

4400.

ATTORNEY—EMPLOYED BY VILLAGE MAY RECEIVE PREMIUMS FOR EXECUTING SURETY BONDS COVERING VILLAGE OFFICIALS.

SYLLABUS:

An attorney of a village hired by the village council pursuant to authority of section 4220, General Code, who receives premiums from said village for executing surety bonds to cover officials of the village, does not violate the provisions of section 3808, General Code.

COLUMBUS, OHIO, July 9, 1935.

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

GENTLEMEN:—This acknowledges receipt of your recent communication which reads:

“In a report on the villages of Logan County just filed in this office, payments from the Village Treasury are shown for premiums on bonds of officials of the village, to an attorney who is regularly employed at a monthly compensation, as legal counsel for said village.

Will you please advise whether this constitutes a violation of section 3808 G. C.?

We have made a search of our files, and there is nothing contained therein to indicate that this question has been previously passed upon.”

Section 3808, General Code, mentioned in your communication, reads as follows:

“No member of the council, board, *officer* or commissioner of the corporation, shall have any interest in the expenditure of money on the part of the corporation other than his fixed compensation. A violation of any provision of this or the preceding two sections shall disqualify the party violating it from holding any office of trust or profit in the corporation, and shall render him liable to the corporation for all sums of money or other thing he may receive contrary to the provisions of such sections and if in office he shall be dismissed therefrom.”

There is no doubt that the premiums paid by a village to an agent of a

surety company for bonding village officials are authorized by section 9573-1, General Code, and such premiums are "expenditures on the part of the corporation" within the meaning of section 3808, General Code. See *Opinions of the Attorney General*, 1930, Vol. III, page 1917.

While you do not so state in your communication, I presume that the village attorney involved was hired by the village council, pursuant to statutory authority contained in section 4220, General Code. Such section reads:

"When it deems it necessary, the village council may provide legal counsel for the village, or any department or official thereof, for a period not to exceed two years, and provide compensation therefor."

This office has, in several opinions of former attorneys general, held uniformly that legal counsel hired by a village pursuant to the terms of this section of the General Code, is a mere "employee" of the village and not an "officer" of the municipality.

In *Annual Report of the Attorney General for 1911-1912*, Vol. II, page 1626, it was held in the second paragraph of the syllabus of an opinion:

"As the village solicitor is not an officer of the village, he may be compensated by said board (of trustees of union cemetery) for legal services rendered for it." (Italics and words in parenthesis mine.)

After referring to section 3808, General Code, which section read the same at that time as now, the then Attorney General said at page 1627:

"The solicitor is not an officer of the village; he is a mere employe. See section 4220, General Code."

Since the rendition of that opinion, succeeding attorneys general have consistently ruled that a village attorney hired under section 4220, General Code, is an employe and not an officer of the village, within the meaning of the word "officer" as used in several statutes other than section 3808, General Code. These rulings are as follows:

1. *Annual Reports of the Attorney General for 1912*, Vol. I, pages 488, 489;
2. *Annual Report of the Attorney General for 1912*, Vol. II, page 2014;
3. *Annual Report of the Attorney General for 1913*, Vol. II, page 1635;

4. *Opinions of the Attorney General for 1915*; Vol. I, page 412;
5. *Opinions of the Attorney General for 1916*, Vol. II, page 1651;
6. *Opinions of the Attorney General for 1921*, Vol. I, page 436;
7. *Opinions of the Attorney General for 1928*, Vol. I, pages 262, 266, 267.

However, since the rendition of these opinions, the Supreme Court of Ohio has had occasion to construe section 3808, General Code, in the case of *Wright vs. Clark*, 119 O. S. 462. In the first two paragraphs of the syllabus of such case, it is stated:

"1. The engineer of a city or village is an officer within the meaning and intent of section 3808, General Code, and therefore inhibited from becoming interested in the expenditure of money of the corporation other than payment of his fixed compensation.

2. Sections 4364 and 4366, General Code, create the office of engineer of a municipality and define the powers and duties of such office."

