

Note from the Attorney General's Office:

1956 Op. Att'y Gen. No. 56-6196 was overruled in part
by 2013 Op. Att'y Gen. No. 2013-016.

6196

1. ENGINEER, SANITARY — COUNTY COMMISSIONERS — POPULATION IN COUNTY IN EXCESS OF 100,000—A. AUTHORITY TO EMPLOY COMPETENT SANITARY ENGINEER BY CONTRACT—B. TO CREATE COUNTY SANITARY ENGINEERING DEPARTMENT—SUPERVISED BY SANITARY ENGINEER — APPOINTED BY BOARD — STAFFED WITH ASSISTANTS APPOINTED BY ENGINEER WITH APPROVAL OF BOARD—C. TO EMPLOY BOTH SUCH PROCEDURES SIMULTANEOUSLY.
2. REQUIREMENTS FOR PRACTICE OF ENGINEERING — DUTIES OF COUNTY SANITARY ENGINEERING DEPARTMENT.
3. SANITARY ENGINEER — EMPLOYED BY BOARD OF COUNTY COMMISSIONERS BY CONTRACT — FIRST METHOD ABOVE DESCRIBED—A. MAY BE EMPLOYED FOR ONE OR MORE SPECIFIED PROJECTS—B. BE COMPENSATED ON PERCENTAGE BASIS OR IN SUCH OTHER OR SUPPLEMENTARY MANNER AS BOARD DEEMS PROPER C. MAY PROVIDE AT HIS OWN EXPENSE PERSONNEL NECESSARY TO ACCOMPLISH WORK AGREED UPON—D. CARRY ON THE WORK UNDER SUPERVISION BY BOARD OR APPOINTED COUNTY SANITARY ENGINEER—BOARD MAY AUTHORIZE ENGINEER TO HIRE SUCH PERSONNEL AS HIS OWN EMPLOYEES OR PROCURE THEIR SERVICES THROUGH A PARTNERSHIP ARRANGEMENT.

SYLLABUS:

1. A board of county commissioners, in a county having a population in excess of 100,000, is authorized, under the provisions of Section 6117.01, Revised Code, (1) to "employ" a competent sanitary engineer by contract, (2) to create a county sanitary engineering department to be under the supervision of a competent sanitary engineer "appointed" by the board and staffed with assistants "appointed" by such engineer with the approval of the board, or (3) to employ both such procedures simultaneously.

2. The practice of engineering includes consultation on engineering matters, and any engineer employed by contract under the first method described above, or the assistants hired and paid by such engineer, may be required by such contract to render consultation service either to a board of county commissioners or to the county sanitary engineer who has supervision of the county sanitary engineering department. (Paragraph one of the syllabus in Opinion No. 3209, Opinions of the Attorney General for 1922, p. 475, overruled.)

3. A sanitary engineer employed by a board of county commissioners by contract under the first method described above, may, by the terms of such contract, (1) be employed for one or more specified sanitary projects, (2) be compensated on the basis of a percentage of the estimated or actual cost of such project or projects, or in such other or supplementary manner as the board deems proper, (3) be required to provide, at his own expense, such personnel as are necessary to accomplish the work agreed upon; (4) carry on his work under such supervision by the board or by the "appointed" county sanitary engineer as the board may require. The board may authorize such engineer to hire such personnel as his own employee or to procure their services through a partnership arrangement with them. (Paragraph two of the syllabus in Opinion No. 3209, Opinions of the Attorney General for 1922, p. 475, modified.)

Columbus, Ohio, January 31, 1956

Hon. Mathias H. Heck, Prosecuting Attorney
Montgomery County, Dayton, Ohio

Dear Sir:

Your request for my opinion raises the following questions:

- "1. Do the Board of County Commissioners have authority to enter into an agreement with a private firm or partnership of consulting engineers for engineering work in reference to the extension of sewer and water lines and all matters germane to the functions of the County Commissioners in reference to sewer and water?
- "2. If the answer to the first question is in the negative, is there any other method by which consultant engineers may be employed to supplement the facilities of the Sanitary Department, whether said engineers be individuals or partners or firms?"

