

Note from the Attorney General's Office:

1931 Op. Att'y Gen. No. 31-2864 was overruled in part by 2013 Op. Att'y Gen. No. 2013-016.

Upon examination of the plans, I note that a committee of your society approved these plans on January 6, 1931. I therefore feel that your society, which is charged by the act with the erection of the monument (see Section 1, H. B. 273, 113 O. L. 622), has thereby determined that the plans are adequate, and in the absence of fact to show the contrary, I must concur in that determination. I assume that said plans do not contemplate an expenditure exceeding three thousand dollars, for it is noted that Section 4 of the act heretofore mentioned appropriates but three thousand dollars for the monument.

Entertaining these views, said plans are hereby approved, and I am returning them herewith.

Respectfully,
GILBERT BETTMAN,
Attorney General.

2864.

SANITARY ENGINEER—NOT CONSIDERED A PUBLIC OFFICER—NO
INHIBITION AGAINST CHANGE OF SALARY DURING TERM FOR
WHICH APPOINTED WHEN.

SYLLABUS:

1. *A sanitary engineer, appointed by a board of county commissioners in a county with a population exceeding 100,000 in which there has been created and maintained a sanitary engineering department, is not a public officer.*
2. *A change may be made in the amount of compensation provided for a county sanitary engineer, and the method of computing and paying the same, during the term for which such engineer is appointed, if done in good faith and for good cause.*

COLUMBUS, OHIO, January 26, 1931.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your request for my opinion with reference to a matter submitted to you by one of your examiners.

Your examiner's inquiry relates to a change made in the compensation to be paid to the sanitary engineer for Montgomery County during the term for which he was appointed. His letter to you is as follows:

"On January 2, 1930, the county commissioners passed a resolution re-appointing P. E. B. County Sanitary Engineer for the year 1930, and fixed his salary at \$4,000.00 per year for such services as are necessary for him to render. (The county commissioners properly appropriated \$4,000.00 for the year 1930).

On March 14, 1930, the county commissioners repealed the resolution passed January 2, 1930 and re-appointed P. E. B. as sanitary engineer beginning March 16, 1930 and fixed his compensation at \$25.00 per day, subject to 160 working days per year, (which would amount to the annual salary appropriated for the year 1930. There is no record of Mr. B. resigning.)

On September 12, 1930, the County Commissioners passed a resolution engaging P. E. B. as sanitary engineer for 56 additional days, at \$25.00

per day, thereby making Mr. P. E. B.'s compensation \$5,400.00 for the calendar year 1930.

Have the County Commissioners the right to change Mr. B.'s compensation from an annual salary to a per diem compensation during the term for which he was employed, thereby increasing his annual salary \$1,400.00? Is the above legal?"

By the terms of Section 6602-1 et seq. of the General Code, county sewer districts may be established and maintained by county commissioners. Section 6602-1, General Code, provides in part, as follows:

"* * Any such board of county commissioners may employ a competent sanitary engineer for such time or times, on such terms as they deem best, and may authorize such engineer to employ necessary assistants upon such terms as may be fixed by said board. In any county having a population exceeding 100,000, the board of county commissioners may create and maintain a sanitary engineering department, to be under their supervision and in charge of a competent sanitary engineer, to be appointed by such board of county commissioners, for the purpose of aiding them in the performance of their duties under this act (G. C. Secs. 6602-1 to 6602-8j) or their other duties regarding sanitation provided by law; and said board shall provide suitable rooms for the use of such department and shall provide for and pay the compensation of such engineer and all necessary expenses of such engineer and department which may be authorized by such board. * **"

I am advised that the Commissioners of Montgomery County have created, and now maintain a sanitary engineering department under the supervision of a sanitary engineer appointed by said board of commissioners by authority of the above statute, the said Montgomery County being a county having a population exceeding 100,000.

The duties of a county sanitary engineer are fixed in part by the statutes, although other duties not specifically set forth by statute may be required of such sanitary engineer by the terms of his employment. See Sections 6602-1, 6602-2, 6608-8b and 6602-17, General Code.

Without quoting the statutory provisions which specifically fix certain public duties to be performed by a county sanitary engineer appointed by authority of Section 6602-1, General Code, it is sufficient, for the purposes of this opinion, to say that in the light of these statutory provisions and tested by the standards laid down by the courts, especially the holding of the Supreme Court in the case of *Wright v. Clark*, et al., 119 O. S., 462, a county sanitary engineer must be held to possess many of the essential elements of a public officer. If a county sanitary engineer fully measured up to the essential elements of a public officer and the law creating his position made of him a public officer, the principle, that a change in the compensation of an officer may not be made so as to affect his salary during his existing term, would be applicable and it would necessarily be held that the action of the county commissioners, as outlined by your examiner's letter, was unauthorized and contrary to law.

That the position of county sanitary engineer, as created by said Section 6602-1, General Code, is not such as to make said engineer a public officer is clear, in that, to be a county officer he must be elected by the electors of the county and not appointed. Article X, Section 2, Constitution of Ohio. The principle above referred to, with reference to a change in compensation affecting the salary of an officer during his existing term, is therefore not applicable to the situation which we have before us.

Nor is the rule that statutory boards of limited powers, authorized to fix a salary

do not possess implied power to unfix that salary, as enunciated by the Supreme Court in the case of *State ex rel Clarke v. Cook*, 103 O. S., 465, applicable, for the reason that the statute, Section 6602-1, General Code, does not direct the authorities, the county commissioners, to "fix" the salary of a county sanitary engineer appointed in counties having a population exceeding 100,000 where there has been created and is maintained a sanitary engineering department. The statute simply authorizes the commissioners to "provide for and pay the compensation of such engineer."

In my opinion, a county sanitary engineer whose position is created, as was that of the county sanitary engineer in Montgomery County, is a mere employe of the county and his contract of employment must be looked upon as any other public contract. Under certain circumstances such a contract may be changed by mutual consent of the parties if done in good faith and for good cause.

It is said in *Donnelly on Public Contracts*, Section 82:

"A public contract is measured and governed by the same laws that control natural persons in contract matters, whether it be the nation, state, city, town or village."

Quite a large number of cases are cited by the author in support of this statement. See also *Donnelly on Public Contracts*, Section 172. The same author in Section 164, observes:

"Public bodies, from the fact that they possess the power to contract, have also the power to modify or change contracts the same as natural persons in the absence of statutory restriction. * * If a public contract, because of changed circumstances or through some mistake, becomes oppressive it is within the power of the public body to modify it and allow additional compensation, or it may annul it."

So far as appears, the change made by the Commissioners of Montgomery County in the contract of employment of their sanitary engineer was done in good faith and in the absence of anything to the contrary we must assume that it was done advisedly and for some good reason.

I assume of course that after the change was made in the salary of the sanitary engineer an additional appropriation was made so as to provide for the payment of his compensation as so changed.

Under the circumstances it was not necessary for the sanitary engineer to resign under his appointment of January 2, 1930, before he might resume his duties in accordance with the action of the commissioners of March 16, 1930.

I am therefore of the opinion that the action of the county commissioners of Montgomery County, with reference to the change in the method of payment and the amount of compensation to be paid to their sanitary engineer as outlined in the letter of your examiner is legal and not beyond the powers of said board of commissioners, inasmuch as we have nothing before us to indicate that the action of the commissioners was not done in good faith and for good cause. *Board of Education v. Juergens*, 110 O. S., 667; *Board of Education v. Featherstone*, 110 O. S., 669.

Respectfully,
GILBERT BETTMAN,
Attorney General.