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1. "CITIES"—WORD USED IN SECTION 743.05 RC—DOES NOT INCLUDE VILLAGES—VILLAGES DO NOT HAVE POWER SPECIFICALLY CONFERRED UPON CITIES AS TO USE OF PORTION OF REVENUE FROM WATER WORKS FOR BENEFIT OF SEWERAGE PLANTS.

2. WATER WORKS AND SEWERAGE SYSTEMS—OPERATED AS SINGLE UNIT—CITY HAS AUTHORITY TO APPLY NOT TO EXCEED TEN PER CENT OF GROSS REVENUES FROM WATER WORKS—BENEFIT OF SEWERAGE SYSTEM AND DISPOSAL WORKS—MUST FIRST PROVIDE FOR PRIOR CHARGES AFTER SETTING ASIDE FIVE PER CENT OF GROSS REVENUES AS RESERVE FOR WATER WORKS—SECTION 743.05 RC.

SYLLABUS:

1. The word "cities" as used in Section 743.05, Revised Code, does not include villages, and villages do not have the power specifically conferred upon cities as to the use of a portion of the revenue from their water works for the benefit of their sewerage plants.

2. A city whose water works and sewerage systems are operated as a single unit, has authority under the provisions of Section 743.05, Revised Code, to apply not to exceed ten percent of the gross revenues from its water works, for the benefit of its sewerage system and disposal works, after first providing for the prior charges of its water works as specified in said Section 743.05, and after setting aside five percent of such gross revenues as a reserve for water works purposes.

Columbus, Ohio, April 29, 1955

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen:

I have before me your letter in which you request my opinion, your communication reading as follows:

"Section 3959 General Code (743.05 R. C.) was amended by House Bill No. 86, passed on April 27, 1943, which was approved by the Governor on May 14, 1943 and filed with the Secretary of State on May 15, 1943, to read, in part, as follows:

> 'Provided, however, that in those *cities* where water works and sewerage systems are conducted *as a single unit under one operating management* a sum not to exceed ten per centum of the gross revenue of the water works for the preceding year may be taken from any surplus remaining after all of the preceding purposes have been cared for and may be used for the payment of the cost of maintenance, operation and repair of the sewerage system and sewage pumping, treatment and disposal works and for the enlargement or replacement of the same, provided, however, that each year a sum equal to five per centum of the gross revenue of the preceding year be first retained from said surplus as a reserve for water works purposes.'

"This section further provides as follows:

> 'The amount authorized to be levied and assessed for water works purposes shall be applied by the legislative authority to the creation of the sinking fund for payment of any indebtedness incurred for the construction and extension of water works *and for no other purpose.*'

"In Opinion No. 1040, rendered on June 25, 1946, the then Attorney General ruled as follows:

> 'Syllabus: 1. Under the provisions of Section 3959 General Code, any surplus arising from the operation of the water works of a municipality after paying the expenses of conducting and managing same may be applied only to the repairs and enlargement or extension of such works or the reservoirs connected therewith, 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.'

"I note that the Attorney General, in his opinion, did not consider that portion of the statute which has provided, since 1943, for the usage of a part of the surplus from the preceding year for sewerage and sewage disposal purposes, if the water works and sewerage departments were operated as a single unit and under one operating management.

"In this opinion, the Attorney General refers to the cases of Cincinnati v. Roethinger, 105 O. S. 145, Hartwig Realty Company v. Cleveland, 128 O. S. 583, and City of Lakewood v. Reese, 132 O. S. 399.

"All of the cases cited in the 1946 Opinion of the Attorney General were decided before the date of the amendment to Section 3959, by the ninety-fifth General Assembly.

"In the various municipalities in the State of Ohio, there seems to be some doubt as to the powers of the municipalities to proceed under the provisions of Section 743.05 of the Revised

Code (3959 G. C., as amended in 1943) and we have recently had inquiries from at least three villages in the state as to the power of the village council to appropriate from their water works surplus for the maintenance, operation and repair of their sewerage system and sewage pumping, treatment and disposal works, as provided in the present law.

"As you well remember, in villages, the sewage treatment plants and water works plants are both operated under the management and control of the Board of Public Affairs and we generally find that the sewer rental charge is based on water consumption and that the collections from water and sewer rental charges are deposited in the village treasury to the credit of separate and distinct funds known as the Water Works Fund and the Sewer Fund.

'In this connection, the following questions have arisen:

"(1) Is the word *cities*, as used in the amended portion of Section 3959 G.C. (743.05 R.C.) broad enough to cover all municipalities, both cities and villages?

"(2) If so, has the council of any municipality, (which operates both a water works and a sewerage and sewage disposal system, and which collects both a water rent and a sewer rent, which rents are deposited in distinct and separate funds, and which plants are under the management of either a service director or a board of trustees of public affairs), the power to appropriate not to exceed ten percentum of the prior years water works gross revenues for the payment of the cost of maintenance, operation and repair of the sewerage system and sewage pumping and treatment works, and for the enlargement and replacement of the same, provided that each year a sum equal to five per centum of the gross revenues of the preceding year has first been set aside from the water works surplus as a reserve for water works purposes?

"Your consideration of these questions will be greatly appreciated. This matter appears to be of state wide concern, as many municipalities are now being pressured to establish new sewage treatment and disposal plants, most of which are under the management and control of either the service director in the cities, or of the board of trustees of public affairs in villages."

Section 3959 of the General Code, now Section 743.05 R. C. was a part of the chapter of the General Code relating to municipal waterworks. Prior to the amendment in 1943, to which you call attention, every word of that chapter applied equally to all municipal corporations, both city and village. With the possible exception of the new matter which you

quote, the same may be said of Chapter 743 of the Revised Code, relating to all municipal utilities, in which former Section 3959 appears as Section 743.05. This entire section now reads as follows:

> "After payment of the expenses of conducting and managing the water works, any surplus of a municipal corporation 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. *In those cities in which water works and sewage systems are conducted as a single unit, under one operating management, a sum not to exceed ten per cent of the gross revenue of the water works for the preceding year may be taken from any surplus remaining after all of the preceding purposes have been cared for and may be used for the payment of the cost of maintenance, operation, and repair of the sewerage system and sewage pumping, treatment and disposal works and for the enlargement or replacement thereof. Each year a sum equal to five per cent of the gross revenue of the preceding year shall be first retained from said surplus as a reserve for waterworks purposes.*
>
> "The amount authorized to be levied and assessed for waterworks purposes shall be applied by the legislative authority to the creation of the sinking fund for payment of any indebtedness incurred for the construction and extension of water works and for no other purpose."

The italicised portion is the matter that was introduced into the section by the amendment passed April 27, 1943. Here, it will be noticed that in the new language the word "cities" makes its appearance. As was the case in the General Code, this is the only word in Chapter 743, that suggests any departure from the general application of all its provisions to villages and cities alike. It might be noted in this connection that the act by which this amendment was made as found in 120 Ohio Laws, page 189, did not by its title suggest any desire to confer any special authority on cities. The title of the act was:

> "To amend Section 3959 of the General Code, relative to the disposition of waterworks funds."

We have, therefore, before us the single question whether in construing Section 743.05 supra, we are compelled to consider the use of the word "cities" as limiting that particular provision of the statute to cities and giving them the authority to use a part of their water works revenue for the maintenance, operation and repair of the sewerage system and

disposal works, while denying to villages the right to do the same, or whether we can find in that statute and related statutes authority to construe the word "cities" as equivalent to "municipalities."

It may be observed that villages as well as cities have authority not only to maintain water works but also to maintain sewerage systems and sewage disposal plants. This power is given generally by Section 715.40, Revised Code, which provides:

> "Any municipal corporation may open, construct, and keep in repair, sewage disposal works, treatment plants, and sewage pumping stations, together with facilities and appurtenances necessary and proper therefor, sewers, drains, and ditches, and establish, repair, and regulate water closets and privies."

Section 729.49, Revised Code, gives legislative authority to *"a municipal corporation* which has installed or is installing sewerage, a system of sewerage, sewage pumping works, or sewage treatment or disposal works for public use," to establish by ordinance, rates or charges of rents to be paid for the use of said services.

Section 735.28, Revised Code, authorizes the creation of a village board of trustees of public affairs when sewage disposal works have been established in a village; and Section 735.29, Revised Code, gives such board of trustees substantially the same powers as are conferred on the director of public service of a city.

There seems to be no possible reason why the special power as to the disposition of surplus water rents embodied in the amendment of 1943 should be given to cities and denied to villages. Both have obtained their funds for the construction of water works and sewage disposal plants by the same process; both have the same obligation to maintain the same and to provide for the payment of the bonds; both are within the limitations of the statute as to the disposition of surplus, except that cities appear to be authorized by this provision to use 10% of the gross revenue of the water works, after maintenance and extension, and sinking fund requirements have been taken care of, for the cost of maintenance, operation and repair of the sewerage system and disposal works, and for the enlargement thereof.

In the light of all of the statutes above referred to, it is hard to resist the conclusion that the legislature must have intended to confer this new power on all municipalities alike, though using the word "cities," possibly inadvertently.

