Accompanying this lease is contract encumbrance record No. 82, which covers a monthly rental under this lease for the month of July and August, 1937. As pointed out to you in former opinions approving leases of this kind, this contract encumbrance record is sufficient compliance with the provisions of Section 2288-2, General Code.

I am accordingly approving this lease and the same is herewith returned.

Respectfully,
HERBERT S. DUFFY,
Attorney General.

1052.

WATERWORKS FUNDS MAY NOT BE DIVERTED TO CITY'S GENERAL FUND.

SYLLABUS:

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 employes of the city who are compensated from the general fund.

COLUMBUS, OHIO, August 23, 1937.

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

Your letter of recent date is as follows:

> "We are inclosing herewith letter from our Springfield Examiner, in which it is shown that the officials of that city pay from the waterworks funds certain fixed amounts to the general fund annually, to cover the 'valuable service' rendered by the general executive and administrative departments, as per Section 1 of Ordinance No. 3322, as adopted by the Commission of that city April 18, 1932, and quoted as follows:
>
> 'The City of Springfield, Ohio, shall make a charge for the valuable services rendered by the City Commission, City Manager, City Treasurer, City Auditor, City Solicitor, Health, Engineering, Municipal Garage and Safety Departments, against the Waterworks of said City in the sum of $833.33 monthly, and said Waterworks Department shall pay said sum in quar-

terly installments of Twenty-five Hundred Dollars ($2500) each, on the first days of January, April, July and October annually, as compensation for the valuable services rendered to said department aforesaid, and as a part of the costs of conducting and managing the said Waterworks Department.'

In this connection we ask the following question:

Question, 'Can a city, with or without charter, adopt and enforce an ordinance of this kind, which in effect transfers waterworks funds to the general fund to cover a predetermined general managerial and overhead cost of the City?"

The authority to assess water rentals in the case of a municipally owned waterworks is contained in Section 3958, General Code, which provides in part as follows:

"For the purpose of paying the expenses of conducting and managing the water works, such director may assess and collect from time to time a water rent of sufficient amount in such manner as he deems most equitable upon all tenements and premises supplied with water. * * *."

Section 3959, General Code, provides as follows:

"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."

The Supreme Court considered Section 3959, supra, somewhat at length in the case of *Cincinnati* vs. *Roettinger,* 105 O.S. 145. The first two branches of the syllabus read:

"1. Section 3959, General Code, is constitutional and operates as a valid limitation upon the uses and purposes for which revenues derived from municipally owned waterworks may be applied. By virtue of the provisions of that section, surplus revenues derived from water rents may be applied only to

repairs, enlargement or extension of the works, or of the reservoirs, and to 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.

2. Section 3799, General Code, is in the nature of a limitation upon taxation, and as applied to cities and villages under charter governments does not violate any of the sections of Article XVIII of the Ohio Constitution and operates to prevent the transfer of revenues from the waterworks fund to the general fund."

Under authority of the foregoing cases, it is clear that charter cities are in the same category as non-charter cities in the administration of municipally owned waterworks revenues.

In the Roettinger case, supra, it appears that the city council had passed an ordinance authorizing certain so-called surplus revenues of the waterworks to be used for general municipal purposes, including current expenses of the municipality. This case establishes the principle that waterworks revenues may not be used for current expenses of a municipality. It is also authority for the position that water rentals are not taxes. The language of the court at page 153, after referring to the provisions of Section 3959 as exclusive with respect to the purposes for which such excess revenues may be used, is as follows:

"It is important at this point to inquire into the nature of rates and charges which are in excess of an amount sufficient to pay the cost of the operation of the waterworks and to make provision for repairs, renewals, extensions, new construction, and interest and principal of debt arising out of construction. While it is universally conceded that rates and charges not in excess of the amount necessary to meet such purposes are not classed as taxes, it does not follow that such excessive amount would not be classed as taxes. While it is quite well settled that charges for service and conveniences rendered and furnished by a municipality to its inhabitants are not taxes, yet where the charge is in excess of the entire cost of the service and convenience, the reason for the rule no longer prevails. A water rate exacted for actual consumption is merely the price of the commodity, and when in an amount which fairly compensates the cost can have no proper relation to those revenues which are expended for the equal benefit of the public at large, and it should not be placed in the same classification with burdens and charges imposed by the legislative power upon

persons or property for the purpose of raising money for general governmental purposes."

