

charge for supplying water for the use of the public school buildings or other public buildings in such city or village, is a violation of the rights conferred upon municipalities by Section 4 of Article XVIII of the Ohio Constitution, and is unconstitutional and void. (*East Cleveland vs. Board of Education*, 112 Ohio St., 607, 148 N. E., 350, overruled.)

3. Municipalities derive the right to acquire, construct, own, lease and operate utilities the product of which is to be supplied to the municipality or its inhabitants, from Section 4 of Article XVIII of the Constitution and the legislature is without power to impose restrictions or limitations upon that right. (*Euclid vs. Camp Wise Assn.*, 102 Ohio St., 207, 131 N. E., 349, approved and followed.)”

If the General Assembly is without power to require of municipalities the furnishing of water for the public schools within their boundaries, it is likewise without power, in my opinion, to require of municipalities the furnishing of legal services to boards of education where the municipality has adopted a charter and thereby so organized its local government as to not provide for that service. It is significant that in some city charters express provision is made for its solicitor or law director to act as attorney for the board of education of the school district in which the city is located. For instance, in Section 77 of the charter of the City of Columbus it is provided that the city solicitor shall perform the duties which are imposed upon city solicitors by the general law of the state. This provision has always been regarded as requiring the solicitor to act as attorney for the Columbus City Board of Education in accordance with the provisions of Section 4761 of the General Code.

I am therefore of the opinion in specific answer to your question that the law director of the City of Maple Heights is not required to act as adviser to and attorney for the board of education of the city school district of Maple Heights, and that the said board of education may legally employ him as its attorney and may lawfully pay him reasonable compensation for his services as such attorney.

Respectfully,

JOHN W. BRICKER,
Attorney General.

2479.

FEES—UNDER SECTION 4556 FEES ALLOWED MAYOR AND MARSHAL DO NOT EXTEND TO ALLOWANCE MADE TO JUSTICE OF PEACE AND CONSTABLE UNDER SECTION 3019, GENERAL CODE.

SYLLABUS:

The provisions of section 4556, General Code, as to fees of a mayor, being the same as those allowed a justice of the peace, and as to fees of a marshal, chief of police and other police officers being the same as those allowed a constable for service of writs or process of a court, do not extend to and include an allowance which may be made in certain cases by the county commissioners to a justice of the peace or constable as provided by section 3019 of the General Code.

COLUMBUS, OHIO, April 9, 1934.

HON. FRANK A. ROBERTS, *Prosecuting Attorney, Batavia, Ohio.*

DEAR SIR:—YOUR office recently requested an opinion of this office in regard to certain questions contained in your letter which reads:

“I have had several inquiries concerning the recovery of costs by mayors and marshals of villages from the County Commissioners in:

1. Felony cases where the State fails to indict or convict or where sentence is deferred after conviction on such cases.
2. Misdemeanors where the defendant is convicted and the State fails to collect its costs.

This matter is a very important one to the law enforcement officials of this county inasmuch as mayors and marshals are displaying an unwillingness to take these cases unless they know that they are to be protected as to their costs.”

The fees of the mayor, marshal, chief of police, and other police officers of villages shall be the same as those allowed for justices of the peace and constables as provided by section 4556 of the General Code. Section 4556 of the General Code, reads:

“The fees of the mayor, in all cases, shall be the same as those allowed justices of the peace, and the fees of the marshal, chief of police, and other police officer serving writs of process of the court, in all cases, shall be the same as those allowed constables.”

In view of the foregoing section of the law, the provisions of the statutes in regard to payment of fees, or allowances to be made in lieu thereof, to justices of the peace and constables must be examined.

Section 3019 of the General Code reads:

“In felonies wherein the state fails, and in misdemeanors wherein the defendant proves insolvent, the county commissioners, at the first meeting in January, shall make an allowance to justices of the peace and constables, in the place of fees, but in no year shall the aggregate allowance to such officer exceed the fees legally taxed to him in such causes, nor in any calendar year shall the aggregate amount allowed such officer and his successor, if any, exceed one hundred dollars. If there be a successor, said amount shall be prorated on the basis of lost fees.”

