

ASSESSORS:  
OFFICERS:  
COUNTY COURT:  
FEES AND SALARIES:

County assessor in third and fourth class county may appoint and fix compensation of clerical or stenographic assistants as may be necessary for the efficient performance of the duties of his office. Certification must be made to the county court by the county assessor before warrant could be drawn for payment of assistants. Assessor appointing wife as assistant would forfeit office.

December 31, 1951



1-8-52

Honorable Joe Collins  
Prosecuting Attorney  
Cedar County  
Stockton, Missouri

Dear Sir:

Your letter at hand requesting an opinion of this department which reads as follows:

"I understand that your department has rendered an opinion that House Bill No. 70 of the 66th General Assembly of Missouri will take effect and be in force on and after the 9th day of October, 1951.

"I would like to have your opinion on whether or not the County Assessor in 4th class counties may appoint and affix the compensation of clerical or stenographic assistant under said House Bill without approval of the County Court. And when the clerical or stenographic assistant is appointed and his compensation fixed by the County Assessor is it then the duty of the County Court to pay this compensation.

"I would also like to know if a county assessor may appoint his wife as a clerical or stenographic assistant without violating the nepotism laws."

House Bill No. 70, enacted by the 66th General Assembly, provides as follows:

"The county assessor in each county of classes three and four may appoint and fix the compensation of such clerical or

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stenographic assistants as may be necessary for the efficient performance of the duties of his office. The compensation of such clerical or stenographic assistants shall be paid from the county treasury and shall not exceed six hundred dollars per annum in counties of class three nor six hundred dollars per annum in counties of class four."

In your opinion request you have first asked whether or not the county assessor in a fourth class county may appoint and fix the compensation of clerical or stenographic assistants, provided for under the above Bill, without the approval of the county court.

You will note in reading the above quoted House Bill that no specific mention of the county court is contained therein, neither as to the matter of appointment of the clerical or stenographic assistants nor as to the fixing of their compensation.

In many statutes previously enacted by the Legislature providing for the appointment of assistants to certain officers there has been included a specific provision for the approval of said appointments.

For example, Section 13514, Revised Statutes of Missouri, 1939, provides for the appointment of assistants in the collector's office in certain class counties and specifically states such assistants shall be appointed "as the county court may deem necessary." The same statute also provides for stenographic assistants in the prosecuting attorney's office, and in so providing states that their appointment shall "be approved by the judge or judges of the circuit court of said county."

Similar provisions relative to the appointment and approval of stenographic assistants in the prosecuting attorney's office in certain class counties is contained in Section 13467, Revised Statutes of Missouri, 1939. There are other statutes which need not be cited that contain similar provisions relative to the appointment and approval of stenographic assistants.

We have cited these statutes to show that in many instances the Legislature has provided for the approval of stenographic or clerical assistants which are appointed. However, as previously noted, House Bill No. 70, supra, contains no specific provision for the approval of stenographic or clerical assistants appointed by the county assessor.

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We, therefore, conclude that the Legislature has given sole authority to the county assessor in third and fourth class counties to make the appointment of clerical or stenographic assistants, as provided in the aforementioned House Bill.

Regarding the matter of fixing the compensation of clerical or stenographic assistants appointed, the rule has been stated as follows in 43 Am. Jur., Sec. 345, p. 138:

"The power to fix the compensation of public officers is not inherently and exclusively legislative in character. Unless the Constitution expressly or impliedly prohibits the legislature from doing so, it may delegate the power to other governmental bodies or officers, as, for example, to the governor, to counties, to cities, to courts or judges, or to other officers or official boards."

With the enactment of House Bill No. 70 it appears that the Legislature has delegated to the county assessor in third and fourth class counties the power to fix the compensation of assistants which have been appointed within certain limitations, as said compensation shall not exceed Six Hundred Dollars a year.

In the case of *In Re McLure's Estate*, 220 Pac. 527, the Supreme Court of Montana, in construing the word "fix" contained in the statute providing for the probate court fixing the compensation of attorneys, said at l.c. 530:

"The word 'fix' means to decide definitely; to settle; to determine. Standard Dictionary; 2 Words and Phrases, Second Series, 575; Bouvier's Law Dictionary."

