

SCHOOL: County superintendent who employed other counsel
OFFICERS: to represent him in a civil action not entitled
FEES: to reimbursement for attorney fees.

May 18, 1950

5/27/50



Mr. Hubert Wheeler
Commissioner of Education
Department of Education
Jefferson City, Missouri

Dear Sir:

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

"On September 28, 1949 this Department reported to your office a case which involved Audrain County, in which the County Superintendent of Schools denied the assignment of elementary pupils living in a common school district adjacent to the School District of Mexico. The parents of the school children who were denied assignment, employed the County Prosecuting Attorney as counsel to bring a mandamus suit in circuit court to compel the County Superintendent of Schools to make an official assignment as provided in Senate Bill 308, Section 10461, Laws of 1945. The County Superintendent of Schools employed an attorney to defend his action in refusing to make assignment. The employment of such counsel involved an expenditure of money. The circuit court, in this case, denied the petition for mandamus action.

"The question asked in this case was whether or not the County Superintendent of Schools was entitled to the legal counsel of the Prosecuting Attorney in the defense of his official actions in administering the school laws under his jurisdiction. Also, inquiry was made about the responsibility for paying both counsel and court costs.

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"In your opinion of November 29, 1949, it was ruled as follows:

"It is the opinion of this department that the county and the state are both "interested" and "concerned," as those terms are used in Sections 12942 and 12944, R. S. Mo. 1939, when the county superintendent of schools is made a defendant in a civil action touching his official acts in administering the school laws within his jurisdiction, and it is the duty of the county prosecuting attorney to defend and represent the county superintendent of schools in such action."

"The second question asked in the request of September 28, 1949 was not answered specifically in your opinion, but rather suggestion was made that the inquiry was not a subject for disposition in this opinion. However, there still remains a problem in connection with the Audrain County case. The County Superintendent of Schools in this case, having been forced to employ counsel, desires to know if he is entitled to reimbursement for such costs, and if so, from what county fund should such payment be made.

"Since this question seems to be of general interest, and may be one applicable to any county in the State, I shall be glad to have your advice and official opinion in regard to the following questions:

"1. Is the County Superintendent of Schools entitled to reimbursement from the county when he has been denied counsel of County Prosecuting Attorney to defend his actions as county superintendent of schools in relation to the enforcement of laws governing the public schools of the county?

"2. If the County Superintendent is entitled to such reimbursement from what county moneys should payment be made?"

As you have pointed out, in our opinion to you under date of November 29, 1949, we held that under Section 12944, R.S. Mo. 1939, it is the duty of the prosecuting attorney to represent the county

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superintendent of schools in a civil action in which he is made a defendant and which touches his official acts in administering the school laws.

Under the facts you have presented the prosecuting attorney was interested in the particular civil case in which the county superintendent was the defendant in that he was representing the plaintiff. Such being the state of affairs, the county superintendent employed other counsel, and with such legal assistance proceeded to trial and won the case.

At the outset, we state that an examination of the laws relating to the powers and duties of the county superintendent of schools fails to disclose any specific statutory authority permitting a county superintendent of schools to employ an attorney to represent him in litigation and be reimbursed for any attorney fees paid.

In the usual case, where the services of the prosecuting attorney would be available, the county superintendent would certainly not be permitted to hire other counsel in preference to the legal services obtainable from the prosecuting attorney and then be reimbursed from public funds for expenditure made in the payment of attorney fees.

We are further aware that in the situation at hand the county superintendent is seeking to be reimbursed for an outlay or expenditure, and it is therefore to be distinguished from cases announcing the rule that officials may not receive compensation or income in addition to that authorized by law. *Nodaway County v. Kidder*, 129 S.W. (2d) 857, 344 Mo. 795; *Smith v. Pettis County*, 136 S.W. (2d) 282, 345 Mo. 839.

At first blush it would appear that the county superintendent might be entitled to reimbursement from public funds on the theory that he had made an outlay or expenditure of money necessary for the performance of the duties of his office. *Rinehart v. Howell County*, 153 S.W. (2d) 381, 348 Mo. 421; *Ewing v. Vernon County*, 116 S.W. 518, 216 Mo. 681. However, in these cases the court's decision was based upon the construction of particular statutes involved and held that by reasonable implication they permitted payment of some particular item of expense, such as janitor service, stamps, stationery and stenographic hire. This was so pointed out in *Maxwell v. Andrew County*, 146 S.W. (2d) 621, 347 Mo. 156, and *Alexander v. Stoddard County*, 210 S.W. (2d) 107.

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There can be no question that the county court in some instances may employ legal counsel to represent the county in cases in which the county is concerned or interested. This office, in an opinion submitted to Honorable Charles B. Butler, Prosecuting Attorney of Ripley County, under date of March 27, 1946, made an exhaustive legal study and discussion of the power of the county to employ legal counsel.