The statute here involved appears to be Section 6117.01, Revised Code, rather than Section 305.15, Revised Code, the former being a special provision and so prevailing over the inconsistent general provisions of the latter. See *Allen v. Sheipline*, 49 Ohio Appellate, 249, (255, 256.) In pertinent part the former section provides:

“* * * Any such board may *employ* a competent sanitary engineer for such time and *on such terms as it deems best*, and may authorize such sanitary engineer to employ necessary assistants upon such terms as are fixed by said board. In any county having a population exceeding one hundred thousand, the board may create and maintain a sanitary engineering department, to be under its supervision and in charge of a competent sanitary engineer, to be *appointed* by such board, for the purpose of aiding it in the performance of its duties under sections 6117.01 to 6117.45, inclusive, of the Revised Code, or its other duties regarding sanitation provided by law. Said board shall provide suitable rooms for the use of such department and shall provide for and pay the compensation of such sanitary engineer and all necessary expenses of such sanitary engineer and department which are authorized by such board. Any such sanitary engineer in charge of such department, with the approval of the board, may *appoint* necessary assistants and clerks and the compensation of any such assistants and clerks shall be fixed and paid by such board. * * *”
(Emphasis added.)

As originally enacted in 1917, Amended House Bill No. 230; 82nd General Assembly, 107 Ohio Laws, 440, these provisions, in pertinent part, read as follows:

“* * * Any such board of county commissioners may employ a competent sanitary engineer for such time or times and on such terms as they deem best; *and*, 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. * * *”
(Emphasis added.)

In 1923, House Bill No. 405, 85th General Assembly, 110 Ohio Laws, 392, this language (then found in former section 6602-1, General Code) was amended to read:

“* * * 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.* * * *”
(Emphasis added.)

The emphasized language in this quotation was added in the 1923 amendment, and the provisions which had previously been set out in a single sentence were there rearranged into two sentences. The significance of this circumstance is that as originally enacted, with the use of the conjunctive "and," these provisions as to *employment* of a sanitary engineer, and the *appointment* of a sanitary engineer, in counties having a population exceeding 100,000, were clearly complementary rather than alternative; and I fail to perceive anything in the subsequent amendment of this section which would indicate that they are not still so. This being so, it may be concluded that the use of the varying terms "employ," and "appointed" (or "appoint" in the case of the assistants to the sanitary engineer appointed to head a sanitary engineering department) indicate the intent to authorize varying legal relationships between the parties. This view is further supported by the provision, in connection with the authorization to "employ" a sanitary engineer, that this may be done "for such time and on such terms as it deems best." This language suggests, therefore, that where an engineer or his assistants are *appointed* there is created the usual employer-employee relationship similar to that of master and servant, and that where a sanitary engineer is *employed* "on such terms" as the board "deems best," the terms of employment *may* be such as to create the relationship of independent contractors between the parties. Further support for this view is found in the authorization for the engineer so employed in turn to "employ necessary assistants upon such terms as are fixed by said board," the "employer" of such assistants being the engineer rather than the board.

In connection with this point it is necessary, however, to consider the decision in *Allen v. Shepline*, 49 Ohio Appellate, 249. In that case, involving a county with a population in excess of 100,000, the court indicated, page 254, that Allen's services had been obtained by *appointment* as an assistant to the county sanitary engineer under authority of the complementary provision in section 6602-1, General Code, above pointed out. Whether this conclusion was reached because of the peculiar wording of Allen's contract with the board does not appear from the report of the case, nor does the court appear to have considered the possibility of construing the language of this section as authorizing more than one method of retaining his services. The court did definitely hold, however, page 260, that Allen's services being limited to a specific project, his "was not a general employment and consequently * * * (he) was not a

public officer." If an "appointee" under the so-called "second provision" in this section is not a public officer but an independent contractor, *a fortiori* one "employed" under "such terms" as the board "deems best," as provided in the so-called "first provision" in this section, is not a public officer or employee, but is an independent contractor. Such "first provision" is, as I have already indicated, believed applicable in the instant case.

