

Note from the Attorney General's Office:

1920 Op. Att'y Gen. No. 20-1579 was overruled
by 1990 Op. Att'y Gen. No. 90-097.

The section to which you refer appears in 108 O. L. (Pt. II, p. 1083), and is part of the Act authorizing a tax on the operation of motor vehicles. The section reads in part:

“Sec. 6309-2. The revenue collected under the provisions of this chapter shall be distributed as follows:

* * * * *

(2) Fifty per centum of all taxes collected under the provisions of this chapter shall be for the use of the municipal corporation or county which constitutes the district of registration as provided in this chapter. Such moneys shall be paid into the treasury of the proper county as provided herein and distributed as are other taxes. In the treasuries of such municipal corporations and counties, such moneys shall continue a fund which shall be used for the maintenance and repair of public roads and highways and streets and for no other purpose, and shall not be subject to transfer to any other fund. ‘Maintenance and repair’ as used in this section, includes all work done upon any public road or highway, or upon any street, in which the existing foundation thereof is used as the sub-surface of the improvement thereof, in whole or in substantial part.

* * * * *

Strictly speaking, the term “street” embraces the area between property line and property line. However, as commonly understood, the term denotes particularly the portion of the traveled way that is used principally for vehicles; and as a matter of general practice, the improvement of such latter portion is denoted “street improvement” and is conducted separately from sidewalk improvement. The improvement of curb and gutter is as a rule included in street improvement rather than in sidewalk improvement.

In the light of these practical considerations, you are advised that curbs and gutters are to be treated as part of the street for the purposes mentioned in section 6309-2, and that the funds mentioned in said section may be used for the improvement of curbs and gutters, provided that their existing foundation is used in whole or in substantial part as the sub-surface of the improvement.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1579.

ROADS AND HIGHWAYS—AUTOMOBILE LICENSE LAW—MONEY ACCRUING TO COUNTY TREASURY UNDER SECTION 6309-2 (108 O. L. 1083) MAY NOT BE TURNED OVER TO TOWNSHIP TRUSTEES FOR USE BY LATTER IN ROAD MAINTENANCE AND REPAIR.

Moneys accruing to the county treasury under section 6309-2 G. C. (108 O. L. Part II, 1083) may not be turned over in whole or in part to township trustees for use by the latter in road maintenance and repair.

COLUMBUS, OHIO, September 20, 1920.

HON. C. A. WELDON, *Prosecuting Attorney, Circleville, Ohio.*

DEAR SIR:—You have recently written to this department as follows:

“Will you please advise me whether the money paid into the county

treasury under section 6309-2 (108 Laws of Ohio, Part II, page 1083) may be disbursed in part by the county commissioners paying a part thereof to the townships, to be used for road maintenance and repair?"

You have supplemented your inquiry by the statement that the commissioners believe the township authorities to be in a better position to procure labor than are the county authorities; and you suggest in your supplementary statement that section 7467 might furnish authority for turning over to the trustees part of the funds in question.

Said section 6309-2 reads:

"The revenue collected under the provisions of this chapter shall be distributed as follows:

(1) All fees collected under this chapter shall be paid into the state treasury to the credit of a fund to be designated as the 'State maintenance and repair fund.'

(2) Fifty per centum of all taxes collected under the provisions of this chapter shall be for the use of the municipal corporation or county which constitutes the district of registration as provided in this chapter. Such moneys shall be paid into the treasury of the proper county as provided herein and distributed as are other taxes. In the treasuries of such municipal corporations and counties, such moneys shall continue a fund which shall be used for the maintenance and repair of public roads and highways and streets and for no other purpose, and shall not be subject to transfer to any other fund. 'Maintenance and repair' as used in this section, includes all work done upon any public road or highway, or upon any street, in which the existing foundation thereof is used as the sub-surface of the improvement thereof, in whole or in substantial part.

(3) Fifty per centum of all taxes collected under the provisions of this chapter, shall be paid by the secretary of state into the state treasury to the credit of the 'State maintenance and repair fund.'

The 'State maintenance and repair fund' provided for herein shall be available for the use of the secretary of state in defraying the expenses incident to carrying out and enforcing the provisions of this chapter and for the use of the state highway commissioner in the manner provided by law. The general assembly shall make appropriations therefrom for such purpose."

This section is clearly intended to provide fully and specifically for the uses which may be made of the funds to which it refers. There is no mention of townships; on the other hand, there is a prohibition in connection with the shares of county and municipality against "transfer to any other fund."

Section 7467 G. C. provides in part that

"The state, county and township shall each maintain their respective roads as designated in the classification hereinabove set forth; provided, however, that either the county or township may, by agreement between the county commissioners and township trustees, contribute to the repair and maintenance of the roads under the control of the other."

The provision just quoted, it will be observed, does not designate the funds which may be used by the commissioners or trustees for the purpose indicated; hence, resort must be had to other statutes relating specifically to funds to ascertain whether such funds may be used for that purpose.

The plain import of section 6309-2 is that the subdivision,—county or municipality,—which receives the funds, must itself expend them rather than turn them over in whole or in part to another subdivision for expenditure. This being the case it follows that while under section 7467 G. C. the township might contribute funds to the county to be used *by the county* in conjunction with funds accruing to the latter under section 6309-2, yet the converse does not follow that the county may turn over such 6309-2 funds to the township. The real effect of such last mentioned action by the county would be to bring townships within the terms of section 6309-2 as fully as if they were designated in said statute as recipients of the funds in question.

For the reasons indicated, your inquiry is answered in the negative.

Respectfully,
 JOHN G. PRICE,
Attorney-General.

1580.

MEMBER OF CITY BOARD OF EDUCATION—DEPUTY HEALTH COMMISSIONER—COMPATIBLE.

The positions of member of the city board of education and deputy health commissioner are not incompatible.

COLUMBUS, OHIO, September 20, 1920.

HON. CHARLES R. SARGENT, *Prosecuting Attorney, Jefferson, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your recent request for the opinion of this department as follows:

“I have a request for opinion from your office as to whether a member of the city board of education could properly be appointed a deputy health commissioner. A Conneaut physician has been appointed health commissioner for the city of Conneaut. A claim is made that the offices are inconsistent. Will you please advise me as to your opinion in regard to the question?”

Sections 1261-16 et seq. known as the Hughes-Griswold health act, found in 108 O. L., Part I, page 236, and Part II, page 1085, and section 7692 and 7602-1 (103 O. L., 897), are pertinent to your inquiry.

As held in *State ex rel. vs. Gebert*, 12 C. C. (n. s.) 274, offices are considered incompatible when one is subordinate to, or in any way a check upon, the other, or when it is physically impossible for one person to discharge the duties of both.

In *State ex rel. vs. Newark*, 6 N. P., 523, it was held that a member of the board of health could not be appointed sanitary policeman, one being subordinate to the other.

In section 1261-26 it is provided in part that:

“The district board of health may also provide for the medical and dental supervision of school children, * * * for the inspection of the schools.”

Sections 7692 and 7692-1 provide for medical inspection of school children and teachers on the part of school physicians at the instance of the board of education.

In Opinion 596, Opinions of the Attorney General for 1919, Vol. II, page 1061,