In the opinion, at page 471, Chief Justice Marshall stated:

"Section 3808, General Code, should not be construed to apply in strictness only to persons who hold an office. The language of that section refers to boards and commissions as well as members of council and officers. It was the purpose of the Legislature in that enactment to reach all persons holding positions in a city or village government who are charged with official responsibility in conducting an economic administration of corporate affairs, and to prohibit them from having any interest in the expenditure of corporate funds. We must therefore look to the spirit as well as the letter of that statute. It is a part of such construction to determine what character of member of a board or office is included in the ban on having any interest in the expenditure of moneys of the municipality. It should be construed with reference to the occasion and necessity for its enactment, the evils existing or threatened, and the remedy which the statute is designed to provide. It should be so construed as to advance its object by suppressing the mischief and securing the benefits intended. The statute will be nullified if, by construction, it should be held not to reach an engineer, who is charged with the preparation of plans, specifications and estimates, with the supervision and letting of contracts, and with the inspection of quantities and qualities of materials used, and the approval and payment of estimates." (Italics the writers).

It might be argued that the foregoing language of the court, particularly the first sentence, is broad enough to include the employment of a village attorney within the language of section 3808, General Code, even though such attorney is not an officer of the village.

However, it seems clear that an attorney for a village cannot be said to be a person holding a position in a village government "who is charged with official responsibility in conducting an economic *administration* of corporate affairs" of the village. The court specifically stated it was the purpose of the legislature in enacting section 3808, General Code, to reach persons holding positions of such nature.

The word "administration" is defined by Webster's Twentieth Century Dictionary as:

"The executive part of government, consisting in the exercise of the constitutional and legal powers, the general superintendence of national affairs, and the enforcement of laws."

Section 4248, General Code, provides:

"The executive power and authority of villages shall be vested in mayor, clerk, treasurer, marshal, street commissioner, and such other officers and departments thereof as are created by law."

In the case of *State ex rel. vs. Viner*, 119 O. S. 303, it was held that legal counsel employed by a board of rapid transit commissioners of a city under authority of section 4000-18, General Code, was not in the *administrative* service of the city.

Moreover, in one of the opinions hereinbefore referred to, namely, Opinions, 1916, Vol. II, page 1653, it is stated as follows:

"I believe none of the essential attributes of a public officer, as above indicated, attach to one who pursuant to law stands in the relationship of a legal counsel to a village, its departments or officers. *One acting as such counsel exercises no function of government imposed upon him by law.* He is required to take no oath of office nor to give an official bond. His duties are such only as the council may choose to impose and *he stands in a contractual relationship to the village council. His functions are neither legislative, executive nor judicial.*" (Italics the writers).

It therefore appears to me that the employment of village attorney cannot be said to be such a position as is covered by the provisions of section 3808, General Code.

In view of the foregoing, and in specific answer to your question, I am of the opinion that where an attorney of a village who is hired pursuant to section 4220, General Code, receives premiums from the said village for executing surety bonds to cover officials of the village, he is not violating the provisions of section 3808, General Code.

Respectfully,

JOHN W. BRICKER,
Attorney General.

4401.

STREET—COMPUTATION OF MILEAGE OF STREETS WITH-
IN MUNICIPALITIES TAKEN OVER BY HIGHWAY DE-
PARTMENT—SECTION 1189, G. C.

SYLLABUS:

No streets within the limits of a municipality which are taken over and added to the state highway system can be considered in computing the five thousand miles of county and township roads and highways which are required to be added to the state highway system during the period from July 1, 1935 to and including June 30, 1936, by the amendment of Section 1189, General Code, which becomes effective July 16, 1935, and no such streets can be considered in computing the minimum miles of such roads and highways required to be added to the state highway system in each county during said period.

COLUMBUS, OHIO, July 9, 1935.

HON. JOHN JASTER, JR., *Director of Highways, Columbus, Ohio.*

DEAR SIR:— I acknowledge receipt of your communication which reads as follows:

“House Bill No. 216, passed by the Ninety-first General Assembly and effective on or about July 15, 1935, requires the Director of Highways to add to the state highway system during the period between July 1, 1935, to and including June 30, 1936, ‘in the manner provided by law five thousand miles of county and township roads to be selected by him, provided that such roads and highways so taken over shall at such time have a duly established right of way of a width not less than fifty feet, and provided that not less than forty miles and not more than seventy-five miles, shall be taken over from each of the eighty-eight counties.’