Again, in the case of *Kacsur v. Board of Trustees*, 109 Pac. 2d 731, the District Court of Appeals of California was construing a statute giving school boards the power to fix the compensation of teachers. In construing the law in question the court at l.c. 737 said:

"Section 5.731 of the School Code is as follows: 'Boards of school trustees, and city, and city and county boards of education shall have power and it shall be their duty to fix and order paid the compensation of

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persons in public school service requiring certification qualifications, employed by such boards, unless the same be otherwise prescribed by law.' We hold, upon the authority of Fidler v. Board of Trustees, 112 Cal. App. 296, 301, 296 P. 912, and cases therein cited, that the California School Code, which empowers school boards to fix the compensation of permanent teachers, confers upon such boards discretionary power to regulate such compensation and in the exercise of such power to decrease as well as increase such salaries; \* \* \* "

In Baynes v. Bank of Caruthersville, 118 S.W.2d 1051, the Springfield Court of Appeals was construing a statute providing for the commissioner of finance to appoint expert assistants and counsel and fix their compensation subject to the approval of the circuit court. At l.c. 1052 the court said:

"Admittedly, under this statute, the Circuit Court does not have jurisdiction to fix the fees of a deputy or lawyer in the first instance but it is the duty of the Commissioner of Finance to act on such matters first, then the application or proposed payment must be submitted to the Circuit Court for its approval."

In view of the aforementioned authorities, we, therefore, conclude that the county assessor in third and fourth class counties, upon appointing clerical or stenographic assistants, has the exclusive authority to fix their compensation within the limitations provided by the statutes.

You have also asked if it is the duty of the county court to pay the compensation when clerical or stenographic assistants have been appointed and their compensation fixed by the county assessor.

Inasmuch as House Bill No. 70, supra, provides that the compensation of said assistants shall be paid from the county treasury, it would follow that this could only be done by warrants issued by the county court and drawn on the county treasury.

In this connection, Section 50.330, RSMo 1949, provides

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as follows:

"Any salary provided for a county officer, deputies and assistants, shall be paid in monthly installments on the first day of each month, by warrants drawn on the county treasury."

Inasmuch as the compensation or salaries of the assistants appointed by the county assessor must be paid by warrants issued by the county court, it would necessarily follow that before such warrants could be issued the county assessor would have to certify to the county court the names of the assistants appointed and the amount of salary or compensation they are entitled to receive, based upon the period of time for which services were rendered.

Since House Bill No. 70, supra, provides that such clerical or stenographic assistants may be appointed as may be necessary for the efficient performance of the duties of the county assessor's office, the question arises who should make the determination of necessity in the appointment of said assistants. In this connection, we again point out that the law in question makes no reference to the county court.

We have previously concluded that the sole power of appointment is vested in the county assessor and that there is no provision requiring the approval by the county court or any other body of any appointments made.

It would seem logical that the time for determining the necessity of having assistants in the county assessor's office would be when the appointments were made.

In the other statutes previously cited, wherein provision is made for approval of appointments, such provision was undoubtedly included for the purpose of having some official body other than the officer making the appointments determining the necessity of additional personnel.

Since the matter of approval is absent in the law we are considering, it is our thought that the county assessor who is vested with the sole power to make the appointment would also make the determination of necessity for other assistants. Consequently, we conclude that the county court would not be authorized to withhold the issuing of warrants for the payment of assistants on the ground that they were not necessary for

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the efficient performance of the duties in the county assessor's office.

We have previously stated that it would be necessary for the county assessor to certify to the county court the names of assistants appointed and the amount of salary or compensation to which they are entitled, based upon services rendered for a specific period. Therefore, we believe that the county court, before ordering the issuance of warrants for the payment of said assistants, would be authorized to ascertain whether or not the assistants were actually employed, whether or not services were actually rendered for the period of time certified, and whether or not the amount of the salary or compensation certified by the assessor for his assistants was within the statutory limit. Such would be for the purpose of determining whether or not a lawful indebtedness existed.

It is our thought that the county court could make the investigation as above outlined under the authority of Section 50.160, RSMo 1949, which provides as follows:

"The county court shall have power to audit, adjust and settle all accounts to which the county shall be a party; to order the payment out of the county treasury of any sum of money found due by the county on such accounts; to enforce the collection of money due the county; to order suit to be brought on bond of any delinquent, and require the prosecuting attorney for the county to commence and prosecute the same; to issue all necessary process to secure the attendance of any person, whether party or witness, whom they deem it necessary to examine in the investigation of any accounts; and in order to procure the exhibition or delivery to them of any accounts, books, documents or other papers, the said court may issue process directed to the person in whose custody or care the said accounts, books, documents or other papers may be, commanding him to deliver or transmit the same to said court, which process shall be served by the sheriff; and the said court may examine all parties and witnesses on oath, touching the investigation of any accounts, and if any person, being served with such process shall not appear according to the command thereof, without reasonable cause, or if any person in attendance at any hearing or proceeding shall, without reasonable cause, refuse to be sworn

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or to be examined, or to answer a question or to produce a book or paper, or to subscribe or swear to his deposition, he shall be deemed guilty of a misdemeanor; provided, that if the county court finds it necessary to do so, it may employ an accountant to audit and check up the accounts of the various county officers."

