

Opinion No. 398**Public Officers — County Officers —
Deputies—County Employees
—Vacations—County
Commissioners.**

HELD: County officers and deputies, whose offices and salaries are determined and fixed by law, may take reasonable vacations with pay and the county commissioners have no authority to diminish their salaries.

County commissioners may, by express contract, or by reason of contract implied from custom, or by rules established by them, allow reasonable vacations with pay to deputies and employees whose positions and salaries are determined and fixed by them.

November 27, 1933

You have submitted the following questions for my opinion: "First. Does an elected county officer, or his deputy or deputies, appointed by authority of law and working on a salary, have a right to take a vacation on pay while employed by the county? Second. Does a clerk or other employee, other than a county official elected by law, or a deputy or deputies as above mentioned, have a right to take a vacation on pay while employed or working for the county?"

You have stated your opinion on the first question to the effect that the county commissioners have no authority to make an order to the effect that an officer or deputy may take a vacation with pay but that an officer or deputy may be absent from his office on frequent occasions and for protracted absences and the board has no authority to increase or diminish his salary which is fixed by law, and any dereliction on the part of the officer or deputy may be corrected by removal or impeachment.

I agree with the conclusion you have reached to the effect that the county commissioners have no authority to diminish the salary of an officer or deputy whose salary is fixed by law because of such officer taking a reasonable vacation. This conclusion is supported by the authorities you have cited. (43 C. J. 687; 5 Opinions of the Attorney General 584; *Bates v. St. Louis*, 153 Mo. 18, 54 S. W. 439, as well as other authorities.)

While there is no express provision in our statutes relating to vacations, it is my opinion that an officer or deputy whose office is determined by law and whose salary is fixed by law, which the commissioners have no right to increase or diminish, should be permitted to take a reasonable vacation for recreation or for the benefit of his health at a time when the work in the office will permit it with no additional cost or loss to the county. Apparently this has been the custom for many years in many counties.

With reference to your second question: Chapter 82, Laws of 1923, gives the county commissioners the power to appoint certain deputies or assistants and to fix their compensation. Section 4465, R. C. M., 1921, as finally amended, gives to the county commissioners, in addition to other powers, the power: "22. To represent the county, and have the care of county property, and the management of the business and concerns of the county in all cases where no other provision is made by law." "23. To make and enforce such rules for its government, the preservation of order and the transaction of business, as may be necessary. * * *" "25. To perform all other acts and things required by law not in this title enumerated, or which may

be necessary to the full discharge of the duties of the chief executive authority of the county government." (Chapter 54, Laws of 1927.)

In Massachusetts. (*Wood v. Haverhill*, 174 Mass. 578, 55 N. E. 381), it was held that where a charter authorizes the city to make reasonable provisions for preserving the public peace and maintaining its internal police, the city has power to grant a reasonable vacation to policemen, not subjecting it to additional expense.

In *McQuillin Municipal Corporations* (Second Edition), Section 528, it is said: "Unless expressly forbidden by law it is fair to assume that the head of a department or chief officer possesses authority to grant a reasonable leave of absence to an officer or employee under him on account of sickness or in the interest of the health of the employee or for other good reason." It will be observed from the provisions of the foregoing mentioned statutes that no limitations or restrictions are placed upon the county commissioners with respect to the terms of the contract of employment, except such as are named in said Chapter 82, in regard to the maximum salaries, unless otherwise provided by law. It appears that the entire matter of the terms of the contract of employment and the fixing of the employee's compensation is left to the discretion of the county commissioners. There is no specific provision of law qualifying or limiting the discretion reposed in the county commissioners.

It is so well settled that no citation of authority is necessary that the unqualified and unlimited discretion vested in a public officer will not be interfered with so long as the action taken by him is not unlawful, arbitrary, unreasonable or of such a character as to constitute an abuse of discretion. In the absence of restrictions there is nothing to prevent the county commissioners, when employing, deputies and assistants whose positions are not created and whose compensation is not fixed by law but whose positions and compensations are determined and fixed by the commissioners, from providing as a part of the contract of employment that they may have a vacation with pay. The compensation paid them during the vacation period would

be considered a part of their regular compensation and supplemental to the pay they are to receive for their services at other times and as part payment for those services. Such contract, whether existing by express terms or implied by reason of a custom existing to grant vacations with pay or by reason of rules applicable to the subject that may have been adopted by the commissioners, would, in my opinion, be within the powers of the commissioners given by statute and would not amount to an abuse of discretion on the part of the commissioners and would therefore be lawful.

Certainly the county commissioners in the exercise of a reasonable discretion, may, by contract, express or implied, or by rules adopted, pay an employee who may be absent for a few hours or a day, or longer on account of illness. In such cases the work of the office is handled by associates, or made up. No reputable or respectable business would pursue a niggardly policy of docking an employee for such occasional brief absence and we see no reason why county commissioners should be less humane in dealing with public employees. The allowance of vacations with pay ordinarily would not increase the expenditures of the county nor add to the burden of the taxpayer. The work of the office during such absence is usually handled by associates or made up on the return of the deputy or employee without the employment of other persons. It is safe to say that a refusal to allow such vacations would generally result in no vacations being taken at all as most employees on the present scale of payment, particularly those having families, would feel it necessary to forego a vacation even for the benefit of their health. From such a policy no material profit could accrue to the taxpayer.