One of the instances when the county may employ legal counsel in cases in which the county is interested or concerned is when the prosecuting attorney refuses, or is unavailable, to represent the county. In the case of State ex rel. Buchanan County v. Fulks, 296 Mo. 614, 247 S.W. 129, there was an action on the official bond of the Collector of Buchanan County to recover a certain sum constituting taxes and funds belonging to said county which had been collected and retained by the defendant collector. The money was being retained by the collector on the ground that it constituted his commission on collection of delinquent taxes. The prosecuting attorney had refused to bring the suit because he believed that the collector was entitled to the money that he was holding, and the county hired another attorney. The right of the county to employ other counsel was questioned, and in ruling on the point the court said at S.W. l.c. 134:

"Another contention is that the court erred in overruling appellant's motion to dismiss this action because it was not brought by the prosecuting attorney of Buchanan county, but by private counsel employed by the county court of that county. The prosecuting attorney was repeatedly directed by the county court to bring the suit, but, being of the opinion that the collector was entitled to retain the 4 per cent. commissions imposed on delinquent taxpayers by the statute in addition to the \$9,000 compensation provided by subdivision 15, supra, he persistently refused to bring the suit. * * *

"It is the duty of prosecuting attorneys to commence and prosecute all civil and criminal actions in their respective counties, in which the county or state may be concerned. * * * We are of the opinion that when the prosecuting attorney refused to perform his duty, as in this instance, the county court was not shorn of its power to act in the

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discharge of its duties in the premises, nor required to supinely abdicate its functions. The servant is not greater than his master. The county court was empowered by the statute to order the suit to be brought and to require the prosecuting attorney for the county to commence and prosecute the action. The refusal of the prosecuting attorney to obey the order of the county court created an emergency. * * * In this emergency we have no doubt the county court had the implied power to employ other counsel to bring the suit; otherwise it would have failed in the discharge of a duty imposed upon it by the statute. * * *

In the instant case the prosecuting attorney had taken a position hostile to that of the county and the superintendent of schools by accepting employment from parties on the other side of the lawsuit, and we believe that the county, under the circumstances, could have contracted for legal counsel to represent the county superintendent of schools.

However, as we understand the situation at hand, the county court did not employ an attorney to represent the superintendent of schools; rather he contracted for his own counsel to represent him without requesting the county court to secure him an attorney.

As previously pointed out, there is no statute authorizing the county superintendent of schools to employ counsel and be reimbursed from public funds. Nor do the facts show that the superintendent of schools obtained any authorization from the county court to employ counsel or to make any contract for legal services on behalf of the county.

In the case of Missouri-Kansas Chemical Co. v. Christian County, 352 Mo. 1987, 180 S.W. (2d) 735, the plaintiff company sued Christian County to recover the purchased price of soap and disinfectant contracted for by the courthouse janitor and one member of the county court for use in the courthouse. In denying recovery the court said at l.c. 736, 737:

" * * * Section 13766 authorizes the county court by an order made of record to appoint an agent to make any authorized contract on behalf of the county. The county clerk testified there was no record authorizing the janitor or any one else to buy these supplies.

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Under the circumstances the janitor was not the agent of the county and his purchases did not bind the county. The same is true of the presiding judge. He likewise was not the agent of the county, nor did he have authority in his individual capacity as presiding judge to make a contract on behalf of the county.

* * *

"There is no record of the county court authorizing the purchase of the materials. A county court is a court of record and speaks only through its records; * * *

* * * * *

"The terms of the statute referring to a contract made with 'the county authorities, or with any agent of the county lawfully authorized' do not permit recovery on the orders signed by the presiding judge or the court house janitor because neither was authorized to make a contract. We have held that this section does not give the claimant a right to recover where he has performed under a contract with a county official if such official is not authorized by law to make the contract. Bryson v. Johnson County, 100 Mo. 76, 13 S.W. 239."

In view of the above decision it would seem that the superintendent of schools contracting for legal counsel without authorization from the county court performed an ultra vires act. Surely the attorney employed could not recover directly from the county for legal services rendered the superintendent of schools, and we do not believe that the rule expounded in the Christian County case could be circumvented by permitting the official contracting for the legal services to recover from the county the amount of the fee and then pay the attorney.

Under the circumstances we believe that the county superintendent was acting as he thought best in employing other counsel. But, under the facts presented, we do not believe that the county superintendent of schools, as a matter of right, is entitled to reimbursement from the county out of public funds.

Since we believe the county court would have had the power to employ legal counsel to represent the superintendent of schools in the case in which he was a party defendant, there is some

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authority to the effect that having such power it could have afterwards ratified the contract which it could have originally negotiated. State ex rel. Crow v. St. Louis, 174 Mo. 125, 73 S.W. 623; Walker v. Linn County, 72 Mo. 650; City of Moorehead v. Murphy, 94 Minn. 123, 102 N.W. 219. However, under the facts presented, it does not appear that the county court ever ratified any contract of employment made by the county superintendent of schools.

In the premises, we are constrained to the view that the county superintendent of schools is not entitled to the reimbursement desired, and your first question must, therefore, be answered in the negative.

Our conclusion reached in the first question forecloses answering the second question.

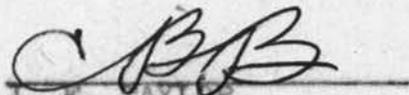
CONCLUSION

It is, therefore, the opinion of this department that when the county superintendent of schools is denied the legal services of the prosecuting attorney in a civil action relating to the administration of the school laws, and in which the county superintendent is a party defendant, reimbursement from public funds for the payment of attorney fees cannot be made to the county superintendent who employed other counsel without authorization from the county court.

Respectfully submitted,

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APPROVED:



J. E. TAYLOR
Attorney General

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