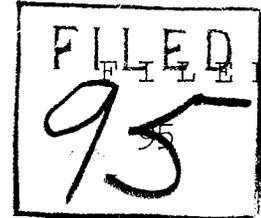


COUNTY CLERK: Duties of the county court in respect to determining salary of county clerk under House Bill
COUNTY COURT: No. 867 of the 63rd General Assembly

March 14, 1947



Honorable Joe C. Welborn
Prosecuting Attorney
Stoddard County
Bloomfield, Missouri

Dear Sir:

This is in reply to your letter of recent date wherein you submit the following statement of facts and request for an official opinion from this department:

"Stoddard County is a Third Class County, and is subject to the provisions of Laws of 1945, H. B. 867. Sections 1 and 2 of H. B. 867 provide that on or before January 1, 1947, the County Court shall determine the proper group to which a county belongs for the purpose of fixing the salary of the County Clerk; and that the Court shall also determine the salary of the Clerk. The County Clerk of this County took office on January 1, 1947 but failed to have the County Court determine the group to which this County belongs. Nor has he since then taken steps to have H. B. 867 complied with, but rather he now seeks to fix his own salary, by his own computations. The County Court has refused to issue warrants for his salary, because the County has not yet been grouped according to the terms of H. B. 867. Since H. B. 867 is a completely new law and has not been given a construction by the Supreme Court and since the terms of the statute are clear, I do not feel that the provisions of H. B. 867 which the County Clerk has failed to have the Court follow, are directory only, and have advised the County Court to await a ruling from the Supreme Court, or action by the legislature, before taking further

action relative to paying the County Clerk.

"Since the salaries of the deputies of the County Clerk are based on the salary of the Clerk by H. B. 867, the Court has not issued warrants to the deputies for the same reasons that it has not ordered warrants for the Clerk.

"The County Court has directed me to request an official opinion from your department as to the proper procedure to be followed by it in view of the above circumstances."

According to Committee Substitute for House Bill No. 476, approved December 5, 1945, and passed by the 63rd General Assembly, Stoddard County comes within Class 3 of the division of counties provided for under the Constitution. For the purpose of providing for salaries of clerks of county courts in counties of the third class, the 63rd General Assembly enacted House Bill No. 867. Section 1 of this Act provides as follows:

"For purposes of establishing the salary of the clerk of the county court in counties of the third class of this state, said counties are hereby divided into four groups as follows: All counties with a per capita assessed valuation of less than \$700 shall be in Group A; all counties with a per capita assessed valuation of \$700 and less than \$1,000 shall be in Group B; all counties with a per capita assessed valuation of \$1,000 and less than \$1,300 shall be in Group C; and all counties with a per capita assessed valuation of \$1,300 and over shall be in Group D. The per capita assessed valuation of any county shall be determined by dividing the population of the county as shown by the 1940 federal decennial census into the 1944 total assessed valuation of the county as shown in the 'Journal of the Board of Equalization of the State of Missouri for the Year Ending December 31, 1944.' The county court in each county

of the third class shall on or before January 1, 1947, determine the proper group to which a county belongs under the provisions of this section. The compensation of the county clerk as provided in this act shall become effective on January 1, 1947; provided, that county clerks now in office shall not have their compensation increased or decreased by reason of this act but shall continue to receive compensation at the same rate as at present until the end of their respective terms."

From an examination of the Memorandum No. 3, issued by the Committee on Legislative Research, dated April 1, 1946, we find that Stoddard County has a population of 33,009, and that it has a valuation, as shown in the Journal of the Board of Equalization of the State of Missouri for the year ending December 31, 1944, of \$15,129,429.00.

For the purpose of determining what class a county clerk in third class counties will be in, the Legislature has provided that the per capita assessed valuation of a county shall be determined by dividing the population of the county as shown by the 1940 federal census into the 1944 total assessed valuation of the county as shown in the Journal of the Board of Equalization of the State of Missouri for the year ending December 31, 1944. When the court has made that calculation, then Section 2 of said House Bill No. 867 provides for the method of determining the salaries of county clerks in the various groups established by Section 1 of the Act. It will be a simple mathematical problem for the county court to determine what group the clerk is in, in order to fix his salary. Section 2 of said House Bill No. 867 sets out the plan for fixing the salaries of the clerks in the various groups. It reads as follows:

"On or before January 1, 1947, the county court of each county in Group A shall determine the annual salary of the county clerk as follows: Of the total population of the county, according to the 1940 federal decennial census, the county court shall allow 20 cents for each of the first 5,000 persons, plus 15 cents for each of

the next 10,000 persons, plus 5 cents for each of the next 5,000 persons, plus 4 cents for each of the next 14,000 persons, plus 3 cents for each of the next 1,000 persons, plus 1 cent for each person over 35,000 in the county.

"On or before January 1, 1947, the county court in each county in Group B shall determine the annual salary of the county clerk as follows: Of the total population of the county, according to the 1940 federal decennial census, the county court shall allow 20 cents for each of the first 5,000 persons, plus 15 cents for each of the next 9,000 persons, plus 10 cents for each of the next 3,000 persons, plus 5 cents for each of the next 6,000 persons, plus 3 cents for each person over 23,000 in the county.

"On or before January 1, 1947, the county court of each county in Group C shall determine the annual salary of the county clerk as follows: Of the total population of the county, according to the 1940 federal decennial census, the county court shall allow 20 cents for each of the first 10,000 persons, plus 10 cents for each of the next 10,000 persons, plus 5 cents for each of the next 5,000 persons, plus 3 cents for each person over 25,000 in the county.