With these preliminary observations we may proceed to the first specific question you have presented relative to entering an agreement with a "private firm or partnership of consulting engineers for engineering works in reference to the extension of sewer and water lines."

In Opinion No. 3209, Opinions of the Attorney General for 1922, page 475, the syllabus is as follows:

"1. County Commissioners in counties having a population of less than 100,000 are unauthorized under the provisions of section 6602-1, G. C. to employ a consulting engineer to assist the sanitary engineer specified by a section in the discharge of his duties.

"2. Section 6602-1, G. C. authorizes the employment by the county commissioners in counties having a population of less than 100,000 of 'competent sanitary engineer,' and such employee under the terms of the statute may only be an individual. A partnership or corporation may not act in such capacity."

On the matter of employment of a "consulting engineer" the writer said, page 476:

"* * * Under the provisions of section 6602-1, G. C., the authority of the county commissioners, in counties having a population of less than 100,000, to employ a sanitary engineer for purposes relevant to this act, is thought to be indicated in the following portion of the section which reads as follows:

'Any such board of county commissioners may employ a competent sanitary engineer for such time or times and on such terms as they deem best.'

"It would seem clear that the portion of the section quoted specifically authorizes the county commissioners in counties having a population of less than 100,000, to employ a competent sanitary engineer, to fix the time of such official's employment and evidently to determine the compensation to be paid in such event. It would seem obvious also, that the language used makes no provision for the employment of a 'consulting engineer,' such

as your inquiry indicates, in addition to the sanitary engineer, stipulated by the provisions of the section, and it would seem to be only reasonably concluded from the import of the language used, that the authority of the county commissioners in respect to the employment of sanitary engineers is limited to the employment of 'a competent sanitary engineer' in such cases. * * *

First, it may be noted that since that ruling was made, Section 6602-1, General Code, was amended in 1923, as hereinbefore noted, to add to the language quoted above in the 1922 opinion, the following:

"* * * and may authorize such engineer to employ necessary assistants upon such terms as may be fixed by the board."

This amendment would appear to dispose of the objection, upon which the writer of the 1922 opinion seemingly based his conclusion, that the use of the singular expression, "a competent sanitary engineer," contemplated only the employment of one individual.

Moreover, the term "consulting engineer" appears to have no legal significance, and it seems plain that a "competent sanitary engineer" might also be a "consulting engineer" and may properly be called upon to do engineering work which includes "consultation" as well as the drafting of plans, the making of surveys, and the field supervision of actual construction. Pertinent to this point is the definition in Section 4733.01, Revised Code, of the term "practice of engineering" as follows:

"* * * (B) 'The practice of engineering' includes any professional service, such as consultation, investigation, evaluation, planning, design, or responsible supervision of construction or operation, in connection with any public or privately owned public utilities, structures, buildings, machines, equipment, processes, works, or projects in the proper rendering of which the qualifications of section 4733.11 of the Revised Code are required to protect public health, safety, and property. * * *"

Moreover, it is to be remembered that the writer of the 1922 opinion was concerned with a county having a population of 100,000 or less, and that he had no occasion, therefore, to consider whether the use of the conjunctive "and" in this section was indicative of two complementary provisions or of two alternatives. For this reason and because of the 1923 amendment noted above, I am unable to regard the first paragraph of the syllabus in the 1922 opinion, supra, as being presently a proper statement of the law.

On the question of employment of a firm or partnership, the writer of the 1922 opinion said, page 477 :

“* * * Relative to your second question, as to whether or not a corporation or partnership may act in the capacity of the ‘competent sanitary engineer’ indicated by section 6602-1, General Code, attention is chiefly directed to the limited authority expressed by the words used in the phrase ‘a competent sanitary engineer’ and it is to be concluded that the language employed does not authorize the employment of a number of sanitary engineers, but contemplates merely one ‘competent sanitary engineer,’ hence it would follow that a partnership or corporation of engineers would not meet the requirements of this section and it would seem apparent that only an individual under the circumstances may act in such capacity.”

