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HIGHWAY CONSTRUCTION COUNCIL, STATE—NO AUTHORITY TO EXPEND FUNDS IN PAYMENT OF OFFICE RENT, EMPLOYMENT OF ADMINISTRATIVE ASSISTANTS, OFFICE STAFF, CLERICAL AND STENOGRAPHIC SERVICES—AMENDED SUBSTITUTE HB 619, 100 GA.

SYLLABUS:

Under the provisions of Amended Substitute House Bill No. 619, of the 100th General Assembly, the state highway construction council provided for therein is without authority to expend funds in the payment of office rent or in the employment of administrative assistants, an office staff, and clerical and stenographic services.

Columbus, Ohio, September 25, 1953

Mr. W. M. Cotton, Secretary, Ohio Highway Construction Council
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“At a meeting of the Highway Construction Council, on September 2, 1953, the Council adopted a motion that the Attor-

ney General be requested to advise this Council whether it has authority to authorize expenditures for payment of office rent, employment of office staff and other expenses necessary to proper operation of the Council.

"In our discussion of organizing the Council to perform the duties imposed by statute, it appears that it would be necessary for the Council to employ at least an administrative assistant and a stenographer, in order to put into effect the apparent intent of the General Assembly in its enactment of this legislation. On the other hand, the Act seems to be silent on the question except by implication. We, therefore, desire to have your opinion on the matter so that there can be no question of our procedure."

The Ohio Highway Construction Council was created by the enactment of Amended Substitute House Bill 619, enacted July 9, 1953, and approved by the Governor July 16, 1953. The sections within this act particularly relating to the creation of the council and the description of its functions and responsibilities, are as follows:

Section 5512.01, Revised Code:

"There is hereby created a 'state highway construction council' consisting of three members to be appointed by the governor with the advice and consent of the senate. No member shall hold any appointive or elective office or position, for which he receives compensation, in the service of the state or any of its political subdivisions.

"Immediately after this act becomes effective the governor, with the advice and consent of the senate, shall appoint three members of the state highway construction council, one for a term ending on the third Monday in January, 1955, one for a term ending on the third Monday in January, 1956, and one for a term ending on the third Monday in January, 1957. Successors of each of such members of the highway construction council shall be appointed by the governor with the advice and consent of the senate, for terms of three years.

"Any member of the council may be removed from office for any of the causes and in the manner provided for in section 3.04, Revised Code. Any vacancy in the office of member of council shall be filled pursuant to section 3.03 of the Revised Code. An appointment to fill a vacancy shall be for the remainder of the term in which the vacancy exists.

"Each member of the council shall receive as compensation for his services fifty dollars for each full day spent in the performance of his official duties and shall be reimbursed for his actual expenses incurred in the performance of his official duties.

Such compensation and expenses shall be paid out of moneys to the credit of the highway construction and bond retirement fund on vouchers signed by the chairman of the council.

“Within thirty days after the original members of the council have been appointed they shall meet and select from among their membership a chairman and a secretary who shall serve until the third Monday in January of 1955. On the third Monday in January, 1955, and on the third Monday in January in each year thereafter the council shall meet and organize by selecting from among its membership a chairman and a secretary to serve for a term of one year.

“The chairman shall preside at all meetings of the council.

“The secretary shall keep or cause to be kept a complete record of the official proceedings of the council.

“The council may adopt such rules and regulations governing its procedure as it may deem necessary.

“Upon request of the council the director of highways shall furnish clerical and stenographic assistance to the council.

“The council may request and obtain from any department, agency, board, bureau or commission of the state government any information which it deems necessary to assist in the performance of its official duties.”

Section 5512.02, Revised Code:

“Prior to the first day of October, 1953, the director of highways shall present to the highway construction council a general plan for the classification of highways on the state highway system. Such plan shall establish, within the state highway system, a system of major thoroughfares which shall include the entire mileage of the interstate highway system.

“The council shall review the plan of classification submitted by the director and shall approve such plan or some modification thereof as the general plan for the classification of highways within the state highway system.

“Within ten days after the approval of a general plan for the classification of highways on the state highway system the council shall officially notify the director of highways of such approval and furnish to the director of highways a copy of such plan including a complete description of the routes denominated as major thoroughfares on the state highway system.

“The council in cooperation with the director of highways shall adopt a system of establishing priorities for construction of highway projects on the major thoroughfares of the state highway system.”

Section 5513.03, Revised Code:

“Prior to the first day of December, 1953, and prior to the first day of December in each year thereafter the director of highways shall submit to the highway construction council a highway construction program containing recommendations for construction of highways on the major thoroughfares and urban extensions thereof in the state highway system. Such program shall contain:

- “(A) Brief description of each project;
- “(B) Estimated total cost of each project;
- “(C) Estimated amount of funds, other than state funds, available to defray the total cost of each project;
- “(D) The priority for construction for each project.”

Section 5512.04, Revised Code:

“The highway construction council shall review the program for the construction of highways submitted to it by the director of highways.

“Within thirty days after the receipt of such highway construction program the council shall designate the projects to be financed from moneys to the credit of the highway construction and bond retirement fund and approve the expenditure of such moneys from the fund to pay the state’s share of the cost of such projects.