"On or before January 1, 1947, the county court of each county in Group D shall determine the annual salary of the county clerk as follows: Of the total population of the county, according to the 1940 federal decennial census, the county court shall allow 30 cents for each of the first 4,000 persons, plus 20 cents for each of the next 3,000 persons, plus 15 cents for each of the next 5,000 persons, plus 10 cents for each of the next 10,000 persons, plus 5 cents for each of the next 4,000 persons, plus 3 cents for each person over 26,000 in the county."

Under Section 3 of the Act the salaries of the county clerks, as determined by the county courts, on or before January 1, 1947, and in accordance with provisions of Sections 1 and 2 of the Act, shall be the annual salaries of the respective county clerks until January 1, 1955.

In your letter you state, "The County Clerk of this County took office on January 1, 1947 but failed to have the County Court determine the group to which this County belongs." From a reading of House Bill No. 867, it appears that the duty of determining the salary to which the county clerk is entitled is imposed upon the county court. Section 7 of Article VI of the Constitution of 1945, provides as follows:

"In each county not framing and adopting its own charter or adopting an alternative form of county government, there shall be elected a county court of three members which shall manage all county business as prescribed by law, and keep an accurate record of its proceedings. The voters of any county may reduce the number of members to one or two as provided by law."

By these provisions of the Constitution, the people have imposed upon the county courts the duty of managing all county business as prescribed by law. House Bill No. 867 contains the duties imposed upon the county court by the General Assembly for determining the salaries of county clerks.

The question of whether or not this duty of determining the salary is mandatory or directory might be raised. In the case of State ex rel. Ellis vs. Brown, 33 S. W. (2d) 104, at l.c. 107, the court set out the rule applicable to mandatory and directory statutes.

"A mandatory provision is one the omission to follow which renders the proceeding to which it relates illegal and void, while a directory provision is one the observance of which is not necessary to the validity of the proceeding. Directory provisions are not intended by the legislature to be disregarded, but where the consequences of not obeying them in every particular are not prescribed the courts must judicially determine them. There is no universal rule by which directory provisions in a statute

may, in all circumstances, be distinguished from those which are mandatory. In the determination of this question, as of every other question of statutory construction, the prime object is to ascertain the legislative intention as disclosed by all the terms and provisions of the act in relation to the subject of legislation and the general object intended to be accomplished. Generally speaking, those provisions which do not relate to the essence of the thing to be done and as to which compliance is a matter of convenience rather than substance are directory, while the provisions which relate to the essence of the thing to be done, that is, to matters of substance, are mandatory."

In this case, the court had before it for consideration the duties of election officials with respect to making a public record of the qualifications of electors. On the question of the making of this record being of the essence of the thing to be done, the court said at l.c. 107:

"**Such record, when made, tends to prevent repeating, colonization, and other fraudulent abuses of the franchise. The making of the record and the truthfulness of its recitals are the essence of the thing the statute requires to be done and not the time in which it is to be done, except that it be within the period between the election and the beginning of the sixth week preceding it. * *" (Emphasis ours.)

Under said House Bill No. 867, the thing to be done by the county court is the determination of the group in which the county clerk of its county will be placed and the determination of the salary which such officer will be entitled to. This duty, we think, is mandatory upon the court. In the case of Warrington et al. vs. Bobb et al., 56 S. W. (2d) 835, at l. c. 837, the court made the following statement with respect to the rule applicable to provisions of a statute which are the essence of the thing to be done:

"* * Provisions relating to the essence of the thing to be done, that is, matters of substance, are mandatory, while, generally, statutory provisions not relating

to the essence of the thing to be done, and as to which compliance is not a matter of substance, are directory. * *"

Following these authorities, it is the mandatory duty of the county court to ascertain and determine the salary of the county clerk under said House Bill No. 867.

From your request, it appears that the county court of Stoddard County did not perform these duties on or before January 1, 1947. We note from the Act that the court is directed to perform these duties on or before January 1, 1947. Then the question which arises is, "The County court having failed to perform this duty on or before January 1, 1945, shall it now perform that duty?" The answer to this question will depend upon whether or not the provisions of the Act fixing the time when the court shall perform this duty are directory or mandatory. We think this question has been answered by the Supreme Court in the case of Mead vs. Jasper County, 18 S. W. (2d) 464, 465. In that case, the court had before it for consideration the question of whether or not an order of the county court fixing the amount to be paid for board of prisoners was a valid order. Under the law it was the duty of the county court to fix this rate at the November term of court. Instead of performing this duty at that time, the court made the order in the following January. In stating the rule applicable, the court said at l.c. 465:

"The rule of construction of statutes of this character is well stated in a very early decision of this court, St. Louis County Court v. Sparks, 10 Mo. 117, 45 Am. Dec. 355, thus: 'It is a rule of construction, that a statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others, is directory merely, unless the nature of the act to be performed, or the phraseology of the statute is such, that the designation of time must be considered as a limitation of the power of the officer'--citing cases."

The court, in that case applied the foregoing rule and held that the statute fixing the time for the court to make the order fixing the amount which would be paid for board of prisoners was directory and that the order made at a time after that provided for by the statute was a valid order.

Applying that rule here, since the county court of Stoddard County did not on or before January 1, 1947, calculate and determine the salary of the county clerk, then the order which it is required to make relative to the clerk's salary would be a valid order even though it is made after January 1, 1947.

Since the salary of the deputies in the county clerk's office will be determined on the basis of the salary paid the county clerk, then the same rules of law announced in this opinion would be applicable to the law in determining the compensation of such deputies.

CONCLUSION

It is therefore the opinion of this department that it is the mandatory duty of the county court, under House Bill No. 867 of the 63rd General Assembly, to determine the salary of the clerk of the county court and his deputies.

It is further the opinion of this department that if the county court has not made this determination on or before January 1, 1947, that the determination after that date of those salaries will be valid.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

TWB:VLM