

2161.

## APPROVAL, BONDS FOR THE FAITHFUL PERFORMANCE OF THEIR DUTIES—11 RESIDENT DISTRICT DEPUTY HIGHWAY DIRECTORS.

COLUMBUS, OHIO, May 25, 1928.

HON. GEORGE F. SCHLESINGER, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—You have submitted to this department certain bonds given by various Resident District Deputy Highway Directors, for the faithful performance of their duties, as follows:

<i>Name</i>	<i>County</i>
Ross E. Hamilton.....	Coshocton.
Frank R. Lander.....	Cuyahoga.
Boyd V. Wright.....	Hocking.
Clifford T. Williams.....	Huron.
Geo. M. Montgomery.....	Mahoning.
Wright McCroba.....	Meigs.
R. S. Fisher.....	Preble.
H. E. Calvin.....	Vinton.
C. M. Weeks.....	Washington.
John W. Dowler.....	Athens.
D. M. Cooper.....	Harrison.

I find all of the foregoing official bonds in proper legal form, and I have noted my approval thereon as to form, and am returning the same herewith to you.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

2162.

## NEWSPAPER—CLEVELAND NEWS—PUBLICATION OF ANNUAL FINANCIAL REPORT OF CITY OF CLEVELAND FOR AN AGREED SUM LESS THAN THAT AUTHORIZED UNDER SECTION 6251, GENERAL CODE—NO RECOVERY OF DIFFERENCE.

## SYLLABUS:

*The rates prescribed by Section 6251, General Code, that may be charged and received by publishers of newspapers for the publication of advertisements, notices and proclamations required to be published by a public officer of a city or other political subdivision are maximum rates only, and a city through its public officers may enter into a contract with the publisher of a newspaper therein for the publication of the financial report of the chief fiscal officer of such city, provided for by Section 291, General Code (112 v. 355), at rates less than those provided for by Section 6251, General Code, and in such case the publisher of the newspaper publishing such report is entitled to recover only the amount provided for in said contract.*

COLUMBUS, OHIO, May 28, 1928.

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

GENTLEMEN:—This is to acknowledge the receipt of your recent communication, which is as follows:

“Complying with the provisions of Section 291, G. C., as amended, 112 O. L. 355, informal lump sum bids were invited and received by the Commissioner of Purchase and Supplies of the City of Cleveland for publishing the chief fiscal officer's financial (annual) report. The bid of the Cleveland News, to-wit: \$910.00 was accepted without any formality or recorded action on the part of such officers. The Cleveland News published the report and the question arises as to the amount to be paid in view of the mandatory provision of Section 6251, General Code, that newspapers having a circulation of over 25,000 *shall* charge and receive for legal advertising rates charged on annual contracts for like amount of space to other advertisers. The Cleveland News has a circulation in excess of 25,000 and its rates to other advertisers for space equal to that given the city's report would make the charge approximately \$1800.00.

Question: May the Cleveland News at this time legally claim and receive an amount determined by its rates to other advertisers?”

From correspondence accompanying your communication it appears that the publication here in question was made by the Cleveland News pursuant to a contract between said newspaper and the City of Cleveland, through its proper officers, which contract was created by the acceptance of a proposal made by said newspaper pursuant to a notice asking for the same, sent to said newspaper by the Commissioner of Purchase and Supplies of said city. By this proposal the Cleveland News agreed to publish the annual reports of the Commissioner of Accounts for the sum of \$910.00.

Section 291, General Code, as amended in 112 O. L. 355, provides in part as follows:

“On or before the thirty-first day of March annually, the chief fiscal officer of each political subdivision or taxing district of each county shall prepare a financial report for the preceding fiscal year, in such form as will comply with the requirements of the bureau of inspection and supervision of public offices, and shall cause same to be published in a newspaper published in the political subdivision or taxing district and if there is no such newspaper, then in a newspaper of general circulation in the district or political subdivision.

\* \* \*

This enactment is in keeping with Section 13 of Article XVIII of the State Constitution which provides that laws may be passed to require reports from municipalities as to their financial condition and transactions, in such form as may be provided by law. There is nothing in the provisions of this section which requires the contract for the publication of the annual report of the chief fiscal officer of a city or other political subdivision to be let pursuant to competitive bids therefor; and the fact that in this instance the officials of the city of Cleveland solicited proposals or bids from the newspapers of the city for publishing this report is not a matter of any significance other than showing the steps taken which resulted in the contract, in the execution of which said publication was made.

The question presented in your communication is whether the Cleveland News, under the provisions of Section 6251, General Code, may now legally claim and receive

for its services in making this publication, an amount to be determined by its rates to other advertisers, notwithstanding its contract to make this publication for the sum of \$910.00.

