

865.

MUNICIPALITY—SUPERINTENDENT OF STREETS—SALARY NOT PAYABLE FROM GASOLINE OR MOTOR VEHICLE LICENSE TAX RECEIPTS.

SYLLABUS:

The salary of a city superintendent of streets, who performs general duties with reference to streets and sewers, may not legally be paid from the motor vehicle license and gasoline tax receipts, in whole or in part.

COLUMBUS, OHIO, September 13, 1929.

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

GENTLEMEN:—This will acknowledge receipt of your recent communication which reads:

“The first branch of the syllabus of Opinion No. 1453, page 254, Opinions of the Attorney General for 1924, reads:

‘A part of the general expenses of the engineering department of a city, whose functions include maintenance and repair of streets, as that phrase is defined in Section 6309-2 of the General Code, may not be legally paid from the municipality’s share of the motor vehicle license tax.’

May a part of the salary of a city superintendent of streets legally be paid from a municipality’s share of the motor vehicle license and gasoline tax receipts, when such superintendent’s duties include supervision of street cleaning, sewer construction and repair, etc., in addition to his duties supervising the construction and repair of streets?”

In view of the provisions of Section 5 of Article XII of the Ohio Constitution, to the effect that no tax may be levied except in pursuance of the provisions of law and must be applied to the purposes for which the same is levied, it follows that the proceeds of the motor vehicle license tax, arising under the provisions of Section 6309-2, may not be expended for any purpose except one coming within the express provisions of the statute.

Section 6309-2, to which you refer, was amended by the 88th General Assembly in House Bill No. 104, and, in so far as municipalities are concerned, the section now provides that the moneys allotted to such municipalities “shall constitute a fund which shall be used for the maintenance, repair, construction and repaving of public streets and for no other purpose, and shall not be subject to transfer to any other fund,” etc. It will thus be seen that in so far as your question is concerned, the amendment of the section does not in any wise present a different question than that which was considered in the opinion of the former Attorney General, to which you refer.

In examining the statutes, I do not find any express provisions fixing the salary and compensation of a superintendent of streets in connection with a city. Section 4323 of the General Code provides for the appointment of a director of public service. Section 4324 provides that the service director shall manage and supervise all public works and undertakings of the city except as otherwise provided by law. Section 4325 expressly imposes upon the service director the duty of supervising the improvement and repair of streets, alleys, sewers, drains, ditches, etc. Section 4327 of the General Code provides:

"The director of public service may establish such sub-department as may be necessary and determine the number of superintendents, deputies, inspectors, engineers, harbor masters, clerks, laborers and other persons, necessary for the execution of the work and the performance of the duties of this department."

In view of the sections hereinbefore referred to, it appears that a street superintendent, such as you mention, may be appointed or employed. However, in the performance of such duties, such a street superintendent would be performing the functions of the director of public service, who, in the first instance, is charged with the responsibility of such duties. The opinion of the Attorney General in 1924, to which you refer, expressly held that the expense of providing engineering for the special purpose of such maintenance and repair may legally be paid out of the maintenance and repair fund. This, of course, was upon the theory that where services were required and performed exclusively for the purpose for which money arising under the provisions of Section 6309-2 was levied, it would be a proper expenditure. However, where an officer is appointed for the purpose of performing general duties, which include the supervision of streets, sewers and other matters, and is not employed exclusively in connection with the maintenance and repair or construction and repaving of streets, it logically follows that his compensation could not be paid from such fund. Furthermore, his salary and compensation are provided for in pursuance of other existing statutes which authorize his employment and compensation or in pursuance of ordinances of similar import and payable out of the general fund of the city. The fact that such employment is authorized and paid for out of the general fund is an argument against the right to use the motor vehicle license tax receipts for the same purpose. In other words, the salary of such a superintendent would be paid even though there were no receipts from the said license tax. As was said in *Longworth vs. Cincinnati*, 34 O. S. 101, referred to by the Attorney General in the 1924 opinion to which you refer:

"Where the surveying and engineering of such improvement were performed by the chief engineer of the city and his assistants, who were officers appointed for a definite period, at a fixed salary, which the law required to be paid out of the general fund of the city, the reasonable cost to the city, of such surveying and engineering, cannot be ascertained and assessed upon the abutting property, as a necessary expenditure for the improvement.

If a superintendent of such an improvement is necessary, and one is employed by the city for that particular improvement, the amount paid by the city, for his services may properly be included in the assessment."

Of course, as hereinbefore indicated, if a superintendent were employed for a given improvement, and the sole purpose of his employment was to carry out the functions of maintaining or constructing streets in accordance with the provisions of Section 6309-2, such compensation probably could be paid from the proceeds of the motor vehicle license tax. However, so long as such an employe or officer has general duties and is drawing money from the general revenue fund for such services, I am inclined to the view that he may not receive part of his compensation from such license tax fund.

Based upon the foregoing, and in specific answer to your inquiry, it is my opinion that the salary of a city superintendent of streets, who performs general duties with reference to streets and sewers, may not legally be paid from the motor vehicle license and gasoline tax receipts, in whole or in part.

In the foregoing discussion I have given detailed consideration only in connec-

tion with the motor vehicle license tax which is distributed to municipalities under the provisions of Section 6309-2, whereas you inquire both as to this tax and the gasoline tax. However, without further consideration it may be stated that the rule hereinbefore announced as applicable to the motor vehicle license tax would be equally applicable to the gasoline tax, for the reason that very similar uses of said funds by municipalities are authorized and any differences existing in reference thereto would not affect the question which you present.

Respectfully,
GILBERT BETTMAN,
Attorney General.

866.

DISAPPROVAL, BONDS OF FULTON COUNTY—\$50,900.00.

Re: Bonds of Fulton County, Ohio—\$50,900.00.

COLUMBUS, OHIO, September 13, 1929.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—The transcript relative to the above issue of bonds discloses that the above bonds are issued in anticipation of a county road improvement, proceedings having been started in May, 1928. These bonds, after having been offered to and rejected by the sinking fund trustees, were advertised pursuant to the provisions of Section 2293-28, General Code. This advertisement, as affixed to the affidavit in proof of publication thereof, states that the bonds bear interest at the rate of 6% per annum, but does not state that anyone desiring to do so may present a bid or bids for such bonds based upon a different rate of interest as is permitted under Section 2293-28, General Code. It appears that notwithstanding this fact a bid was received upon a different rate of interest and the bonds awarded to bear interest at the rate of 5½% per annum. This office has consistently held that unless the advertisement published pursuant to the provisions of Section 2293-28, General Code, prior to amendment by the 88th General Assembly, states that bids may be presented based upon bonds bearing a different rate of interest as therein provided, the acceptance of a bid at a different rate of interest is void. See Opinion No. 341 under date of April 23, 1929, directed to your commission and also Opinion No. 93 under date of February 14, 1929, also directed to your commission.

In view of the foregoing, I advise you not to purchase these bonds.

Respectfully,
GILBERT BETTMAN,
Attorney General.

867.

APPROVAL, CONTRACT FOR CHANNEL IN BED OF MIAMI RIVER IN CITY OF DAYTON, MONTGOMERY COUNTY, OHIO.

COLUMBUS, OHIO, September 13, 1929.

HON. RICHARD T. WISDA, Superintendent of Public Works, Columbus, Ohio.

DEAR SIR:—This is to acknowledge receipt of a recent communication from you which reads as follows: