

by the court for extra services should also be taxed as costs and paid by the person applying for relief.

I am therefore of the opinion, in specific answer to your question, that the compensation of a commissioner of insolvents, allowed by the court by authority of Section 11179, General Code, must be paid by the applicant for relief, who makes an assignment to avoid arrest by authority of Section 11146, et seq. of the General Code.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2708.

TAX AND TAXATION—COUNTY COMMISSIONERS CANNOT BORROW MONEY IN ANTICIPATION OF FEBRUARY, 1928, TAX SETTLEMENT TO PAY FOR 1927 ROAD CONTRACT.

SYLLABUS:

1. *County commissioners are without power to borrow money and issue notes therefor in anticipation of the February tax settlement, before January first of the year of such tax settlement.*

2. *Where appropriations made by county commissioners for road purposes for the fiscal year have been exhausted, it is unlawful for such commissioners to enter into a contract for work to be performed during such fiscal year, and to provide in such contract that the contractors shall be paid from the proceeds of the December tax collection.*

COLUMBUS, OHIO, October 13, 1928.

HON. W. M. MCKENZIE, *Prosecuting Attorney, Chillicothe, Ohio.*

DEAR SIR:—This will acknowledge your recent communication as follows:

“During the year of 1928 the county commissioners of this county appropriated \$115,000 for road purposes. This was appropriated for various jobs. These appropriations have all been exhausted and there is no unappropriated balance in the road fund. I am advised by the county auditor, Mr. S., that he has advised them from time to time of the condition of the road fund. With all their funds appropriated, there are several miles of service treating which should have a second coat and for which they have never made any provisions.

The commissioners want to know if they can borrow the sum of \$10,000 to put on the coat or second treatment on the road. If this can not be done they want to know if the contractors were willing to wait for the money until December, could the December tax collection be used to pay these contractors.”

The first question asked is whether the commissioners may at this time borrow \$10,000 to complete the work, in view of the fact that the appropriations for the year 1928 have been exhausted. I assume that what you have in mind is whether the commissioners may issue notes and borrow money in anticipation of current revenues. In answering this question I believe it sufficient to quote the provisions of Section 2293-4 of the Code, which section is as follows:

"In anticipation of the collection of current revenues in and for any fiscal year, the taxing authority of any subdivision may borrow money and issue notes therefor, but the aggregate of such loans shall not exceed one-half of the amount estimated to be received from the next ensuing semi-annual settlement of taxes for such fiscal year as estimated by the budget commission, other than taxes to be received for the payment of debt charges, and all advances. The sums so anticipated shall be deemed appropriated for the payment of such notes at maturity. The notes shall not run for a longer period than six months and the proceeds therefrom shall be used only for the purposes for which the anticipated taxes were levied, collected and appropriated. No subdivision shall borrow money or issue certificates in anticipation of the February tax settlement before January first of the year of such tax settlement."

The language of this section sufficiently negatives any right to borrow in anticipation of the February tax collection until after the first of January of 1929. Even though the last sentence of the section were not found therein I believe the language of the first sentence would be sufficient, since it only authorizes borrowing money "in anticipation of the collection of current revenues in and for any fiscal year, and the proceeds of the December tax collection of 1928 are not available to the subdivision until the February tax collection in 1929, and the levy is made to produce revenues for the expenses of the fiscal year of 1929. Consequently, there could not in any event be any borrowing except in the fiscal year of 1929 in anticipation of the February tax settlement.

Accordingly, I am of the opinion that the county commissioners are without power at this time, to borrow money and issue notes in anticipation of the February 1929 tax collection.

It is further inquired in substance, whether the contract could now be made for this work, provided the contractors were willing to wait for their money until the receipt of the proceeds of the December tax collection. In answering this question it is necessary to examine the provisions of the budget law (House Bill No. 80—112 O. L. 391). Section 5625-33, General Code, as therein found, is in part as follows:

"No subdivision or taxing unit shall:

(a) Make any appropriation of money except as provided in this act; provided that the authorization of a bond issue shall be deemed to be an appropriation of the proceeds of the same for the purpose for which such bonds were issued, but no expenditure shall be made from any bond fund until first authorized by the taxing authority.

(b) Make any expenditure of money unless it has been appropriated as provided in this act.

(c) Make any expenditure of money except by a proper warrant drawn against an appropriate fund which shall show upon its face the appropriation in pursuance of which such expenditure is made and the fund against which the warrant is drawn.

(d) Make any contract or give any order involving the expenditure of money unless there is attached thereto a certificate of the fiscal officer of the subdivision that the amount required to meet the same (or in the case of a continuing contract to be performed in whole, or in part, in an ensuing fiscal year, the amount required to meet the same in the fiscal year in which the contract is made) has been lawfully appropriated for such purpose and is in the treasury or in process of collection to the credit of an appropriate fund

free from any previous encumbrances. Every such contract made without such a certificate shall be void and no warrant shall be issued in payment of any amount due thereon. In case no certificate is furnished as hereinbefore required, upon receipt by the taxing authority of the subdivision or taxing unit, of a certificate of the fiscal officer that there was at the time of the making of such contract or order, and at the time of the execution of such certificate a sufficient sum appropriated for the purpose of such contract and in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances, such taxing authority may authorize the issuance of a warrant in payment of amounts due upon such contract; but such resolution or ordinance shall be passed within thirty days from the receipt of such certificate; provided, however, that if the amount involved is less than fifty dollars, the fiscal officer may authorize it to be paid without the affirmation of the taxing authority of the subdivision or taxing unit, if such expenditure is otherwise valid."