Said Section 6251, General Code, provides as follows:

"Publishers of newspapers may charge and receive for the publication of advertisements, notices and proclamations required to be published by a public officer of the state, county, city, village, township, school, benevolent or other public institution, or by a trustee, assignee, executor or administrator, the following sums, except where the rate is otherwise fixed by law, to-wit: For the first insertion, one dollar for each square, and for each additional insertion authorized by law or the person ordering the insertion, fifty cents for each square. Fractional squares shall be estimated at a like rate for space occupied. In advertisements containing tabular or rule work fifty per cent may be charged in addition to the foregoing rates. Providing, however, newspapers having a circulation of over twenty-five thousand shall charge and receive for such advertisements, notices and proclamations, rates charged on annual contracts by them for like amount of space to other advertisers who advertise in its general display advertising columns; and the publisher shall make and file with his bill before its payment, an affidavit, that the newspaper had a bona fide circulation of more than twenty-five thousand at the time the advertisement, notice or proclamation was published, and that the price charged in the bill for same did not exceed the rates herein provided for such advertisement, notice or proclamation."

Touching the question here presented, it is to be recognized that with respect to certain kinds of public service it has been uniformly held that contracts to perform such services for a compensation less than that fixed by law are void, and on the performance of such services recovery may be had for the full amount of the compensation provided by law for such services.

Thus it has been held that a contract between an appointive officer of the city, whose salary is fixed by a statute or ordinance, and the city council, by which such appointive city officer agrees to perform the duties of his office for a sum less than that prescribed by law, is against public policy and void, and that such officer is entitled to have and recover on the performance of the services of the office, the full amount of the compensation provided by law for said office. *Gallaher vs. City of Lincoln*, 63 Nebr., 339; *Abbott vs. Hayes County*, 78 Nebr., 729; *The People ex rel. Satterlee vs. The Board of Police*, 75 N. Y., 38; *Rhodes vs. Tacoma*, 87 Wash., 341. See *Prentiss vs. Dittmar*, 93 O. S., 314.

However, the Supreme Court of this state, in the case of *McCormick vs. The City of Niles*, 81 O. S. 246, quite clearly indicated its view that the rates prescribed by Section 6251, General Code, regulating the amount that newspapers may charge and receive for publications of the matters referred to in said section are maximum rates only and that they do not have the effect of preventing contracts for publications of this kind at rates less than those provided for by said section.

In said case of *McCormick vs. The City of Niles*, supra, the action was one by the publisher of a newspaper in said city to recover for the publication therein of certain ordinances, resolutions and legal notices for and on behalf of said city. In this case it did not appear that the publication of said matters was pursuant to any express contract therefor between the publisher of the newspaper and the city, but the publisher of the newspaper, as the plaintiff in said action, contended that inasmuch as by statute all ordinances and resolutions requiring publication were required to be published in two newspapers of opposite politics, published and of general circulation

in the municipality, of which plaintiff's newspaper was one, and inasmuch as under the provisions of Section 4366, Revised Statutes, now Section 6251, General Code, the rates which the plaintiff in said action was entitled to charge and receive for making said publications were fixed by law, no contract for the publication of said ordinances and resolutions was necessary in order to entitle plaintiff to recover in said action. With respect to this claim made by the plaintiff in said case, the Supreme Court in its opinion said:

"In order to relieve the amended petition from objection on account of its lack of averments of contract, we are pressed with the statement that the city or village council is required to publish ordinances, etc., in two newspapers of opposite politics published and of general circulation in the city. The following is part of Section 1536-619, which prescribes the duty: 'All ordinances and resolutions requiring publication shall be published in two newspapers of opposite politics, published and of general circulation in such municipality, if such there be \* \* \*.' It is claimed, therefore, that publication in that manner is mandatory, and for that reason no express contract is necessary. To this claim is added another, that Section 4366, Revised Statutes, fixes the rates per square for each publication which left mere clerical duty for the clerk to perform in calculating the cost of publication. But it must be observed that this statute fixes maximum rate, and no minimum rate. Hence it is practicable to contract for a much lower rate than the maximum and thereby make large savings for the city or village. The printing bills in the larger municipal corporations loom up to large proportions at times, and the Legislature has not undertaken to prevent the obtaining the publication or advertising at as low rate as may be agreed upon."

In the case of *The City of Cleveland vs. The Legal News Publishing Co.*, 110 O. S., 360, it was held that the provisions of Section 6251, General Code, did not permit the authorities of a city and the publisher of a newspaper to enter into an agreement for the payment of a greater rate for the publication of advertisements than that therein fixed. The court further held in this case that the payment by the city of sums of money greater than that fixed by said Section of the General Code in pursuance of such contract, did not preclude a recovery against the publisher of said newspaper for the amount illegally paid, even though said contract and payment was made without fraud or collusion and in good faith. It is quite clear, however, that there is nothing in the decision of the Supreme Court in the case last above noted which is at all inconsistent with the views expressed by said court in deciding the case of *McCormick vs. The City of Niles*, supra.

Following the views expressed by the Supreme Court in said case of *McCormick vs. The City of Niles*, supra, I am of the opinion that it was legally competent for the publisher of the Cleveland News to enter into a contract with the City of Cleveland to publish said report for a sum of money less than it would have received had it charged the rates which it was authorized to charge under the provisions of Section 6251, General Code.

By way of specific answer to the question submitted in your communication, I am of the opinion that the same should be answered in the negative.

Respectfully,

EDWARD C. TURNER,  
*Attorney General.*