

"The statutes limiting the powers of public boards to contract or purchase supplies and materials without public and competitive bidding are enacted for the benefit of the public, to protect the funds derived from public taxation from the possible extravagance and carelessness of those entrusted with supervision of such funds. This court will not relax the protection which such statutes throw around the public treasury. It is true that a modification in the strictness of this doctrine was made in *State, ex rel. Hunt, Pros. Atty., v. Fronizer*, 77 Ohio St., 7, 82 N. E., 518. In that case, it was held that there could be no recovery back of money paid upon a county commissioners' bridge contract, fully executed, but rendered void because of the lack of the necessary statutory certificate by the county auditor, where there was no claim of unfairness, fraud or extortion, and no claim of effort to put the contractor in status quo by return of the bridge, or otherwise. The court said that this rule rested upon the principle of common honesty, and that the county should not be permitted to retain both the consideration and the bridge. However, the *Fronizer* case, which is still the law in this state cannot be extended beyond the specific doctrine which it announces. It is not authority for the theory that there can be a money judgment or recovery for articles delivered to a municipality under a void contract."

And since no legal claim exists, the county commissioners have no authority to pay out county funds in the instant case because no appropriation may be drawn from the county treasury except by authority of law. *Article X, Section 5, Ohio Constitution.*

In view of this conclusion, a consideration of the authority of an auditor of a county to issue his certificate as to the availability of funds for contracts consummated during the prior fiscal year need not here be made.

In view of the foregoing, I am of the opinion that where through non-compliance with the statutory provisions concerning the making of contracts with a county, no valid contract exists between the county and a company for furnishing materials to the county, the county commissioners may not at a later date authorize the payment of the bills for materials furnished under such invalid contract.

Respectfully,

GILBERT BETTMAN,

*Attorney General.*

---

3409.

MUNICIPALITY—POWER TO USE MONEYS FROM MOTOR VEHICLE LICENSE AND GASOLINE TAX FUNDS FOR PENSIONS FOR EMPLOYEES WHOSE COMPENSATION BEFORE RETIREMENT WAS LEGALLY PAYABLE FROM SUCH FUNDS.

**SYLLABUS:**

*A municipality which inaugurates a pension system for the purpose of providing pensions for its officers and employes, may lawfully make provision therein for the payment from the automobile license and gasoline tax funds, of the pensions*

*for such of those employes whose regular compensation was legally payable from those funds before they were placed on the pension list.*

COLUMBUS, OHIO, July 7, 1931.

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

GENTLEMEN:—This will acknowledge receipt of your request for my opinion, which reads as follows:

“The City of Cincinnati has inaugurated a pension system for all employes except members of the police and fire department, under which each will receive a pension on retirement. Each employe contributes a part of his compensation semi-monthly or monthly, and the city pays a similar amount from its own funds appropriated for the purpose, in order that a fund may be accumulated on the amortization plan. The legislation provides that the city’s portion on employes whose salary is legally payable from the automobile license and gasoline tax funds, may be paid from such funds.

Question: May funds received by a municipality from auto license and gasoline taxes be appropriated and expended for the payment of pensions to employes whose compensation before retirement was legally paid from such funds?”

The doctrine upon which rests the justification for the payment of a pension to a public employe is stated by Judge Allen, in the case of *State ex rel. v. Kurtz*, 110 O. S. 332 at page 343, as follows:

“Contributing to a state teachers’ retirement fund is a proper expenditure of money for a school purpose. Such a retirement system increases the morale and tends to raise the standard of the teaching force.”

This doctrine is equally applicable where contributions of public money are made to a pension fund for the purpose of paying pensions to municipal employes.

Pensions of this kind are distinguishable from military pensions or pensions springing from the appreciation and graciousness of the sovereign government and given in consideration or recognition of meritorious past services or of loss or damage sustained in the public service. Such a pension is not a matter of contract and is not founded on a legal liability. It is a mere bounty or gratuity and is distinguished from compensation and salary. See *Corpus Juris*, Volume 48, pages 785 and 786.

On the other hand, pension systems for municipal employes, while possessing some of the characteristics of pensions granted in consideration of past services or for loss or injury suffered in the public service, are based more especially on the theory that the pensions for which they provide are a part of the compensation of the employe for services rendered.

As applying to pension systems of this kind, it is said in *Ruling Case Law*, Volume 19, page 726:

“The establishment of a pension system for municipal officers and employes, whereby, after serving a certain number of years or upon disablement for injuries received in the course of their duties, they are relieved from active service and paid a certain proportion of their salaries for the remainder of their lives, is not an unconstitutional disposition of

public moneys for private use when applied to officers and employes who have entered or continued in the service after the system went into effect.

"A pension in such a case is not a gratuity but a part of the stipulated compensation. A judiciously administered pension fund is doubtless a potent agency in securing and retaining the service of the most faithful and efficient class of men connected with those arms of the municipal service in which every property owner and resident of the city is most vitally interested. Reasons in support of this proposition need not be stated in detail. They are such as readily suggest themselves to every reflecting mind."

With reference to the same subject it is stated in *Corpus Juris*, Volume 43, page 813, as follows:

"A provision for a pension to police officers and their beneficiaries, at least under a statute applicable to members of the police force when it becomes effective, is not invalid, and when services are rendered under such a pension statute, the pension becomes a part of the contemplated compensation for those services, and in a sense becomes part of the contract of employment itself."

On the theory that pensions paid to municipal employes in pursuance of a pension system inaugurated for the purpose of providing pensions for such employes is a part of their compensation for services rendered it seems beyond question that the pensions may lawfully be paid from the same fund that the employe's regular compensation is paid.

I am therefore of the opinion in specific answer to your question, that funds received by a municipality from automobile license and gasoline taxes may lawfully be appropriated and expended for the payment of pensions to those municipal employes whose regular compensation, before being placed on the pension list, was legally paid from those funds.

Respectfully,

GILBERT BETTMAN,

*Attorney General.*

---

3410.

COUNTY COMMISSIONERS—POWER TO LEASE REALTY TURNED OVER BY DISBANDED COUNTY AGRICULTURAL SOCIETY, DISCUSSED.

SYLLABUS:

1. *Where county commissioners have the title to lands acquired under the provisions of section 9898, of the General Code, they may legally lease the same from year to year, for a period of years, with the right of the lessee to sublet the premises subject, however, to the reservation that upon reasonable notice the county may terminate the lease if and when the public interests require it.*