

The power to remit a fine imposed by court of special sessions rests solely in the county judge (other than in the City of New York). See Code of Criminal Procedure, sections 484, 740; Judiciary Law, sections 798, 799, 799-a.

CONCLUSION

Application must be made to the county judge of the county in which the defendant was convicted for remission of a fine imposed by a court of special sessions.

August 22, 1946.

File No. 1554

TOWN LAW, SECTION 202 (5).

The expense of the extension to a water district must be borne by the real property within the extension. No part thereof may be borne by real property within the original district.

You inquire whether the cost of an extension to a water district must be borne by the real property within the extension or whether such cost is borne in part by real property in the original district.

Pursuant to subdivision 5 of section 202 of the Town Law, the cost of the extension of a water district must be borne by the real property within the extension alone. No part of such cost may be paid by the original district.

August 22, 1946.

File No. 1555

TOWN LAW, SECTION 20 (2); COUNTY LAW, SECTION 200 (4).

Town may not employ attorney to prosecute criminal action in a court of special sessions.

INQUIRY

May a town board employ an attorney to prosecute a criminal action in a court of special sessions?

STATEMENT OF LAW

Paragraph (b) of subdivision 2 of section 20 of the Town Law provides as follows:

"(b) The town board of any town which shall not have established the office of town attorney may employ an attorney to give it such professional service and advice as it may require. * * * but, the total compensation of such attorney * * *, so employed shall not exceed the sum of three thousand dollars per annum."

In our opinion, paragraph (b) of subdivision 2 of said section 20 does not authorize the town board to employ an attorney to prosecute a criminal action in a court of special sessions.

The Attorney-General, in construing the above quoted provision of law, has stated (1939 Op. Atty. Gen. 177, 178):

"* * * it is my opinion that the statute above quoted empowers a town board to employ an attorney whenever the necessity arises for his professional services or advice in connection with a matter, action or legal proceeding for the sole use and benefit, interest or protection of the town, in any of its rights or property, as the town board in the proper exercise of its discretion may require and deem necessary, * * *"

There is no statutory provision authorizing towns to undertake the prosecution of criminal actions and proceedings. Such prosecutions are undertaken on behalf of the people of the State of New York.

Subdivision 4 of section 200 of the County Law, relating to the office of district attorney, provides as follows:

"4. It shall be the duty of the district attorney to conduct all prosecutions for crimes and offenses cognizable by the courts of the county for which he shall have been elected or appointed; * * *"

In 1933 Op. Atty. Gen. 78, it was held that it was the duty of the district attorney of the county of Jefferson to prosecute a charge of misdemeanor cognizable by the city court of Watertown.

CONCLUSION

A town board may not employ an attorney to prosecute a criminal action in a court of special sessions.

August 22, 1946.

File No. 1557

HIGHWAY LAW, SECTION 140.

Town superintendent may not maintain streets or roads which are not part of town highway system.

You ask in substance whether or not the town superintendent of highways of the town of Berne has authority to maintain a road in such town which is not a part of the town highway system.

The town superintendent of highways of the town of Berne has no authority to maintain roads which are not part of the town road system.

Under Article 8 of the Highway Law, there is a procedure whereby persons assessable for highway tax may make application to the town superintendent to lay out new highways. Should

such proceedings be taken in your town, and if the road was taken over by the town as a part of its highway system, then the maintenance would be a town expense.

August 23, 1946.

File No. 1558

COUNTY LAW, SECTIONS 12 SUBD. 5, 162 AND 163.

Extra compensation may not be paid to a deputy clerk for additional services imposed subsequent to his taking office.

INQUIRY

May a board of supervisors authorize the payment of additional compensation to a deputy county clerk for services to be performed in the county clerk's office at other times than the regular office hours in which the office is open to the public for official business?

STATEMENT OF LAW

Section 12 of the County Law provides in part as follows:

"§ 12. General powers.

The board of supervisors shall:

5. (a) Have the power * * * to fix the amount and the time or manner of payment of the salary or compensation * * * of any county officer or employee * * *

The salary or compensation of an officer elected or appointed for a definite term shall not be increased or diminished during such term."

The courts of this State have never considered the salary of a public official as one based upon quantum meruit but rather as an incident to the office. (*Grieb v. City of Syracuse*, 94 App. Div. 133, 136; *Carrol v. Mearray*, 131 Misc. 577, 580, aff'd no opinion, 222 App. Div. 832; Vol. 1, Dillon, Municipal Corporations, 5th Ed., 737.)

Work outside of office hours ordinarily will not justify extra pay where salary is definitely prescribed by law. (*McQuillin, Municipal Corporations*, 2nd Ed., 339.)

A public officer, upon whom additional statutory burdens are imposed, may not, in addition to his salary, receive extra compensation for the performance of such new duties. No compensation for the performance of public service or other official duties is recoverable unless such compensation is given by law. (*Matter of Goldstein v. Berry*, 232 App. Div. 583.)

The court in the case of *Palmer v. Mayor, etc. of the City of New York*, 2 Sanford 318, in an action instituted by a special justice of New York who was receiving an annual salary, to

recover extra compensation for services performed on Sunday, in an opinion rendered therein stated as follows:

"If the duty were legitimately imposed upon the plaintiff, and were a duty appertaining to, or connected with his office, then he could not sustain his action, even if his duties were imposed after his second appointment, for it is well established rule a salary officer cannot rightfully claim compensation extra his salary by performing a new duty; or one imposed by the legislature since the salary was provided."

It would appear from authorities cited, that if a county clerk imposed a duty upon a deputy county clerk of performing additional services, as described in this inquiry, such deputy would not be entitled to receive additional compensation for such service.

The foregoing opinion is written to cover the particular inquiry therein contained and while it may be of assistance to you in reaching a conclusion in reference to welfare department employees, it should not necessarily be construed solely on this opinion that welfare employees may or may not be employed to work overtime in a different unit of the welfare department than that in which such employees are regularly employed.

CONCLUSION

A board of supervisors is without authority to appropriate moneys for payment of extra compensation to a deputy county clerk who is paid an annual salary, for services to be performed by such deputy at other times than the regular hours in which he is regularly employed.

An annual salary paid a deputy county clerk is full and complete for the performance of all the duties of such deputy even though new duties are imposed upon such deputy subsequent to acceptance of such office.

August 23, 1946.

File No. 1559

EDUCATION LAW, SECTION 310(10); GENERAL MUNICIPAL LAW, ARTICLE 13; TOWN LAW, SECTION 220.

Union free school district may convey land not needed for playground or physical training purposes to town and/or village for use by latter for playground and recreation purposes; referendum not required for establishment of such project by town and/or village.

INQUIRY

May a town and village develop an athletic field in honor of their citizens who fought in World War II, such field to be located on the large field owned by Union Free School District No. 3?