

2. Where there are only two full time regular members of the fire department of a municipal corporation, under the provisions of Sections 4600 and 4600-1, General Code, as amended by the 93rd General Assembly, it is the duty of such full time regular members to serve as members of the board of trustees of the firemen's relief and pension fund.

Respectfully,

THOMAS J. HERBERT,
Attorney General.

1525.

WATERWORKS, MUNICIPAL.—CITY MAY NOT USE FUNDS DERIVED FROM SUCH OPERATION TO PAY PORTION SALARIES OF MAYOR, DIRECTOR OF LAW, DIRECTOR OF FINANCE OR FOR OPERATING EXPENSES OF SUCH MUNICIPAL DEPARTMENTS—OPINIONS ATTORNEY GENERAL, 1937, VOLUME II, PAGE 1835, APPROVED.

SYLLABUS:

A city, which operates a municipal waterworks, may not use the funds derived from the operation thereof in payment of a portion of the salaries of the mayor, director of law, director of finance of such city, and may not use such funds in payment of the operating expense of such municipal departments (2 O. A. G. 1937, p. 1835, approved).

COLUMBUS, OHIO, December 7, 1939.

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

GENTLEMEN: I am in receipt of your request for my opinion, which reads:

“Our examiners of the accounts of the City of Cleveland have submitted Voucher 62843, dated December 13, 1938, showing payment from the Water Department Revenue Fund to the General Fund in the amount of \$30,001.36. We quote from said voucher as follows:

‘Division of Water and Heat Portion of 1937 Expense for Mayor’s Office, Law Department and Finance Department, Based on Number of Requisitions issued during years 1932 to 1937, inclusive:

Total Requisitions	146,753
Water Division	14,864
Water Division Percent Total	.1012858

Total Expense of Mayor, Law and Finance Departments' application to Utilities Department \$296,205.03.

Water Division's Percent of Total Expense, \$30,001.36.'

In this connection may we direct attention to Attorney General's Opinion No. 1052, page 1835, Vol. II of Opinions for 1937.

In view of the fact that the transfer effected by the above mentioned voucher No. 62843, accomplishes the same purpose, but uses a different basis of calculation from the Springfield case covered by the opinion, may we inquire if, in your opinion, the above payment should be considered by the examiners to be illegal, and if finding for adjustment against the general and in favor of the water revenue fund should be rendered on account of said illegal payment."

The syllabus of the opinion of my predecessor (No. 1052, O. A. G. 1937, Vol. II, p. 1835), to which you refer in your request, reads:

"A city may not by ordinance or otherwise divert waterworks funds for the purpose of compensating such city for services rendered to the waterworks department by officers or employees of the city who are compensated from the general fund."

I have reviewed such opinion, together with the authorities therein cited. Such opinion is based upon Section 3959, General Code, which reads:

"After paying the expenses of conducting and managing the water works, any surplus therefrom may be applied to the repairs, enlargement or extension of the works or of the reservoirs, the payment of the interest of any loan made for their construction or for the creation of a sinking fund for the liquidation of the debt. The amount authorized to be levied and assessed for water works purposes shall be applied by the council to the creation of the sinking fund for the payment of the indebtedness incurred for the construction and extension of water works and for no other purpose whatever."

Such section has not been amended since 1910 when it was carried over into the General Code from the Revised Statutes. My predecessor cites and quotes from the cases of *Cincinnati v. Roettinger*, 105 O. S., 145, *Hartwig Realty Co. v. Cleveland*, 128 O. S., 583, and *Longworth v. Cincinnati*, 34 O. S., 101, and the opinion of a former Attorney General (2 O. A. G. 1930, 1030), to support his conclusion.

Such decision clearly supports the propositions that Section 3959, General Code, is a constitutional restriction upon the use of funds de-

rived from the operations of a water plant for the payment of the salaries of officers or employees of a municipality. My predecessor might also have cited the case of *City of Cleveland v. Rees*, 132 O. S., 399, wherein the city of Lakewood sought to obtain the approval of the court to a transfer of so-called "surplus funds" from the water works fund, under authority of Sections 5625-13a et seq., General Code, to the general fund for the payment of the general operating expenses of the city. That court held in the first paragraph of the syllabus that :

"Revenues derived from municipally owned and operated water works may not be transferred to the general revenue fund of such municipality and be used to meet general governmental expenses and municipal obligations. (*City of Cincinnati v. Roettinger, a taxpayer*, 105 Ohio St., 145, and *Hartwig Realty Co. v. City of Cleveland*, 128 Ohio St., 583, approved and followed.)"

See also *Ohio Power Co. v. Craig*, 50 O. App., 235.

Upon a review of such authorities it becomes apparent that under Ohio law the revenue derived by means of service charges for the furnishing of water by a municipally owned waterworks must be used for the purpose of payment of the expenses of conducting and managing the waterworks, the enlargement and maintenance of the plant, the payment of the principal and interest on bonds issued to acquire or maintain the plant, and for no other purpose ; that the salaries of the salaried officers of the city, such as mayor, law director and director of finance, and the expense of the operation of their departments, are a part of the general operation expense of the city rather than of the municipal waterworks, even though some portion of their efforts may be expended in promoting the welfare of such utility, and are payable only from the general fund of the city.

I am therefore in agreement with the opinion of my predecessor cited in your request. The facts presented in your letter show the payment of a portion of such salaries and expense direct from the waterworks fund rather than a transfer of the moneys to the general fund, and thereupon a payment of the entire salaries and expense from such fund, as in some of the cases above cited. It seems to me that if moneys may not legally be paid for a specific purpose, it is immaterial as to the manner such illegal expenditure is sought to be accomplished. It would be just as unlawful if done in one manner as if done in another where the purpose is unlawful.

By reason of the foregoing decisions and opinions, and in specific answer to your inquiry, it is my opinion that your inquiries should be answered in the affirmative.

Respectfully,

THOMAS J. HERBERT,

Attorney General.