



STATE OF KANSAS

Office of the Attorney General

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CURT T. SCHNEIDER
Attorney General

March 11, 1975

Opinion No. 75- 114

Mr. Patrick J. Reardon
Leavenworth County Attorney
Leavenworth County Courthouse
Leavenworth, Kansas 66048

Dear Mr. Reardon:

K.S.A. 59-216(a) provides that in Leavenworth County, with a population of approximately 49,000, the probate judge shall receive as compensation for his services an annual salary in the amount of \$22,000. Subsection (b) provides in pertinent part thus:

"Such probate judge . . . may appoint a judge or judges pro tem, who shall be attorneys-at-law, to preside in the probate court, juvenile court, or county court, . . . when the probate judge is unavoidably absent or otherwise unable or disqualified to sit in any case, and each such judge shall receive as compensation for his services a reasonable sum not to exceed fifty dollars (\$50) per day for each day of service as such judge pro tem."

You inquire whether the amount of compensation to be paid to the probate judge pro tem within the maximum of \$50 per day is to be determined by the board of county commissioners or by the probate judge.

The statute is absolutely silent on the question. In view of the lack of any statutory provision to the contrary, and the general rule that it is the board of county commissioners who fix the compensation of officers and employees of the county

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to be paid from county funds, we must conclude that it is within the authority of the board to determine the "reasonable sum not to exceed fifty (\$50) dollars per day" which the probate judge pro tem is to receive for his services. K.S.A. 28-825 states that the

"board of county commissioners of all counties shall by resolution determine and establish the salaries of all appointive county officers, not otherwise provided by law."

Although this provision was very likely designed to apply to officers of the county appointed by the board of county commissioners, its literal language permits its application in this instance. At least until unification of the courts is adopted and implemented, under present law the probate judge pro tem is a judicial officer of the county, whose compensation is not fixed precisely by law. It falls, then, to the board of county commissioners to determine the compensation within the limits fixed by law.

Although it is probably not necessary to reach so far, the general doctrine of separation of powers may be invoked in the absence of statutory authority. The fixing of compensation for public officers, including judicial officers, generally, at least, involves the exercise of legislative power. Unless the power to fix precisely the compensation of the probate judge pro tem is vested expressly by law in the probate judge, under the general allocation of governmental powers, that duty would fall to the board of county commissioners as the body which levies taxes and provides the necessary budget authority for payment of the compensation in question.

Accordingly, we cannot but conclude that the power to fix the compensation of the probate judge pro tem within the limits prescribed by law rests with the board of county commissioners.

Yours very truly,



CURT T. SCHNEIDER
Attorney General

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