Here again the conclusion appears to be based on the use of the singular expression “a competent sanitary engineer,” a term which has been modified by the 1923 amendment in the matter of authorizing such engineer himself to employ necessary assistants. Nor was any consideration given by the writer to the possible effect of the broad language authorizing such employment being made “on such terms as they deem best,” as Section 6602-1, General Code, then provided. It is entirely possible to suppose that “such terms” could have embraced the authority for the engineer thus retained to employ his own assistants, or even to utilize the services of associates in a partnership, for the purpose of accomplishing the work agreed upon. In the agreement submitted with your inquiry, for example, I note that the firm in question has undertaken to (a) prepare preliminary estimates and reports, (b) prepare complete detailed plans and specifications, (c) make detailed estimates of costs, and (d) maintain general supervision of construction, all as to numerous sanitary engineering projects. Certainly, in view of the usual magnitude of any single project of this sort, it cannot be supposed probable, or perhaps not even possible, that a single individual would accomplish all such work unaided.

For these reasons, and especially in view of the 1923 amendment above noted, and in view of the evident provision, in varying language, of complementary procedures in the case of counties having a population in excess of 100,000, I am impelled to the conclusion that the ruling in the 1922 opinion that boards of county commissioners may not avail themselves of the services of firms of professional engineers in connection with the planning and construction of sanitary projects is no longer tenable.

Whether the provisions of existing Section 6117.01, Revised Code, are sufficiently broad to authorize the board to contract with an engineering partnership, *as such*, for sanitary engineering services, in addition to the services of the county sanitary engineer and the county employees in the department which he heads, it appears to be unnecessary presently to decide. This is true for the reason that you have subsequently informed me that the parties concerned in your inquiry propose to terminate the existing contract by mutual consent, and to enter into a new agreement between the board and the principal partner in such firm. I am informed also that such new contract will provide (1) that such individual's employment will be limited in each succeeding instance to a particular project, (2) that his compensation will be fixed in part at a percentage of the estimated cost of the project, and in part on the basis of stated fees for particular items of service, and (3) that he will be free to obtain the services of assistants or associates, at his own expense, by whatever means of compensating them he chooses to utilize.

Such an arrangement I deem to be clearly authorized by the provisions of the statute hereinbefore discussed, and if the individual in question should, in the execution of such agreement, choose to avail himself of the assistance of his partnership associates by a division of his fee with them, I cannot see that the board could in any way object, nor that the statute would in any way be infringed.

Accordingly, in specific answer to your inquiry, it is my opinion that:

1. A board of county commissioners, in a county having a population in excess of 100,000, is authorized, under the provisions of Section 6117.01, Revised Code, (1) to "employ" a competent sanitary engineer by contract, (2) to create a county sanitary engineering department to be under the supervision of a competent sanitary engineer "appointed" by the board and staffed with assistants "appointed" by such engineer with the approval of the board, or (3) to employ both such procedures simultaneously.

2. The practice of engineering includes consultation on engineering matters, and any engineer employed by contract under the first method described above, or the assistants hired and paid by such engineer, may be required by such contract to render consultation service either to a board of county commissioners or to the county sanitary engineer who has supervision of the county sanitary engineering department. (Paragraph

one of the syllabus in Opinion No. 3209, Opinions of the Attorney General for 1922, p. 475, overruled.)

3. A sanitary engineer employed by a board of county commissioners by contract under the first method described above, may, by the terms of such contract, (1) be employed for one or more specified sanitary projects, (2) be compensated on the basis of a percentage of the estimated or actual cost of such project or projects, or in such other or supplementary manner as the board deems proper, (3) be required to provide, at his own expense, such personnel as are necessary to accomplish the work agreed upon; (4) Carry on his work under such supervision by the board or by the "appointed" county sanitary engineer as the board may require. The board may authorize such engineer to hire such personnel as his own employees or to procure their services through a partnership arrangement with them. (Paragraph two of the syllabus in Opinion No. 3209, Opinions of the Attorney General for 1922, p. 475, modified.)

Respectfully,

C. WILLIAM O'NEILL
Attorney General