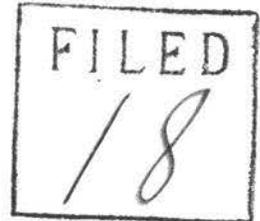


PROSECUTING ATTORNEYS.

Prosecuting Attorneys entitled to receive compensation for office while legally holding title thereto.

1945  
January 3, 1944

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Honorable C. E. Cobb  
County Clerk, Wayne County  
Greenville, Missouri

Dear Mr. Cobb:

Under date of October 25, 1944, you wrote to this office requesting an opinion as follows:

"Will you please honor the County Court of Wayne County, Missouri, with your official opinion on the following subject matter?

"The Prosecuting Attorney of Wayne County, Missouri, has left his office and volunteered into the Armed Forces of the U. S. Army, there is no Deputy left in charge, only occasionally a Stenographer in the office, he continues to bill the county for the amount of his monthly salary; Is it legal for the county to pay his salary when the work is going undone, and no legal representative in the office.

"The above favor is being asked by Order of the County Court of Wayne County, Missouri."

The compensation or salary of any officer is a matter which is covered by statute. Absent statutory provision authorizing the payment of compensation to an officer he can draw no compensation.

Section 12939 R. S. Mo., 1939, provides for the payment of compensation to Prosecuting Attorneys. This Section is not quoted herein because it is known and contains a great deal of matter not pertinent to your question.

The rule has long been established in Missouri that the person who holds the title to the office is entitled to the emoluments and all of the incidents pertaining to the office. In the early case of State of Missouri ex rel. Vail v. Clark, State Auditor, 52 Mo. p.508 a question was

raised as to a ~~precedent of the~~ payment of salary to a judge while a quo warranto proceeding was pending. The following brief quotation is taken from l. c. 512:

"\* \* \* The commission issued to the relator invested him with the title, and is prima facie evidence of his right to the office. It gave him the possession and the power to exercise its functions, of which he could be deprived only on due process, in the manner prescribed by law. State ex rel. Vail vs. Draper, 48 Mo., 213. He alone is entitled to the emoluments of the office, until the State, by a proper proceeding, has revoked the authority with which it has invested him. Meanwhile the auditor cannot rightfully withhold the salary.\* \* \*"

The same rule is also stated in the case of State ex rel. Chapman v. Walbridge, 153 Mo., 194. This case involved the payment of salary to a patrolman in the City of St. Louis who had been improperly ousted from his office. The Supreme Court in discussing his right to recover compensation incident to the office, state the rule as follows in l. c. 203:

"The legal right to the office carried with it the right to the salary. The board by its wrongful act could not deprive him of this legal right. The right of a public officer to the salary of his office, is a right created by law, is incident to the office, and not the creature of contract, nor dependent upon the fact or value of services actually rendered. (Givens v. Daviess Co., 107 Mo. 603; Gammon V. Lafayette Co., 76 Mo. 675; State ex rel. v. Carr, 3 Mo. App. 6; State ex rel. v. Brown, 146 Mo. 401; Fitzsimmons v. Brooklyn, 102 N. Y. 536; Andrews v. Portland, 79 Maine, 484; Memphis v. Woodward, 12 Heiskell, 499; People ex rel. v. Smyth, 28 Cal. 21; Carroll v. Siebenthaler, 37 Cal.193; Koontz v. Franklin Co., 76 Pa. St. 154; Walker v. Cook, 129 Mass. 579; Hoke v. Henderson, 4 Dev. (N. C. ) 1; City Council

v. Sweeney, 41 Ga. 463; People ex rel. v. Brennan, 30 How. Prac. Rep. 417.) Hence, the fact that the relator after he was wrongfully and without warrant of law discharged from his position as policeman, and was thereby and thereafter prevented from discharging the duties of that position, and did not in fact discharge those duties or offer to do so, affords no ground for denying him his salary, and the court committed no error in awarding him a mandamus therefor.\* \* \*"

In the later case of Coleman v. Kansas City, 351 Mo., 254, the following is at l. c. 267:

"\* \* \* During the time Murray held the office, he is entitled to the salary fixed by law as an incident to that office. 'Compensation to a public officer is a matter of statute, not of contract; and it does not depend upon the amount or value of services performed, but is incidental to the office.' State ex rel. Evans v. Gordon, 245 Mo. 12, l. c. 27, 149 S. W. 638. Also, see State ex rel. Chapman v. Walbridge, 153 Mo. 194, 54 S. W. 447; State ex rel. Vail v. Clark, 52 Mo. 508. \* \* \*"

In none of these cases is found a set of facts identical with the facts stated in your letter.

The Prosecuting Attorney of the county, by his entrance into the Armed Forces of the United States did not forfeit his office.

State ex inf. McKittrick v. Wilson, 166 S. W. (2d) 499, 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.\* \* \*"

Search has been made of all the statutes relating to the compensation of Prosecuting Attorneys and

Hon. C. E. Cobb

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we have been unable to find any statute which would authorize the refusal to pay the compensation of a Prosecuting Attorney while he holds title to the office and has not been suspended.

CONCLUSION.

Therefore, the conclusion from the foregoing authorities is that the salary for the office of Prosecuting Attorney is to be paid to the person holding the legal title to the office to the expiration of his term unless he is suspended or ousted from office by a decree of a court of competent jurisdiction before the expiration of his term.

Respectfully submitted

---

W. O. JACKSON  
Assistant Attorney General

APPROVED:

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VANE C. THURLO  
Acting Attorney General

WOJ:LeC