“The council shall notify the director of highways in writing of such designation and approval of expenditures and upon receipt thereof, the director of highways shall be authorized to encumber an amount sufficient to pay the state’s share of such project out of moneys to the credit of the state highway construction and bond retirement fund.

“The state’s share of the cost of such project shall be paid out of moneys credited to the state highway construction and bond retirement fund created pursuant to the provisions of section 17 of this act. *Any moneys accruing from the provisions of this act during the present biennium, are hereby appropriated for the purposes for which they were levied and collected under this act.*”
(Emphasis added.)

The purposes for which the moneys were “levied and collected under this act” may be ascertained by reference to certain provisions in Section 5728.06, Revised Code, with respect to the axle tax, and in Section 5728.16, Revised Code, with reference to the additional motor vehicle fuel excise tax. These sections in pertinent part read as follows:

Section 5728.06, Revised Code:

“For the purpose of providing revenues to pay the cost of administering and enforcing the laws pertaining to the levy and collection of the tax imposed by this section, *to defray the expenses of the highway construction council*, to provide funds to pay the state’s share of the cost of constructing or reconstructing highways and eliminating railway grade crossings on the major thoroughfares of the state highway system and urban extensions thereof and to pay interest, charges and principal of bonds issued to provide funds to pay the state’s share of the cost of such construction, reconstruction and elimination of railway grade crossings, there is hereby levied a highway use tax upon each commercial car with three or more axles, each commercial car used as part of a commercial tandem and each commercial tractor used as part of a commercial tractor combination or commercial tandem at the following rates * * *.”

(Emphasis added.)

Section 5728.16, Revised Code:

“For the purpose of providing funds to pay the state’s share of the cost of constructing and reconstructing highways and eliminating railway grade crossings on the major thoroughfares of the state highway system and urban extensions thereof; to pay interest, charges and principal of bonds issued to provide funds to pay the state’s share of the cost of constructing and reconstructing highways, including but not limited to the elimination of grade crossings on the state highway system and urban extensions thereof, *and to pay the expenses of the highway construction council*, an excise tax is hereby levied on all dealers in motor vehicle fuel, upon the use, distribution, or sale within the state by them of motor vehicle fuel, at the rate of one cent per gallon so used, distributed or sold * * *.”

(Emphasis added.)

It will be observed that in each of these sections is a clear statement that the purposes of the levies include meeting the “expenses of the highway construction council,” and this is one of the purposes, therefore, for which the Legislature has expressly appropriated funds arising under such levies. This gives rise to the question of what expenses may properly be incurred by the council.

It must be remembered that the council is a creature of statute and any authority which it may have in the matter of expenditure of public funds must be found in a statutory grant of power. The only such grant

of power which I find in this act appears to be the following paragraph in Section 5512.01, Revised Code:

“Each member of the council shall receive as compensation for his services fifty dollars for each full day spent in the performance of his official duties and shall be reimbursed for his actual expenses incurred in the performance of his official duties. Such compensation and expenses shall be paid out of moneys to the credit of the highway construction and bond retirement fund on vouchers signed by the chairman of the council.”

It will be observed that the expenditures for expenses thus authorized are for the actual expenses of individual members of the council, rather than the expenses of the council as a whole. That it was the legislative intent that no further expenses should be incurred by the council is apparent from the further provision in this section that even such minor and incidental expense as that which is incident to the employment of clerical and stenographic assistance is to be borne not by the council but by the director of highways, who is required to make available to the council such clerical and stenographic assistance as the council shall request.

In this situation it becomes necessary to conclude that there is serious doubt as to the authority of council to expend funds appropriated under Amended Substitute House Bill No. 619 for payment of office rent, employment of office staff and other expenses. In this situation the rule stated by the court in *State ex rel. Bentley v. Pierce*, 96 Ohio St. 44, becomes applicable:

“In case of doubt as to the right of any administrative board to expend public moneys under a legislative grant, such doubt must be resolved in favor of the public and against the grant of power.”

With respect to the provision of office space for the council, reference may be made to Section 154-41, General Code, Section 123.02, Revised Code, which reads in part as follows:

“The department of public works shall have the supervision and control of the state house and heating plant therein, the fixing and placing of all departments and offices of the state therein, and full control and supervision of fixing and placing all departments and offices in offices, buildings and rooms outside of the state house when the same cannot be placed therein,

materials and persons employed in and about the state house, the grounds and appurtenances thereof and all work or materials required in or about them. * * *

In view of the provisions of this section, it would appear to be necessary for the council to apply to the director of public works for the assignment of office quarters in the state house or in some state-owned building. Certainly it is clear that in the absence of any statutory authorization the council could not legally contract for rental of office space in a privately owned building and of course the council is without any appropriation of funds to pay the rental on any such privately owned office space as the department of public works may secure for the use of the council.

For the reasons heretofore stated, it is my opinion that under the provisions of Amended Substitute House Bill No. 619, of the 100th General Assembly, the state highway construction council provided for therein is without authority to expend funds in the payment of office rent or in the employment of administrative assistants, an office staff, and clerical and stenographic services.

Respectfully,

C. WILLIAM O'NEILL
Attorney General