The “fees” of the mayor, marshal, chief of police and other police officers are limited to the amount of those provided for justices of the peace and constables.

The language of section 4556 does not embrace the provision of section 3019 as to an allowance “in the place of fees”, but only says that the “fees” shall be the same.

By way of observation it is noted that section 3019 as it now stands was

enacted on February 19, 1920, 108 Ohio Laws, Pt. 2, 1207, and that the previous section, R. S. 1309 read as follows:

"The county commissioners may, at any regular session, make an allowance to any of said officers in lieu of fees, in causes of felonies wherein the state fails, and in misdemeanors, wherein the defendant proves insolvent, but the aggregate amount of such allowances to an officer in any year shall not exceed the fees legally taxed to him in such causes, nor shall the aggregate amount allowed to an officer in any year exceed one hundred dollars."

The language "any of said officers" being entitled to an allowance in lieu of fees was broad enough to include mayors, marshals, chiefs of police and other police officers, as well as justices of the peace, but when reenacted in 108 Ohio Laws, Pt. 2, 1207, the application was limited to justices of the peace and constables.

Mayors, marshals, chiefs of police and other police officers are not entitled to an allowance "in place of fees."

By virtue of Sections 13455-7 and 13455-8, of the General Code, the state is authorized to pay the costs of prosecution when a person convicted of a felony fails to pay the costs, after the clerk of the court of common pleas has issued a writ of execution against the property and it is returned showing no property upon which to levy.

It may be noted that in certain misdemeanor cases the magistrate or court may demand security for costs before issuing the warrant. Section 13432-20 of the General Code.

The same rules would apply when and if, as you state, the sentence is "deferred" or suspended or prisoner placed on probation, if the terms and conditions on which same was done are so ordered by the judge or magistrate making such an order.

Your attention is invited to an opinion of my immediate predecessor in office, Opinion No. 4861 of the Opinions of the Attorney General for 1932, Vol. III, page 1460, the syllabus of which reads:

"1. There is no way by which a justice of the peace may be paid for his services as an examining magistrate, either in misdemeanor or felony cases, where the grand jury fails to indict a person who has been charged with a crime before such magistrate, except in misdemeanor cases wherein the complainant, as provided by Section 13432-20, General Code, has been required by the justice of the peace to be liable for the costs in the event that the complaint is dismissed.

2. A justice of the peace who hears and determines a misdemeanor case for a violation of the prohibition laws of the state commenced by a law-enforcing officer and for which the magistrate fails to receive his fees because the prosecution fails, cannot collect them from the state."

I see no reason for departing from the conclusion reached in that opinion and believe the same would apply to part of your inquiry.

It follows then that the provisions of Section 4556, General Code, as to fees of a mayor, being the same as those allowed a justice of the peace, and as to fees of a marshal, chief of police and other police officers being the same as those

allowed a constable for service of writs or process of a court, do not extend to and include an allowance which may be made in certain cases by the county commissioners to a justice of the peace or constable as provided by Section 3019 of the General Code.

Respectfully,
 JOHN W. BRICKER,
Attorney General.

2480.

APPROVAL—NOTES OF EDENTON RURAL SCHOOL DISTRICT, CLERMONT COUNTY, OHIO—\$1,143.00.

COLUMBUS, OHIO, April 10, 1934.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

2481.

APPROVAL, NOTES OF HIGHLAND VILLAGE SCHOOL DISTRICT, HIGHLAND COUNTY, OHIO—\$1,200.00.

COLUMBUS, OHIO, April 10, 1934.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

2482.

APPROVAL, BONDS OF BERLIN RURAL SCHOOL DISTRICT, ERIE COUNTY, OHIO—\$2,000.00.

COLUMBUS, OHIO, April 10, 1934.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

2483.

APPROVAL, NOTES OF NILES CITY SCHOOL DISTRICT, TRUMBULL COUNTY, OHIO—\$33,000.00.

COLUMBUS, OHIO, April 10, 1934.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.