason that one judge may live a greater distance from the courthouse than either of the other two judges, and for the further reason that a judge may move his place of domicile to a shorter or greater distance from the place of holding court and therefore the mileage fees are not specifically set out by statute. Our further reason that the act of 1939 in reference to mileage of the county judges is not a violation of article 14, section 8, of the Missouri Constitution, is that mileage is considered as expenses and not a part of the compensation, or fee. In support of that holding, we set out the following out-state decisions.

In the case of Taxpayers' League of Carbon County, Wyoming, v. John McPherson et al., 106 A.L.R. Ann. 767, Wyoming Supreme Court, February 11, 1936, 54 Pac. (2d) 897, the court said:

"The question whether an item of travel fees, with other items for per diem fees and extra service, should be included in the fee and emolument account of a federal district attorney, as belonging to the 'fees, charges and emoluments' to which that officer was entitled by reason of the discharge of his official duties, was involved in the case of United States v. Smith, 158 U. S. 346, 15 S. Ct. 846, 847,

39 L. Ed. 1011. The federal statute provided that certain fees should be allowed district attorneys in addition to a stated salary. In that part of the act providing for fees was a provision that these attorneys should receive \$5 per day while attending court and 10 cents per mile for traveling from the place of their abode to the place of holding court, and a like sum per mile for returning. In 1882 (22 Stat. 344) the law was changed so that as it affected New Mexico and Arizona it read, 'For the like services, double the fees hereinbefore provided' (Rev. St. U. S. sec. 837); but this amendment also limited the amounts receivable as fees and salaries by such district attorneys to \$3,500 annually. The plaintiff, a district attorney of the United States for the Territory of New Mexico, claimed the increase per diem and mileage, although if this mileage was regarded as a fee, his salary and fees would exceed the statutory limited amount. The government insisted that the mileage was a fee or emolument and should be considered in computing the annual salary. In holding that the allowance was not a 'fee, charge or emolument,' but was intended simply to reimburse the officer for expenses, the Supreme Court of the United States said: 'While an allowance for travel fees or mileage is, by section 823, included in the fee bill, we think it was not intended as a compensation to a district attorney for services performed but rather as a reimbursement for expenses incurred, or presumed to be incurred, in traveling from his residence to the place of holding court, or to the office of the judge or commissioner. The allowance of mileage to officers of the United States, particularly in the military and naval service, when traveling in the service of the government, is fixed at an arbitrary sum, not only on account of the difficulty of auditing the petty items which constitute the bulk of traveling expenses, but for the reason that officers travel in different styles; and ex-

penses, which in one case might seem entirely reasonable, might in another be deemed to be unreasonable. There are different standards of traveling, as of living; and, while the mileage in one case may more than cover the actual expenses, in another it may fall short of them. It would be obviously unjust to allow one officer a certain sum for traveling from New York to Chicago, and another double that sum, and yet their actual expenses may differ as widely as that. The object of the statute is to fix a certain allowance, out of which the officer may make a saving or not, as he chooses or is able. And while, in some cases, it may operate as a compensation, it is not so intended, and is not a fee, charge, or emolument of his office, within the meaning of section 834. It is much like the arbitrary allowance for the attendance of witnesses and jurors, which may or may not be sufficient to pay their actual expenses, depending altogether upon the style in which they choose to live.'

"We think it plain, from the authorities cited above, that generally speaking, statutory compensation for expenses necessarily incurred in performing the duties of an office is neither salary nor an emolument of the office within the meaning of section 32 of article 3 of our State Constitution. Such compensation is merely to assure the officer that for the performance of his official duties alone, and not for the performance of such duties and the payment of expenses incident thereto, he will receive the salary provided by law therefor. Consequently the amount allowed by law for such expenses may be changed during the officer's term, without doing violence to the aforesaid constitutional provision. * * "

Also, it is stated in State ex rel. Weldon v. Thomason (1919) 142 Tenn. 527, 221 S. W. 491:

"* * that it is well established upon reason and authority that the expenses of public officers incurred in the performance of their official duties are distinct from and not included in the compensation allowed them, unless authoritatively so declared, and the apparently uniform consensus of opinion in those cases wherein the question has been considered is to the effect that constitutional prohibitions against change in the compensation fixed for public officers are not intended to be construed as limitations upon legislative authority to provide for the expenses of such officials. *"

Also, in Kirkwood v. Soto (1891) 87 Cal. 394, 25 P. 488, it was held:

"* * * that it was the compensation for services to be rendered, and not the incidental expenses of the office, that the legislature was forbidden to increase by the provision of the Constitution that the compensation of any county, city, town, or municipal officer should not be increased after his election, or during his term of office. The County Government Act provided, in respect to the class of county officers to which the officer in question belonged, that they should receive as compensation for the services required of them by law, or by virtue of their office, a specified salary, and the court said that the words 'compensation' and 'salary' were evidently used synonymously in the Constitution and in such act. In this case a statute passed during the term of office of a county super-

intendent of schools, which provided that each county superintendent should receive his actual and necessary traveling expenses, to be paid out of the general fund, was held not to violate the constitutional restriction. The court further said that since the adoption of the Constitution containing the restriction, many acts had been passed by the legislature, after the commencement of terms of office, providing for the payment of necessary expenses incident to the offices, and their constitutionality had never been questioned."

Also, it was held in *Scroggie v. Scarborough* (1931) 162 S. C. 218, 160 S. C. 596;

"* * that an allowance of expenses, including mileage, to members of the legislature, did not violate a constitutional prohibition against an increase in the compensation of public officers during their term of office."

CONCLUSION

In view of the above authorities, it is the opinion of this department that the county judges of Nodaway County are entitled to the mileage as set out in Section 2092, Laws of Missouri, 1939, page 332, and it is not a violation of Article 14, section 8, of the Missouri Constitution.

IV

In regard to your inquiry as to whether or not the county clerk of Nodaway County is entitled to \$500.00 as budget officer, and as set out in Section 21a, Laws of

Missouri, 1939, page 658, we are calling your attention to the following: Section 21, Laws of Missouri, 1933, page 351, which reads as follows:

"Wherever in this act the term 'budget officer' shall appear, it shall be deemed to mean the presiding judge of the county court, unless the county court shall have by order designated the county clerk as budget officer. Wherever the term 'accounting officer' shall appear, it shall be deemed to mean the county clerk, auditor, accountant, or other officer or employe keeping the principal financial records of the county."

It will be noticed under the above section that the term "budget officer" is deemed the presiding judge, unless the county court shall have by order designated the county clerk as "budget officer." In view of that statement, the legislature has not seen fit to specifically say that the county clerk at all times shall be the budget officer. In some counties the county clerk is not the budget officer, but it remains with the presiding judge of the county court.

Laws of Missouri, 1939, Section 21a, page 658, reads as follows:

"In all counties of the state now or hereafter having a population of eighty thousand inhabitants or less, the clerks of the county court of such counties shall for services as budget officers receive and be paid an annual compensation, payable out of the County Treasury at the end of each month in equal monthly installments in the same manner as the compensation of such county clerks are now paid, which compensation shall be in addition to the compensation now allowed them by law for their services as clerks of the county court of their respective counties, and shall be in full compensation for all additional services now or hereafter required of, or rendered by them under this act. Such additional annual compensation

shall be in all counties, now or hereafter having, according to the last federal decennial census, a population of less than ten thousand inhabitants the annual sum of \$200.00, a population of ten thousand inhabitants and less than fifteen thousand inhabitants the annual sum of \$300.00, a population of fifteen thousand inhabitants and less than twenty-five thousand inhabitants the annual sum of \$400.00, a population of twenty-five thousand inhabitants and less than fifty thousand inhabitants the annual sum of \$500.00, a population of fifty thousand inhabitants and not more than eighty thousand inhabitants the annual sum of \$600.00."

It will be noticed under Section 21a, supra, that in counties having a population of 25,000 inhabitants and less than 50,000 inhabitants, the county clerk shall receive \$500.00 for his services as budget officer. Under this section there is no alternative but that the county clerk is the budget officer, and it becomes his duty to act as a budget officer and for that reason additional duties have been placed on the county clerk by statute, while, under Section 21 of the 1933 Session Laws, page 351, it was in the discretion of the county court whether or not the county clerk should act as budget officer. In view of this comparison, additional statutory duties have been placed upon the county clerk for which he should receive additional compensation.

CONCLUSION

In view of the above sections and comparisons, it is the opinion of this department that the county clerk of Nodaway County, is entitled to \$500.00 additional pay per annum as budget officer, in compliance with Section 21a, Laws of Missouri, 1939, page 658, and it is not a violation of Article 14, Section 8, of the Missouri Constitution.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

Respectfully submitted,

W. J. BURKE
Assistant Attorney General