Further illustrative of the rigidity with which the Supreme Court has precluded any diversion of waterworks revenues to general municipal purposes is the recent case of *Realty Co.* vs. *Cleveland,* 128 O.S. 583. The syllabus is as follows:

"1. The provisions of Section 3959, General Code, prescribing and limiting the use of funds created by water rentals, prevent the diversion thereof to a use for any purpose other than therein enumerated. *(City of Cincinnati* vs. *Roettinger, a Taxpayer,* 105 Ohio St., 145, approved and followed.)

2. The appropriation of such waterworks funds to the construction or maintenance of a sewage disposal plant may not be validated by the enactment of a city ordinance providing that 'the operation of sewage disposal plants shall be treated and construed as being part of the operation of water purification.'"

At page 585, the court said:

"The mere *ipse dixit* of the city council that the disposal of sewage and the purification and distribution of water to users are parts of a single process cannot be conclusive upon the question and thus effect a release from the clear inhibition of the statute.

If this evasion be permitted, there is no length to which council may not go to compel water users to pay the expense of carrying on other city functions which may be remotely connected with sewage disposal; council might even extend it to maintenance of other departments of government—all upon the theory that such departments are in some respect connected with the function of supplying pure water to the inhabitants of the city."

Having in mind the principle that water users shall not be compelled to pay the expenses of carrying on other city functions, I address myself to the question of whether or not the ordinance here under consideration providing for payment, presumably to the general fund of the municipality of $10,000 per year, from the waterworks fund, may be properly construed as part of "the expenses of conducting and managing the waterworks" as the phrase is used in Section 3958, supra. I assume that the chief basis for this charge rests upon the contention that the members

of the city commission, the city manager, the city treasurer, the city auditor, the city solicitor, and other municipal officers and employes are required to expend part of their time in rendering services to the waterworks and hence the municipality which in paying their salaries or compensation is entitled to be reimbursed for such services.

There is no question but that any officer or employe who devotes full time to rendering services for the waterworks may be compensated from the proceeds of water rentals nor is there any doubt but what anyone specially employed on a per diem basis or otherwise may be so compensated. There is, however, in my judgment a decided distinction to be drawn between the power to so expend waterworks revenues and the power to reimburse a municipality on account of part time service being rendered to the waterworks by employes or officers of the municipality who are compensated out of the general fund.

This distinction has been clearly made by the Supreme Court and by this office. The situation is not unlike that arising where part time services of a municipal officer or employe are rendered for a given municipal project the cost of which is paid not from the proceeds of general taxation but from special assessments. It has been hereinabove shown that water rentals are not taxes. In so far as a determination of the question here under consideration is concerned, they are in the same category as special assessments. The second branch of the syllabus in the case of *Longworth* vs. *Cincinnati,* 34 O.S. 101, reads as follows:

> "Where the surveying and engineering of such improvement were performed by the chief engineer of the city and his assistants, who were officers appointed for a definite period, at a fixed salary, which the law required to be paid out of the general fund of the city, the reasonable cost to the city, of such surveying and engineering, can not be ascertained and assessed upon the abutting property, as a necessary expenditure for the improvement."

This case was cited and followed in an opinion of this office appearing in Opinions of the Attorney General for 1930, Vol. II, page 1030, the syllabus of which is as follows:

> "1. When a municipality employs engineers on a per diem basis for the purpose of performing engineering services in connection with any improvements which have been undertaken, and such engineers' employment is dependent upon the existence of improvement projects, their daily wage may be designated as payable out of any such specific improvement fund or funds,

and it constitutes a proper item of cost of such improvement or improvements, and as such is assessable.

2. If such engineers are paid salaries out of the general fund, there is no authority for reimbursing the general fund to the extent that a portion of such salaries may be allocated to a particular improvement, and therefore such engineering cost may not be assessed."

Specifically answering your question, it is my opinion that 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 employes of the city who are compensated from the general fund.

Respectfully,
HERBERT S. DUFFY,
Attorney General.

1053.

APPROVAL — BONDS OF THE CITY OF AKRON, SUMMIT COUNTY, OHIO, $10,000.00.

COLUMBUS, OHIO, August 23, 1937.

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

IN RE: Bonds of the City of Akron, Summit County, Ohio, $10,000.

The above purchase of bonds appears to be a part of an issue of bonds of the City of Akron, Summit County, Ohio, dated June 1, 1937. The transcript relative to this issue was approved by this office in an opinion rendered to your Board under date of July 30, 1937, being Opinion No. 947.

It is accordingly my opinion that these bonds constitute a valid and legal obligation of said city.

Respectfully,
HERBERT S. DUFFY,
Attorney General.