

COUNTY OFFICERS: (Induction into the Armed Forces does not
create vacancy in office.

January 26, 1945



Honorable Henry C. Walker
Prosecuting Attorney
Kennett, Missouri

Dear Sir:

Reference is made to your letter of January 20, 1945,
requesting an opinion of this office, and reading as follows:

"The Dunklin County Court has instructed
me to write you and ask you for an opinion
in the following matter:

"Charles C. Redman, Jr., was elected County
Surveyor in November, 1940; his term com-
mencing January 1, 1941. He qualified, made
bond and took the oath of office. He has
been in the Armed Services ever since. On
January 5, 1943 he appointed Leonard C.
Carney as his Deputy to serve while he was
in the Armed Forces. The Court advises me
that neither he, nor his deputy, have ever
performed any services for Dunklin County.
At no time has provision for his salary
been made in the budget. On December 20,
1944 he filed a letter with the County Court
asking for the sum of \$4,800, being payment
for four years at \$100 per month. Is the
County liable for the payment of this sum?
If so, what fund can, or should, it be paid
from?"

For convenience in writing the opinion, we have divided
your request into the following elements:

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(1) Did the induction of the officer into the Armed Forces create a vacancy in the office of County Surveyor for Dunklin County?

(2) Did the officer have the right to discharge his official duties by deputy while personally absent on active duty in the Armed Forces?

(3) Did the failure of the County Court to include in its budget for each fiscal year of the term of the officer an amount for the payment of the salary of the County Surveyor and Ex Officio County Highway Engineer have the effect of precluding such officer from the collection of such salary?

(4) What amount of salary, if any, is the officer entitled to?

(5) From what source should payment, if any be due, be made?

With respect to (1), we think the cases of State ex rel. McGaughey v. Grayston, 163 S. W. (2d) 335, and State ex inf. McKittrick, Attorney General v. Wilson, 166 S. W. (2d) 499, are controlling. We quote from the last cited case, l. c. 501:

"It is our judgment that Wall did not forfeit his office by being drafted into the military service of his country. This would be equally true if he had volunteered for the duration, particularly in view of our universal military service.

* * * * *

"We come to the conclusion that there is nothing in the law, constitutional, statutory or common, which requires us to hold that Wall has forfeited his office by becoming a soldier in the army. * * * "

With respect to (2), it is necessary to examine the statutes creating the office. We take notice that the population of Dunklin County, as disclosed by the Federal Census of 1940, is 44,957. No statement to the contrary appearing in your request for an opinion, we presume that the provisions of

the County Highway Engineer law have not been suspended in Dunklin County. Therefore, the following portion of Section 8660, R. S. Missouri, 1939, is directly applicable to the office and to the salary:

"* * * Provided further, after January 1, 1941, that in all counties in the state which contain, or which may hereafter contain not less than twenty thousand inhabitants or more than fifty thousand inhabitants the county surveyor shall be ex officio county highway engineer, and his salary as county highway engineer shall not be less than twelve hundred dollars per annum, nor more than two thousand dollars per annum as shall be determined by the County Court."

It thereupon becomes apparent that the person elected County Surveyor for Dunklin County is ex officio the County Highway Engineer.

Under Section 13208, R. S. Missouri, 1939, the County Surveyor is authorized to appoint a deputy under the conditions outlined in such section. The decision in *Halter v. Leonard*, 223 Mo. 293, we think, discloses that all official acts performed by the deputy must be in the name of his principal. We, therefore, hold that the duties of the office could have been discharged by the deputy under the official bond of the officer.

This conclusion might be attacked on the ground that the officer was not personally attending to his official duties, in contravention of Article II, Section 8, of the Constitution of Missouri, and Section 12828, R. S. Missouri, 1939. In that regard the opinions in *State ex rel. McGaughey v. Grayston*, 163 S. W. (2d) 535, and *State ex inf. McKittrick, Attorney General v. Wilson*, 166 S. W. (2d) 499, are decisive. In those cases the Supreme Court specifically held that absence on active duty in the Armed Forces did not contravene the constitutional and statutory provisions referred to.

Parenthetically, we call your attention to your statement that a deputy was not appointed until January 5, 1945,

and that no services were ever rendered Dunklin County by either the official or the deputy. These are questions of fact upon which we do not express an opinion.

With respect to (3), we believe that the failure of the County Court to formally budget an allowance for the payment of the salary of the officer does not affect the situation. The salary of the County Surveyor and Ex Officio County Highway Engineer for Dunklin County is fixed by legislative enactment found in the hereinbefore quoted portion of Section 8660, R. S. Missouri, 1939. The precise question then presented is controlled by the decision of the Supreme Court in Gill v. Buchanan County, 346 Mo. 599, from which we quote, l. c. 606:

" * * * The action of the Legislature in fixing salaries of county officers is in effect a direction to the county court to include the necessary amounts in the budget. Such statutes are not in conflict with the County Budget Law but must be read and considered with it in construing it. They amount to a mandate to the county court to budget such amounts. Surely no mere failure to recognize in the budget this annual obligation of the county to pay such salaries could set aside this legislative mandate and prevent the creation of this obligation imposed by proper authority. Certainly such obligations imposed by the Legislature were intended to have priority over other items as to which the county court had discretion to determine whether or not obligations concerning them should be incurred. They must be considered to be in the budget every year because the Legislature has put them in and only the Legislature can take them out or take out any part of these amounts. * * * We, therefore, hold that a county court's failure to budget the proper amounts necessary to pay in full all county officers' salaries fixed by the Legislature, does not affect the county's obligation to pay them."

With respect to (4), we quote from the opinion in State ex rel. Walther v. Johnson, 351 Mo. 293, wherein the Supreme Court in deciding the salary to be paid the County Surveyor and Ex Officio County Highway Engineer in a county having the same population as Dunklin County, and in which the County Court had failed to fix the amount of salary by order, said, l. o. 299:

" * * * Under the proviso the county court does have discretion to fix the annual salary of the county highway engineer at from \$1200.00 to \$2,000.00. As that discretion was not expressly exercised in this case, relator is entitled to the minimum salary. (State ex rel. v. Bulger, 289 Mo. 441, 233 S. W. 486.)"

Your attention is directed to this case for the reason you have not indicated in your opinion request that the County Court had fixed the salary to be paid to the County Highway Engineer by court order, and in the premises the above rule will be applied.

With respect to (5), we hold that if the County Court determines under the facts applied to this particular case that the obligation is due in the entire amount claimed, or some portion thereof, a warrant can be drawn in Class 4 in settlement of such obligation. In the event Class 4 is insufficient in amount to allow the payment of such warrant, the warrant may be drawn against funds in Class 6.

CONCLUSION

In the premises, we are of the opinion that a vacancy in office was not caused by the induction of the County Surveyor and Ex Officio County Highway Engineer into the Armed Forces; that such official so inducted into the Armed Forces could discharge his official duties by deputy during the period of his absence on active military duty; that the failure of the County Court to provide in its budgets for the years 1941 to 1944, inclusive, does not now preclude the officer from collecting the salary established by legislative

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enactment; that the salary to which the officer is legally entitled is the sum of \$1200.00 per annum; and that the County Court is authorized to draw a warrant chargeable to Class 4 in discharge of the obligation.

Respectfully submitted

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

HARRY H. KAY
(Acting) Attorney General

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