

1995 Ky. Op. Atty. Gen. 2-120, Ky. OAG 95-31, 1995 WL 455531 (Ky.A.G.)

Office of the Attorney General

Commonwealth of Kentucky

OAG 95-31

July 26, 1995

Subject: Compensation of county officials

Syllabus: Compensation paid to county officials for non-official services must be a reasonable consideration for services personally performed by the compensated official

OAGs cited: OAG 92-161

Statutes construed: None

Pam Miller
Mayor of Lexington

Lexington-Fayette Urban County Government pays the county clerk to provide LFUCG with information from the state's automated vehicle information system. LFUCG also pays the sheriff to serve warrants and provide transportation for juvenile prisoners. The question presented is whether these contracts are permissible under [Buchignani v Lexington-Fayette Urban County Government, KyApp. 632 SW2d 465 \(1982\)](#).

1. Genesis of the question presented

In 1976 LFUCG began contracting with the county jailer, Harold Buchignani, for the operation of its detention facility. The contracts included the following clause:

The Jailer agrees to perform all routine services relating to "booking" of prisoners which specifically include fingerprinting, photographing and necessary administrative procedures. The Jailer shall be compensated from the personnel account category in the operations subsidy referred to in paragraph one, \$2400, for consideration of providing this service and for assuming the management and supervision of this responsibility.

This \$2400 payment was in excess of the jailer's maximum salary permitted under [§ 246 of the state constitution](#).

Around the same time, the jailer began operating a commissary in the detention facility. The commissary was his personal venture, and he kept the profits from it.

Doubts were raised about these arrangements, prompting the jailer to file a declaratory judgment action to determine the lawfulness of the commissary and the \$2400 booking fee. The Fayette Circuit Court ruled against the jailer on both issues and awarded a judgment against him for the total of the contract payments and his profits from the commissary. The Court of Appeals held that (1) the commissary was unlawful; (2) the jailer

could keep the profits he had earned from the commissary; and (3) the booking fee was not unlawful. [Buchignani v Lexington-Fayette Urban County Government, KyApp. 632 SW2d 465 \(1982\)](#).

Relying on the Buchignani decision, LFUCG now pays similar fees to Buchignani for serving warrants and transporting juvenile prisoners, although the payment is made in his current capacity as sheriff rather than jailer. LFUCG also relied on Buchignani to begin contracting with the county clerk for the provision of motor vehicle registration information. Under this arrangement, LFUCG provides the clerk with license plate numbers of vehicles whose owners owe parking tickets. The clerk's deputies enter the license numbers in the state's computer to retrieve information that LFUCG can use to track down the owners and collect the fines. Like the fee paid to Buchignani, the fee paid to the clerk exceeds the clerk's constitutional maximum salary of \$42,877.

*2 The Auditor of Public Accounts audited the clerk for calendar year 1993 and questioned the \$18,000 payment, noting that the sum was treated as personal compensation and was not deposited into the clerk's official bank account. The Auditor did not disallow the payment, but recommended that LFUCG obtain an opinion from this office before renewing the contract. The mayor of Lexington has done exactly that, and has asked us to consider the sheriff's contract in addition to the clerk's.

2. [Ky Const § 246](#): The constitutional salary limitation

[Section 246 of the state constitution](#) states that no public officer or employee may receive compensation for official services in excess of certain stated dollar amounts. Those dollar limits are relative, and have been adjusted upward on the authority of [Matthews v Allen, Ky., 360 SW2d 135 \(1962\)](#). If an officer receives official compensation for more than one duty, the amounts cannot in the aggregate exceed the [§ 246](#) limitation. [Coleman v Hurst, 226 Ky 501, 11 SW2d 133 \(1928\)](#).

In three often-cited cases, the state's appellate courts have considered the extent to which a government may compensate an officer beyond that which he receives for his official duties. In [Slayton v Rogers, 128 Ky 106, 107 SW 696 \(1908\)](#), the Court of Appeals upheld payments to a county attorney for his efforts in the settlement of some accounts. The court distinguished earlier cases in which attempts had been made to compensate officers twice for their official duties. "We are of the opinion," the court said, "that the facts of this case bring it within the rule that where an officer or employee performs extra services outside of official duties and with which they have no affinity or connection, and which do not interfere with his official duties, he is entitled to compensation." [Id. at 699](#).

