OFFICIAL OPINION NO. 74

September 10, 1953.

Mr. R. R. Wickersham,
State Examiner,
State Board of Accounts,
304 State House,
Indianapolis, Indiana.

Dear Mr. Wickersham:

I have your request for an official opinion which reads in part as follows:

> "1. Does a common council of a city have authority to fix and appropriate a specific amount for 'travel allowance' to be paid monthly to elected officers of such city for the use of their automobiles in carrying out duties of their offices within the corporate limits of such city?
>
> "2. Does the mayor of a city have authority to fix with the approval of the common council, and does the common council have the authority to appropriate, a specific amount for 'travel allowance' to be paid monthly to appointive officers, employees, deputies, assistants and departmental and institutional heads of such city for the use of their automobiles in carrying out duties of their offices or employment within the corporate limits of such city?"

Your first question concerns a fixed monthly "travel allowance" for elected officers of a city. I have examined the pertinent laws of this state and can find no statutory authority for such a "travel allowance" for elected officers of cities.

It also appears that the "travel allowance" about which you inquire is to be paid to elected officers of cities, every month, without regard to the number of miles, if any, which the officer may have travelled in his own conveyance in the performance of his duties. Furthermore, actual travel is not a prerequisite to the drawing of this "travel allowance" and I am therefore of the opinion that such an allowance is, in reality, in the nature of extra compensation to the recipient thereof.

Section 21 of Chapter 233 of the Acts of 1933, as amended, the same being found in Burns' Indiana Statutes Annotated (1950 Repl.), Section 48-1233 provides in part as follows:

> "The common council of each and every city shall, by ordinance duly enacted on or before the first day of April of the year in which elections for the election of city officers are held, fix the annual salaries of all officers provided for in this act, and such salaries when so fixed shall not be changed by the common council during their respective terms of office. *The salaries as herein authorized shall be in full for all* services performed for the city. * * *" (Our emphasis.)

This section applies to all sections of Chapter 233 of the Acts of 1933 and to all salaries fixed by, under, or pursuant thereto.

In addition to this, it has generally been held that public officers cannot claim compensation for services unless there is a statute providing that they shall receive remuneration.

> "It is well settled law in this state that a public officer is entitled to only such compensation for the performance of his official duties as is allowed to him by statute. He takes and holds office *cum onere* and undertakes to perform the duties thereof for such compensation as pertinent statutes provide, even though those duties be increased during his term of office."

State *ex rel.* v. Myers (1948), 119 Ind. App. 1, 6, 83 N. E. (2d) 799.

See also: City of East Chicago, Indiana v. Seuberli (1940), 108 Ind. App. 581, 31 N. E. (2d) 71;

Nowles v. Brd. of Commissioners (1882), 86 Ind. 179;

Donaldson v. Brd. of Commissioners (1883), 92 Ind. 8;

Brd. of Commissioners v. Harman (1884), 101 Ind. 551;

Applegate, Auditor v. State *ex rel.* Pettijohn (1933), 205 Ind. 122, 185 N. E. 911.

> "This principle has been recognized in this State from the beginning, and accordingly, it has invariably been held that official duties imposed upon a public officer, to which no compensation is attached, must be performed as all official duties anciently were, gratuitously."
>
> Brd. of Commissioners v. Gresham (1884), 101 Ind. 53, 56.

This general rule is applicable to all public officers in all cities in this state.

As previously stated, the "travel allowance" here involved must be considered as extra compensation to the recipient thereof. Since there is no statutory authority for such an allowance, I am of the opinion that elected officers of cities are not entitled to a fixed monthly travel allowance for the use of their automobiles in carrying out the duties of their office within the corporate limits of the city.

Your second question concerns various municipal personnel which for the purposes of this opinion, fall into two general groups, to-wit:

> (a) appointive officers, and deputies, departmental heads, and institutional heads who are public officers.
>
> (b) employees, assistants, departmental heads and institutional heads who are not public officers.

I will first consider the municipal personnel in (a) above, who are public officers.

The salaries of some of these officers are fixed by statute, while in other instances their salaries are fixed by the mayor subject to the approval of the common council, or by other properly authorized boards or officials. In any event, such salaries are fixed either by statute or pursuant to statute, and there is no statutory authority for the payment of a fixed monthly "travel allowance."

Moreover, the same general principles of law apply to the payment of a "travel allowance" for these public officers as have been applied to a "travel allowance" for elective officers

since all are public officers within the meaning of the authorities heretofore cited.

I am therefore of the opinion that appointive officers and deputies, departmental heads and institutional heads who are public officers are not entitled to a fixed monthly "travel allowance" to be paid to them without regard to the number of miles, if any, actually travelled in their own conveyance on official duty, regardless of the fact that such an allowance has been fixed by the mayor with the approval of the council and appropriated by said common council.

The relationship between a city and its employees, assistants, departmental and institutional heads who are not public officers is essentially that of employer and employee.

I can find no statutory authority for the payment of a fixed monthly travel allowance to municipal employees and the employment relationship does not change the fact that such a "travel allowance" is in the nature of extra compensation to the employees involved.

The employment relationship carries with it the idea of paying the employee for services rendered. But it is also fundamental that a city is not authorized to pay out of city funds for services which have not been rendered or performed. See State *ex rel.* City of Madison (1937), 224 Wis. 17, 271 N. W. 393, 395. Also, a city may not reimburse an employee for travel expense which is, in fact, not incurred by the employee. State *ex rel.* Murane v. Jack, Auditor (1937), 52 Wyo. 173, 71 P. (2d) 917; see also Sec. 237, Chapter 129 of the Acts of 1905, Burns' Indiana Statutes Annotated (1950 Repl.), Section 48-1301 which requires the itemization of claims against a city.

The "travel allowance" about which you inquire is to be paid without regard to the number of miles, if any, actually travelled by city employees in the performance of their duties. I am, therefore, of the opinion that such a travel allowance is not authorized.

This opinion is limited to the payment of a fixed monthly travel allowance and should not be considered as touching upon the authority of a city to reimburse its employees for travel upon a mileage basis, or by any other proper method based on the expense of the travel.