OFFICE OF THE ATTORNEY GENERAL OF TEXAS

AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable John C. Marburger
County Attorney
Fayette County
La Grange, Texas

Dear Sir:

Opinion No. O-4421
Re: Under facts stated County Attorney of Fayette County earned compensation in excess of $3,500 in the year 1935, and it is now the mandatory duty of the Commissioners' Court of Fayette County to set the salary of the present County Attorney of said county at $3,500 per annum.

Your request for opinion has been received and carefully considered by this department. We quote from your request as follows:

"Your opinion is respectfully requested on the following matter:

"The County Attorney of Fayette County, Texas, during the fiscal year 1935, earned and collected fees and ex-officio compensation totaling $1,973.70.

"During the year 1935 he earned but did not collect fees in misdemeanor cases totaling $2,294.00, the defendants in these cases served out the same in the county jail.

"When the full amount of the fees earned and not collected are added to the fees earned and collected, plus the ex-officio salary, the earned fees and ex-officio salary total $5,571.55.

"If only one-half the earned fees not collected or the sum of $1,147.00 should be consider-

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ed as earned compensation under Article 1055 CCP then the compensation earned by the County Attorney in 1935 totals $5.120.70.

"If no earned and not collected fees are allowed as compensation for 1935 because the provisions of Article 1055 CCP were not complied with, the compensation earned by the County Attorney in 1935 would total $1,973.70.

"There were no authorized deductions claimed for 1935.

"The County Attorney in office during 1935 filed an annual fee report under the provision of Article 3897 R.C.S. in which he declared under oath that his gross fees of office, plus ex-officio compensation during 1935 was $1,978.-80 and he attached thereto a typewritten list headed earned cases which, when added to the fees listed in the annual fee report, totaled $2,262.30. This Annual Fee Report was checked by the County Auditor and stamped approved by him. With this sworn report of the then County Attorney approved by the then County Auditor before them, the Commissioners' Court in January 1936 fixed the salary of the County Attorney at $2,750.00 for 1936 and this rate has been renewed each year thereafter through the year 1941.

"During the year 1941 an audit of the County records was made by an outside auditor and the fees of the County Attorney for 1935 were then ascertained at approximately the amount quoted herein, and this additional information about 1935 was before the Court when it became time to fix the 1942 salary of the County Attorney; the Commissioners' Court and the County Attorney stipulate that the fees quoted herein under the various provisions are correct.

"Our question therefore is this:

"What was the minimum earned compensation of the County Attorney of Fayette County, Texas, for the fiscal year 1935 under the provisions of Article 3912 E of the R.C.S.?"

"The letter hereto attached is the one we failed to bring with us when the auditor and I saw you yesterday. It was drafted by the auditor that was with me, and I am presenting it just like he wrote it since I do not know what the Commissioner's Court told him to find out.

"As he told you in person, both the (1) Dockets of the various Courts and the (2) Sheriff's Reports show that in 1935 the County Attorney of Fayette County actually earned more than $3,500, based upon your method of calculating fees, etc. This includes both collected and uncollected fees in criminal cases. Naturally the then County Attorney nor the present County Attorney could actually determine which defendant paid his fine and costs and which laid them out except by going to the Sheriff's Records since he is the jailer.

"Whenever a judgment has become final, the County Attorney has actually earned his fees, regardless of whether the defendant pays his fine and costs or lays them out in jail, and has nothing further to do with the case or the defendant. The defendant is placed in the custody of the Sheriff or Constable and it is up to him to see that the judgment is satisfied. Naturally the County Attorney of 1935 nor any subsequent one, could determine whether a defendant laid out his fine and costs, except by going to the Sheriff's Records.

"It is therefore my opinion:

"(1) That the best evidence of what the County Attorney actually earned in criminal cases are the dockets and judgments records of the various courts, rather than his individual annual report that he files with the District Clerk. His annual report certainly is not conclusive nor binding on him nor anyone else. See Burtschell vs Colorado County, 185 S. W. 1164; Llano County vs Moore (t) 14-152. Judgments, after they have become final, on the other hand, are conclusive.

"(2) That the Sheriff's Records and reports are the best evidence of which defendant laid his fine and costs out in jail, because the County Attorney's fees are actually earned when a conviction has become final and the collection thereof is then up to the Sheriff or Constable. Only the Sheriff knows whether the defendant has laid out his fine and costs in jail.

"I thought I would give you this additional information hoping that it will aid you in answering the question asked in the attached letter."

Opinions No. O-4281 (as modified by Opinion No. O-4363) and No. O-4363 of this department held under the facts and figures stated therein (not materially or substantially different from the facts and figures above given) that it was the mandatory duty of the Commissioners' Court of Fayette County, Texas, to set the County Attorney's salary at $3,500.-00, per annum. Copies of these opinions are enclosed herewith for your information.

We agree with you that the annual report filed by the County Attorney in 1935 is not conclusive or controlling on the question as to the amount he earned in 1935. See the following authorities: Burtschell v. Colorado County, 183 S. W. 1184; Broad v. City of Paris, 18 S. W. 342; Llano County v. Moore, 14 S. W. 152; Boone County v. Jones (Iowa), 37 Amer. Rep. 234, 2 N. W. 987, add Wharton's Evidence § 22.

We agree with you that when the County Attorney secures a conviction in the justice or county court in a criminal misdemeanor case (either by plea of guilty or contested trial) and that judgment thereafter becomes final the County Attorney has earned the fees allowed him by the statutes. Whether or not the defendant pays his fine in cash, leaves the country and never pays it or lays the fine out in jail or works it out on the county farms or other county projects, is immaterial to the determination of the question as to the amount of "earned compensation" of the County Attorney. See opinion No. O-409 of this department, a copy of which is enclosed for your information. Since this is true we agree with you that the judgment records would be the best evidence to determine the amount of fees earned for such convictions. The sheriff's records or any other evidence with reference to whether or not the defendants laid their fines out in jail would be immaterial to the question involved here.

Under the facts stated here it is our opinion that the "earned compensation" (under the Officers' Salary Law) of the County Attorney of Fayette County for the fiscal year 1935 was in excess of $3,500.00. It is our further opinion under the facts stated that it is the mandatory duty of the Commissioners' Court of Fayette County to set the salary of the County Attorney of Fayette County at $3,500.00 per annum.

Very truly yours

ATTORNEY GENERAL OF TEXAS

APPROVED FEB 18, 1942

Grover Sellers

FIRST ASSISTANT
ATTORNEY GENERAL

By Wm. J. Fanning

Wm. J. Fanning
Assistant

WJF:GO

ENCLOSURE

APPROVED
OPINION
COMMITTEE
BY BWB
CHAIRMAN