

2989.

APPROVAL, BONDS OF MORROW COUNTY, OHIO—\$30,023.59.

COLUMBUS, OHIO, February 25, 1931.

Industrial Commission of Ohio, Columbus, Ohio.

2990.

MUNICIPALITY—ASSISTANT TO SOLICITOR—EMPLOYED FOR SOLE PURPOSE OF APPEARING IN PROCEEDINGS CONCERNING MUNICIPAL LIGHT AND POWER PLANTS—COMPENSATION PAYABLE FROM LIGHT AND POWER FUND.

SYLLABUS:

The compensation of an assistant to the solicitor employed by a city under authority of council for the sole purpose of appearing in proceedings concerning the municipal light and power plant may be paid from the light and power fund of a municipality.

COLUMBUS, OHIO, February 25, 1931.

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

GENTLEMEN:—Acknowledgment is hereby made of your recent communication, which reads:

“Section 4306, G. C., authorizes the employment of assistants to the city solicitor. In Opinion No. 1278, page 295, year 1916, the Bureau was advised that a city council may not employ special counsel or attorneys, but could authorize such employment as assistant to the solicitor. The Bureau was further advised that the council should fix the compensation.

“The city of.....owns and operates a municipal electric light and power plant, and in 1926 instituted ouster proceedings against an electric power company which was operating in the city ofin competition with the light plant and without a franchise. This case was litigated through the Supreme Court of Ohio and terminated favorably to the city and an order of ouster was issued. Trustees for the bond holder of the electric power company instituted injunction proceedings in the United States District Court, and it has become necessary for the city to employ assistants to the solicitor. The general fund is depleted and the question of using the balance in the light fund for the purpose of paying the assistants appointed for the specific purpose of prosecuting the case in the United States Courts, has been presented to the Bureau.

Question: In view of these conditions, may compensation of assistants to the city solicitor be paid from the city light fund?”

For the purpose of this opinion, I assume that the municipal electric light and power plant in question is owned and operated by a non-charter city or one whose charter does not contain provisions relating to the subject in question conflicting with those found in the General Code.

It is to be noted that Article XVIII, Section 4, of the Constitution of Ohio, and Section 3816, General Code, grant to municipalities the power to establish light, power and heating plants. Sections 4324 et seq. place the management of municipal public utilities under the control of the Director of Public Service. Section 4305, General Code, requires, among other things, that the city solicitor

shall serve the several directors and officers as legal counsel and attorney. This constitutes him the legal officer and attorney of the director of public service. *Smith, Solicitor, vs. Lotschultz, Auditor*, 10 O. N. P. (n. s.) 257,260.

Section 4308, General Code, provides that the city solicitor shall prosecute or defend, on behalf of the corporation, when required to do so by resolution of council, all complaints, suits and controversies in which the corporation is a party.

As stated in your communication, an opinion of the Attorney General for 1916, page 295, holds that a city council may not employ assistants to aid the city solicitor in litigation in the absence of his request for such assistance. The opinion also held that the city council has authority to fix the compensation for assistants, when requested by the solicitor, and prescribe the amount and manner of the payments thereof.

It is to be noted that under the provisions of Section 5625-9, General Code, which states that "each subdivision shall establish the following funds," paragraph (g) provides for a special fund for each public utility operated by a subdivision. In accordance with this provision, it is necessary that a special fund be set aside for a municipal light and power plant.

The question presented is whether or not the compensation of an assistant selected by the city solicitor and authorized by city council may be paid from such special fund.

Section 5625-13, General Code, reads in part as follows:

"No transfers shall be made from one fund of a subdivision to any other fund, by order of the court or otherwise, except as hereinafter provided."

This section does not contain any authority for the transfer of the moneys in the special fund to the general fund. It may therefore be seen that no money can be transferred from the special light and power fund to the general fund for the salary of assistants to the city solicitor. The revenue arising from the operation of a public utility should be paid into the special fund authorized by Section 5625-9, paragraph (g), where it would be subject to appropriation by the city council, in accordance with Section 4212, General Code, which reads as follows:

"Except as otherwise provided in this title, council, by ordinance or resolution, shall determine the number of officers, clerks and employes in each department of the city government, and shall fix by ordinance or resolution their respective salaries or compensation, and the amount of bond to be given for each officer, clerk or employe in each department of the government, if any be required. Such bond shall be made by such officer, clerk or employe, with surety subject to the approval of the mayor."

An examination discloses that there are no provisions in the statute above quoted concerning the fund from which assistants to the solicitor may be compensated. It is clear that the above section grants to the municipal council authority to provide for the payment of salaries from appropriate funds.

In an opinion to your Bureau, found in Opinions of the Attorney General for 1916, Vol. II, p. 1910, it was held that a municipal council could designate the payment of a portion of the salary of the director of public service from the water works fund. It is to be noted that the water works fund is one arising from the operation of a public utility.

In opinion No. 1441, found in Opinions of the Attorney General for 1930, the syllabus of which reads:

"The salary and expenses of a group of engineers employed by a city for the sole purpose of preparing plans, specifications and supervising the construction of streets and paving generally, may properly be paid from the proceeds of the motor vehicle and gasoline taxes."

I cited several authorities holding that the employment of engineers other than that of the city may be paid out of the specific fund authorized for the employment. In the instant case, the assistant to the solicitor is to be employed for one specific purpose, which concerns solely the municipal light and power plant, viz.: the injunction proceedings in the United States District Court. It is extremely important to a municipality that its light and power plant operate without unlawful competition and it would seem to be good business policy that such illegal competition be eliminated by court proceedings. I believe that the employment of a legal assistant in such a situation would be imperative in connection with the operation of such plant, and since the only services to be rendered by the assistant are in litigation pertaining to the light and power plant, it is equitable that such fund bear the burden of the payment for the legal services rendered.

In view of the fact that a municipal council has the authority to fix the compensation and provide for the payment of officers, clerks and employes in each department of the city government, and that in the instant case the assistant is to be appointed for the sole purpose of carrying on legal proceedings in connection with the municipal light and power plant, and that such employment does not appear to be an abuse of discretion on the part of the city solicitor and the municipal council, I am of the opinion that the compensation of an assistant to the solicitor employed by a city under authority of council for the sole purpose of appearing in proceedings concerning the municipal light and power plant may be paid from the light and power fund of a municipality.

Respectfully,
GILBERT BETTMAN,
Attorney General.

2991.

APPROVAL, LEASE TO STATE RESERVOIR LAND AT GRAND LAKE OR LAKE ST. MARYS, FOR COTTAGE SITE AND LANDING PURPOSES—JOHN F. AND WILLIAM J. GIBSON.

COLUMBUS, OHIO, February 25, 1931.

HON. I. S. GUTHERY, *Director of Agriculture, Columbus, Ohio.*

DEAR SIR:—You have submitted to me, through the Division of Conservation, a certain reservoir land lease, executed on behalf of the State, by J. W. Thompson, Conservation Commissioner, acting for and on behalf of the Conservation Council, by which there is leased and demised to John F. and William J. Gibson of St. Marys, Ohio, a certain parcel of state reservoir land at Grand Lake or Lake St. Marys.

This lease, which is one for a term of fifteen years, permits the use of said parcel of land for cottage site and landing purposes, and the annual rental provided for therein in six per cent upon the appraised value of such property, which appraised value is the sum of three hundred dollars.

Upon examination of the provisions of said lease, I find that same was executed by the Conservation Council pursuant to the authority of section 472-1,