The phrase "no affinity or connection" resurfaced in 1945 when the Court of Appeals decided [Land v Lewis, Ky, 186 SW2d 803 \(1945\)](#). A deputy county clerk had worked nights, Sundays, and holidays to produce new indexes of records in the clerk's office. The fiscal court paid him for the work, and a taxpayer filed suit contending that because the clerk's official duties included preparation of indexes; any contracts to pay for such work were invalid. The court held that the clerk had no duty to reindex records filed by his predecessors. The work was not part of the clerk's official duty, and the payments were valid. "The situation is different from one where a clerk or other officer merely does something, even under statutory or official requirement, which may be regarded as incident to or is of the same character as a previous official duty.... That rule does not apply where an officer or employee performs extra services outside of official duties and with which they have no affinity or connection and which do not interfere with his official duties. In such an instance, he may be employed to perform the services and is entitled to compensation provided for it." [Id. at 806](#).

*3 The third case in this series is Buchignani, decided in 1982 by the Court of Appeals. On the issue of the booking fee, the court held that the service for which the jailer was compensated was not part of his official du-

ties. Citing *Land v Lewis*, and quoting the phrase regarding “no affinity or connection,” the court held that the payment was lawful.

In OAG 92-161 we said that payments to county attorneys for collecting child support do not violate the [§ 246](#) limitation on salaries. We cited *Buchignani*, *Slayton v Rogers*, and *Land v Lewis* in finding that the payments in question were not in exchange for official duties. We concluded that the official duty regarding child support collection belongs not to county attorneys but to the Division of Child Support in the Cabinet for Human Resources.

In providing formal opinions of this office, we must take the law as we find it. We cannot state what we think the law ought to be when there exists a case like *Buchignani* that sets forth an undeniable legal interpretation, however much we may disagree with it. In our view, the *Buchignani* decision is an invitation to abuse. We simply do not agree that fingerprinting and photographing prisoners has no affinity or connection with a jailer's official duties.

Nevertheless, *Buchignani* is the law, and we must follow it.

The point of law established by *Buchignani* is that public officials may receive payment in excess of the constitutional salary maximum for services that have no affinity or connection with official duties. While the Court of Appeals did not set out a clear standard to determine when services have an affinity or connection with official duties, we are convinced that the actions of the clerk and sheriff under review here are no more closely intertwined with official duties than the actions of the jailer in *Buchignani*. We cannot apply a higher standard to the clerk and sheriff than the Court of Appeals applied to the jailer. *Buchignani* represents the most recent view of Kentucky's appellate courts, and the Attorney General will not adopt a view in conflict with that decision. Therefore we do not find the contracts in question to violate the constitutional salary limitation expressed in [§ 246](#).

This is not to say that a public officer can use the resources of his office however he chooses. Any compensation for work that falls outside the [§ 246](#) limitation on salaries must be in reasonable exchange for services provided. For example, for collecting child support county attorneys receive compensation and reimbursement under contract from the Cabinet for Human Resources. The contracts allow the county attorneys to be personally paid reasonable for administering the program as well as payment of an hourly rate for actual collection work. They also receive reimbursement for direct collection expenses. There is no question that such contracts are valid. In contrast, if an officer signs a contract with a governmental agency under which the officer receives compensation unrelated to his actual performance of services, the contract would violate [§ 173 of the Constitution of Kentucky](#), which prohibits “the receiving, directly or indirectly, by any officer of the Commonwealth, or of any county, city, or town, or member or officer of the General Assembly, of any interest, profit or perquisites arising from the use or loan of public funds in his hands.” [Section 173](#) prohibits an officer from receiving personal compensation for non-official work performed by his staff. Therefore, contracts such as those presented to us are valid only if 1) the services are personally performed by the officer who receives compensation; 2) the compensation is reasonable in amount; and 3) the officer is not required by law to perform the services.

3. Conclusion

*4 Because it is not clear to us whether the clerk and sheriff are being paid for personally performing the services for which they are compensated, and if so whether the amount paid is reasonable, we provide no opinion on those particular questions. They are issues of fact, not of law. If the contracts are analogous to county attorneys' contracts for child support, they are valid. It is our understanding that both contracts were beneficial to the

government; the AVIS information increased the government's tax collections, and the sheriff performed his services at less cost than the government formerly incurred using its own urban-county police officers. While we commend such efforts at cost saving, we emphasize that in order for the contracts to be valid the actual compensation must be for services personally performed by the officers rather than their staffs, the compensation must be reasonable in amount, and the services must not be part of official duties required by law.

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