However, we cannot, in construing a statute, be influenced by our conception of what would be desirable nor by a conviction that the consequences of a literal interpretation would be more or less unfair or even disastrous. The outstanding case with which we are confronted is that of Slingluff v. Weaver, 66 Ohio St., 621. There the Supreme Court had presented to it a statute which plainly by inadvertent action on the part of the legislature had been so worded as to deprive the Supreme Court of practically all of its long established appellate jurisdiction. Section 6710 of the General Code, was amended so as to read in part as follows:

> "Section 6710. A judgment rendered, or a final order made, by any circuit court, or a judge thereof, court of common pleas, or a judge thereof, probate court, insolvency court, or the superior court, or a judge thereof, may be reversed or modified by the supreme court, on petition in error, for errors appearing on the record, in any case in *quo warranto, mandamus, habeas corpus, procedendo,* * * *"

The court, finding that the amendment did have the effect above indicated, held as shown by its syllabus:

> "1. The object of judicial investigation in the construction of a statute is to ascertain and give effect to the intent of the law-making body which enacted it. And where its provisions are ambiguous, and its meaning doubtful, the history of legislation on the subject, and the consequences of a literal interpretation of the language may be considered; punctuation may be changed or disregarded; words transposed, or those necessary to a clear understanding and, as shown by the context manifestly intended, inserted.
>
> "2. But the intent of the law-makers is to be sought first of all in the language employed, and if the words be free from ambiguity and doubt, and express plainly, clearly and distinctly, the sense of the law-making body, there is no occasion to resort to other means of interpretation. The question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact. That body should be held to mean what it has plainly expressed, and hence no room is left for construction."

In the course of the opinion, it was said by Spear, J.:

> "It is further urged that a slight change of punctuation will relieve the difficulty. By changing the comma after the word 'record' where it first appears to a semi-colon, and by inserting a comma before the word 'but' in the place of the semi-colon, it will

> then be plain that the intent was to enlarge and not circumscribe the jurisdiction. A like result would follow, it is suggested, if a comma were inserted after the word 'case' and before the words 'in quo warranto," and then the enumeration of classes thereafter following treated as surplusage.
>
> "Finally it is contended that, upon general principles, the court may well take notice of the information communicated by counsel that neither the author of the bill nor the judiciary committee under whose inspection it presumably passed, nor the members of either house, had any purpose of curtailing the jurisdiction of this court, or indeed any suspicion until after their adjournment that that result had been brought about."

The word "cities" as used in the statute under consideration, cannot possibly result in any ambiguity. Its definition and distinction from villages is set forth in the Constitution. Section 1 of Article XVIII reads:

> "Municipal corporations are hereby classified into cities and villages. All such corporations having a population of five thousand or over shall be cities; all others shall be villages. * * *"

The statute, now Section 703.01, Revised Code, has for upwards of forty years contained precisely the same definition. It must be recognized further that while cities and villages have for a long period of time been recognized as having an equal claim to the name "municipalities" yet the municipal law has in very many respects contained different provisions for cities from those provided for villages. Their powers are sometimes differently defined and their methods of procedure are frequently varied.

Accordingly, I feel compelled to come to the conclusion that the legislature either intended to endow a city with certain powers which it did not see fit to give to a village, or else that it did so without intention. In either case, we must take the statute as we find it, without being swayed by what we might believe as to the wisdom of the legislation.

The answer which I have indicated to your first question appears to make it unnecessary to discuss at length your second question. The provisions of the statute are quite clear that a city has the authority, *after first applying its income from water rents to the repair, enlargement and extension of the waterworks, to the payment of the interest on any loan made for their construction, and the creation of a sinking fund for the liquidation of the debt,* to use not exceeding ten percent of the remainder of the gross revenue of the water works for the preceding year for the maintenance,

enlargement or replacement of its sewerage system and disposal plant; excepting, however, that each year a sum equal to five percent of the gross revenue of the preceding year shall first be retained from said surplus as a reserve for water works purposes.

I note your reference to Opinion No. 1040, Opinions of the Attorney General for 1946, page 452. I do not consider that that opinion is in any way in conflict with my conclusions above indicated. It did not have to deal with the situation set forth in the new provision of Section 3959, General Code, which presupposed the ownership of a sewage disposal plant, but was merely a general statement of the law embodied in the remaining portion of that section. Accordingly, in specific answer to the questions submitted, it is my opinion:

1. The word "cities" as used in Section 743.05, Revised Code, does not include villages, and villages do not have the power specifically conferred upon cities as to the use of a portion of the revenue from their water works for the benefit of their sewerage plants.

2. A city whose water works and sewerage systems are operated as a single unit, has authority under the provisions of Section 743.05, Revised Code, to apply not to exceed ten percent of the gross revenues from its water works, for the benefit of its sewerage system and disposal works, after first providing for the prior charges of its water works as specified in said Section 743.05, and after setting aside five percent of such gross revenues as a reserve for water works purposes.

Respectfully,
C. WILLIAM O'NEILL
Attorney General