

COUNTY HIGHWAY ENGINEER: (1) County highway engineer in third class county authorized to appoint assistants only upon determination of inability to properly perform all the duties of office. (2) Salary of county highway engineer in counties of the third class and necessary assistants to be paid out of Class 4 Funds.

February 21, 1949

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Honorable Howard B. Lang, Jr.  
Prosecuting Attorney  
Boone County  
Columbia, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office reading as follows:

"The Highway Engineer of this county has two persons who have been assisting him in the carrying on of his work. In his budget requests in the past he has always put these men's pay as payable out of Class 3. He is now desirous of designating these persons as assistants to him and paying them out of Class 4.

"Would you kindly render an opinion, first, as to whether or not he can appoint the assistants, and, secondly, if he does appoint them, can they be paid out of Class 4 or must they be paid out of Class 3?"

With respect to the first question you ask, your attention is directed to an act found Laws of Missouri, 1945, page 1493, appearing as Section 8660, Mo. R.S.A.. This statute and all others referred to herein are applicable to counties of the third class to which Boone County belongs in accordance with the classification of counties adopted by the General Assembly and found Laws of Missouri, 1945, page 1801.

Section 8660, Mo. R.S.A., referred to supra, reads in part as follows:

" \* \* \* In the event that the county highway engineer cannot properly perform all the duties of his office, he shall, with the approval of the court, appoint one or more assistants, who shall receive such compensation as may be fixed by the court."

From the quoted portion of the statute, it is apparent that no authority exists in the county highway engineer to appoint any assistants unless such officer is unable to properly perform all of the duties of his office. This question is necessarily one of fact and not for determination by this department. We, therefore, can only answer your question by reference to the statute quoted and by saying that the authority of the county highway engineer with respect to the appointment of assistants must be determined in accordance therewith.

With respect to the second question you have asked, we direct your attention to Section 10911, R. S. Mo. 1939, found as a part of the County Budget Laws and creating the various classification of expenditures. We find therein the following:

"Class 3. The county court shall next set aside and apportion the amount required, if any, for the upkeep, repair or construction of bridges and roads on other than state highways (and not in any special road district). The funds set aside and apportioned in this class shall be made from the anticipated revenue to be derived from the levies made under Sections 8526 and 8527 R. S. Mo. 1939. \* \* \* \*

"Class 4. The county court shall next set aside the amount required to pay the salaries of all county officers where the same is by law made payable out of the ordinary revenue of the county, together with the estimated amount necessary for the conduct of the offices of such officers, including stamps, stationery, blanks and other office supplies as are authorized by law. \* \* \* "

You will note that the funds set aside in apportion to Class 3 are to be those derived from revenue arising from the levies made under what are "designated as Sections 8526 and 8527, R. S. Mo. 1939." Section 8526, R. S. Mo. 1939, has been repealed by an act found Laws of Missouri, 1945, page 1478.

Section 8527, R. S. Mo. 1939, has been reenacted and appears Laws of Missouri, 1945, page 1478, and as Section 8527, Mo. R.S.A. This statute, after providing for the

levying of an additional tax for a fund to be known as the "special road and bridge fund," contains the following pertinent directions with respect to the usage to be made of the money contained therein:

" \* \* \* to be used for road and bridge purposes and for no other purpose whatever; \* \* \* "

While it might be argued that the payment of administrative expenses such as the salary of the assistants to the county highway engineer are for "road and bridge purposes" within the meaning of that phrase as used in Section 8527, Mo. R.S.A., yet we believe that the general rule, with respect to the payment of salaries of county officers, is the one which should be followed. This general rule has been expressed by the Supreme Court of Missouri, en banc, in State ex rel. Hall vs. McElroy et al., 274 S.W. 753, wherein the court said:

" \* \* \* The law, after creating the office and prescribing the duties, fixes a salary of \$125 per month for the performance of those duties. The law does not say from what fund this salary shall be paid. We realize that in the creation of an office, the lawmakers might designate a fund out of which the salary shall be paid, and this fund may be other than the salary fund of the county. But such was not done in this case. In such situation it will be presumed that the Legislature intended the salary to be paid as other official salaries are paid, i. e., out of the salary fund of the county. We think this to be clear and without doubt. \* \* \* \* "

In view of the rule so declared, particularly when considered in connection with the provisions of Section 10911, R. S. Mo. 1939, creating under Class 4 a fund for the payment of salaries of county officers, we believe that the salary of assistants to the county highway engineer should properly be paid from moneys apportioned to such class.

Hon. Howard B. Lang, Jr.

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CONCLUSION

In the premises, we are of the opinion that a county highway engineer in a county of the third class is without authority to appoint assistants except when such officer is unable to properly perform all of the duties of his office.

We are further of the opinion that assistants to a county highway engineer in a county of the third class should be paid by warrants drawn upon Class 4.

Respectfully submitted,

WILL F. BERRY, JR.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

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