In the case of Jackson County v. Fayman, 44 S.W. (2d) 849, the county sued the county treasurer on his bond to recover the amount of a certain county warrant alleged to have been wrongfully paid by the treasurer in part payment for construction of a public road. The county had issued the warrant to the contractor, but later upon finding that the issuance of the warrant had been procured by false representations regarding the work performed the county court directed the treasurer not to pay the warrant. The county court upon investigation had determined that the contractor had already been paid that amount which was due him for the road construction work, and it was therefore contended that the warrant in question was without consideration and was issued in payment for work not performed. The Supreme Court in ruling on the question held that the decision of the county court to first issue the warrant was not final and binding and that the county court could thereafter change its decision and order the warrant not to be paid. The Supreme Court in rendering its decision undertook to discuss the power and authority of county courts in auditing and paying claims and recognized that the county court could investigate claims and exercise some discretion in the payment of same. At l.c. 852 the court said:

"The power and authority of county courts and the capacity in which such body acts in auditing and paying claims against the county has been before this court for decision many times. We think that it is now well settled that county courts do not act judicially in allowing, adjusting, or refusing claims presented against the county, or necessarily arising from managing its financial affairs. While such body does not act in a purely ministerial capacity in such matters, in the sense that they act without investigation and have no discretion in the matter, yet they do not try the merits of the claim as a court, but rather act as auditing financial agents of the county whose action is not final in the sense that a judgment of the court is final except on appeal or by other appropriate remedy."

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In the case of State ex rel. Becker v. Wehmeyer, 113 S.W. (2d) 1031, an attorney sought to mandamus the county court to compel it to issue a warrant for a specific sum as compensation for certain professional services allegedly to have been rendered by him. In deciding the matter the appellate court recognized the right of a public officer to compel the payment of a salary fixed by law as to a specific amount, but pointed out that this would not be true relative to a person other than a public officer who has a claim for fees or compensation for services rendered to the county. In ruling on the question the court, at l.c. 1033, 1034, said:

"But, while a public officer may rightfully have recourse to mandamus to compel the payment of a salary fixed by law as to amount, the same is not true of a person who has a claim for fees or compensation for services rendered to the county, where both the validity and the amount of the claim are subject to be put in issue. In such an event the county court is called upon to exercise its discretion in auditing and settling the claim, and the particular action it should take is therefore not to be decided by mandamus. Perkins v. Burks, supra.

"Relator's claim in the case at bar is precisely of the latter character. Not only are there questions of fact to be determined, but respondents have both the right and the duty of examining into the law with respect to the validity of the claim as a condition precedent to a finding that any indebtedness exists. They must not only find that the contract was made with relator, but, if so, that it was a contract which it was within their power to make. They must also find that relator's services were performed in compliance with the obligations of the contract. In short, they must exercise the discretion which has been vested in them with respect to the auditing and settling of claims against the county, with the result that they are not to be compelled to honor relator's claim by this manner of proceeding."

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In connection with your last question relative to the county assessor appointing his wife as a clerical or stenographic assistant, your attention is directed to Article VII, Section 6 of the Constitution of Missouri, which provides as follows:

"Any public officer or employee in this state who by virtue of his office or employment names or appoints to public office or employment any relative within the fourth degree, by consanguinity or affinity, shall thereby forfeit his office or employment."

The above section is substantially the same as Section 13, Article XIV of the Constitution of 1875.

In construing the nepotism section of the old Constitution the Supreme Court, in State ex inf. Norman v. Ellis, 28 S.W. (2d) 363, clearly held that a wife came within the degree of relationship set forth in the constitutional provision.

Inasmuch as Article VII, Section 6, supra, does include a relative named or appointed to employment by a public officer, we conclude that a county assessor would forfeit his office if he employed his wife as a clerical or stenographic assistant in his office.

#### CONCLUSION

It is, therefore, the opinion of this department that in third and fourth class counties the county assessor has the sole authority to appoint and fix the compensation of clerical or stenographic assistants as may be necessary for the efficient performance of the duties of his office, and that he has the power to determine the necessity for the appointment of said assistants.

It is our further opinion that before the county court could draw a warrant on the county treasury for the payment of assistants appointed by the county assessor the county assessor would first have to certify to the county court the names of the assistants appointed and the amount of salary or compensation to which they are entitled, based upon actual services rendered for a particular period of time. Upon receiving this certification the county court would be empowered to first determine whether or not the named assistants were actually appointed, whether or not they actually rendered the services for the time certified and whether or not the amount of the salary or compensation certified was within the statutory limit, before issuing a warrant.

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We further conclude that under the provisions of Article VII, Section 6 of the Constitution of Missouri, a county assessor would forfeit his office if he named or appointed his wife as an employee in his office in the capacity of a clerical or stenographic assistant.

Respectfully submitted,

RICHARD F. THOMPSON  
Assistant Attorney General

APPROVED:



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J. E. TAYLOR  
Attorney General

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