Paragraph (d) specifically prohibits the making of any contract involving the expenditure of money unless there is attached thereto a certificate of the fiscal officer of the subdivision that the amount required to meet the contract has been lawfully appropriated for such purposes and is in the treasury or in process of collection. Manifestly, the funds, in this instance, are not in the treasury, but since the levy has presumably been made for the year 1929, it might be argued that the funds are now in process of collection.

There is, however, the further requirement that the certificate show that the money has been lawfully appropriated, and it accordingly is necessary to determine whether a lawful appropriation could in this instance be made.

I have not overlooked the portion of paragraph (d) found in parenthesis which constitutes an exception where there is a continuing contract to be performed in whole, or in part, in an ensuing fiscal year to the effect that the fiscal officer need not certify as to the appropriation and availability of the funds except as to the amount required to meet the contract in the fiscal year in which it is made. In this instance, however, the contract is to be immediately performed, except that it is proposed to withhold payment until after the end of the fiscal year of 1928. I do not believe that this kind of contract is contemplated by the exception above noted. The local authorities cannot, by an arrangement such as is contemplated here, actually have services performed during one fiscal year and postpone payment therefor until the succeeding fiscal year, thereby encumbering the available funds of such succeeding year for the purpose of providing for the expenses legitimately chargeable to the previous year. That is to say, I believe that it clearly is the intent of the provisions of the section hereinabove quoted, to require an appropriation and certificate for all expenditures to be made for contracts to be performed within the fiscal year.

This necessitates further inquiry as to whether an appropriation can now be made effectively so as to encumber the funds which will be available upon the receipt of the February tax collection. Paragraph (a) of Section 5625-33, General Code, prohibits any appropriation except in the manner provided by the budget law. Other sections of the law provide the machinery whereby on or before the fifteenth day of July of each year, each taxing authority submits a budget to the budget commission, which budget covers the estimated rates and the estimated obligations of the subdivision for the succeeding fiscal year. After adjustment by the budget commission the results of its action are certified to the taxing authority which proceeds to make the levy as permitted. This levy then is applied to the duplicate so that the December collection which is made available in February, is based upon the needs

of the subdivision for the year in which the settlement is made. That is to say, the budget adopted in 1928 and the levy made pursuant thereto is for the needs of the subdivision in the fiscal year of 1929.

Section 5625-27, General Code, makes it the duty of the budget commission to revise its estimate of the amount available where changed conditions provide an excess of revenues and to certify to the taxing authority of each subdivision an amended certificate of estimated resources. The last sentence of that section is as follows:

"The total of appropriations made at any time during the fiscal year from any fund shall not exceed the amount set forth as available for expenditure from such fund in the official certificate of estimated resources or any amendment thereof certified prior to the making of the appropriation or supplemental appropriation."

Section 5625-30, General Code, provides as follows:

"The total amount of appropriations from each fund shall not exceed the total of the estimated revenue available for expenditure therefrom as certified by the budget commission or in case of appeal by the tax commission of Ohio. No appropriation measure shall become effective until there be filed with the appropriating authority by the county auditor a certificate that the total appropriations from each fund taken together with all other outstanding appropriations, do not exceed such official estimate, and if amended the last amended official estimate, and in every case in which the appropriation does not exceed such official estimate, the county auditor shall give such certificate forthwith upon receiving from the appropriating authority a certified copy of the appropriation measure. Appropriations shall be made from each fund only for the purposes for which such fund is established."

It is clear that these provisions of law, together with other provisions applicable to budget procedure contemplate that no appropriation in any fiscal year shall exceed the estimated revenues available for that fiscal year, for the purpose for which such appropriations are to be made. In the specific case now under consideration the appropriations for the year 1928 have been exhausted. The funds to meet these appropriations were the proceeds of the tax collection made in December 1927 or June 1928. The December tax collection of 1928 cannot in any event be available to augment the revenues to be expended during 1928, since such levies are made for expenditures during the fiscal year of 1929.

The commissioners in this instance, are accordingly without power to make a valid appropriation at this time and such an appropriation is a condition precedent to the validity of a contract for work to be performed during the current fiscal year.

Answering your second inquiry specifically, I am therefore of the opinion that, where appropriations made by county commissioners for road purposes for the fiscal year have been exhausted, it is unlawful for such commissioners to enter into a contract for work to be performed during such fiscal year, and to provide in such contract that the contractors shall be paid from the proceeds of the December tax collection.

Respectfully,
EDWARD C. TURNER,
Attorney General.