OPINION NO. 81-084

Syllabus:

A board of county commissioners is not exempted by law from paying penalty charges on overdue payments for utility services purchased from a municipality where the municipal ordinances establishing rates for the services provide for such penalty charges.

To: Gregory W. Happ, Medina County Pros. Atty., Medina, Ohio
By: William J. Brown, Attorney General, December 16, 1981

I have before me your request for an opinion regarding the payment by the board of county commissioners of delinquency charges on overdue utility bills. I read your question to be whether the board of county commissioners is either prohibited from paying such a charge, or enjoys immunity from these penalties.

The City of Medina owns and operates various public utilities under authority granted it by the Revised Code and the Ohio Constitution. Ohio Const. art. XVIII, §4 states:

> Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility.

Thus, the constitution authorizes a municipal corporation to own and operate any

public utility. R.C. Chapter 743 of Title 7 sets out the statutory framework under which a municipality may exercise this constitutional authority. R.C. 743.01 to R.C. 743.23 deal with a municipal corporation's power to operate a waterworks. R.C. 743.26 to R.C. 743.99 set out the powers of a municipal corporation in operating a gas, water, or electric utility. Under these statutes and Ohio Const. art. XVIII, §4, a municipal corporation enjoys vast powers in operating utility systems.

The Ohio Supreme Court has held that the provisions of Ohio Const. art. XVIII, §4, which empower a municipality to own and operate any public utility, are self-executing, and "are not subject to restriction by the General Assembly." Pfau v. City of Cincinnati, 142 Ohio St. 101, 50 N.E.2d 172 (1943) (syllabus, paragraph one); Swank v. Village of Shiloh, 166 Ohio St. 415, 143 N.E.2d 586 (1957); State ex rel. Indian Hill Acres Inc. v. Kellogg, 149 Ohio St. 461, 79 N.E.2d 319 (1948); City of Akron v. Public Utilities Commission, 149 Ohio St. 347, 78 N.E.2d 890 (1948); Zangerle v. City of Cleveland, 145 Ohio St. 347, 61 N.E.2d 720 (1945); Dravo-Doyle Co. v. Village of Orrville, 93 Ohio St. 236, 112 N.E. 508 (1915). Further, the court has found this principal dispositive where the General Assembly, by statute, has attempted to limit the power of municipalities to operate their utilities. Such restrictions have been held to be violations of Ohio Const. art. XVIII, §4, and, therefore, unconstitutional. City of Columbus v. Ohio Power Siting Commission, 58 Ohio St. 2d 435, 390 N.E.2d 1208 (1979) (held unconstitutional statutes which authorized Power Siting Commission to evaluate municipality's need for proposed municipal utility); City of Columbus v. Public Utilities Commission, 58 Ohio St. 2d 427, 390 N.E.2d 1201 (1979) (held unconstitutional statutes which would control rates municipally-owned electric companies could charge customers for off-peak periods); City of Canton v. Whitman, 44 Ohio St. 2d 62, 337 N.E.2d 766 (1975) (held constitutional a statute as it did not interfere with municipality's operation of its utility); State ex rel. McCann v. City of Defiance, 167 Ohio St. 313, 148 N.E.2d 221 (1958) (held that the General Assembly has no power to limit or restrict the power of a municipality to operate a public utility); Board of Education v. City of Columbus, 118 Ohio St. 295, 160 N.E. 902 (1928) (held unconstitutional statute which required municipal waterworks to supply water to public buildings at no charge); Village of Euclid v. Camp Wise Association, 102 Ohio St. 207, 131 N.E. 349 (1921) (held statute in effect prior to adoption of art. XVIII, §4, requiring municipal waterworks to provide service to charitable institutions at no charge, inoperative subsequent to adoption of constitutional provision); Dravo-Doyle Co. (held unconstitutional statute which prohibited municipality from acquiring an already existing private utility absent owner's consent). Further, the court has upheld the authority of a city to pass an ordinance which went beyond setting rates, and established ultimate liability against a landlord for his tenant's unpaid utility bills. Pfau.

Municipalities are empowered by Ohio Const. art. XVIII, §4 to set rates for public utilities they own and operate. City of Grandview Heights v. Redick, 79 Ohio L. Abs. 59, 154 N.E.2d 180 (C.P. Franklin County 1955), aff'd, 79 Ohio L. Abs. 63, 154 N.E.2d 183 (Ct. App. Franklin County 1956). See R.C. 4933.87. I have opined in the past that this rate-making authority grants to a municipal corporation the authority to "enact and charge a special rate for its service according to classifications based on an individual reaching retirement age and having a limited income." 1975 Op. Att'y Gen. No. 75-001 (syllabus). A predecessor opined that "[a] municipal corporation has the authority pursuant to sections 4 and 6 of Article XVIII, Ohio Constitution, to charge reasonable rentals for the services it provides. . . ." 1961 Op. Att'y Gen. No. 2078, p. 140 (syllabus). Clearly, a municipal corporation has authority to set rates for utility services which it provides. See also R.C. 743.26 (legislative authority of municipal corporation in which utility company is established or operates may regulate the prices which may be charged).

In light of the authorities outlined above, it appears that a municipal corporation's authority to own and operate utilities includes the power to pass any ordinance it deems necessary for the operation of those utilities. The case law

indicates that this authority goes beyond merely setting rates. Pfau. Thus, the City of Medina has the power, pursuant to Ohio Const. art. XVIII, §4, to establish, by ordinance, penalty charges to be assessed against customers whose bills become overdue.

R.C. 307.04 specifically authorizes a board of county commissioners to contract for the provision of light, heat, and power to county buildings. It states:

> The board of county commissioners may, at any time, before or after the completion of any county building, award contracts for supplying such building with light, heat, or power for any period of time not exceeding ten years. Sections 5705.41 and 5705.44 of the Revised Code shall not apply to any such contracts.

As an aside, it is worth noting that R.C. 307.86(C) expressly exempts county purchases from municipal corporations from competitive bidding requirements. Further, R.C. 9.30 specifically allows county officers to acquire utility services without advertising for bids or giving public notice. It states:

> The appropriate public officer of the state, county, municipal corporation, township, school, or other public body or institution, may acquire the service, product, or commodity of a public utility at the schedule of rates and charges applicable to such service, product, or commodity on file with the public utilities commission, or the applicable charge established by a utility operating its property not for profit, at any location where such public utility service, product, or commodity is not available, from alternate public utilities, without the necessity of advertising to obtain bids, and without notice, irrespective of the amount of money involved. (Emphasis added.)

It is my understanding that all utility rates and penalties charged by the City of Medina for utility services which it provides are set out in the Medina Code of Ordinances, and that no written contract for utility services has been entered into between the City of Medina and the county.[1] It is not clear from your request which particular utility charge this question involves. However, so long as the penalty charges in question are set out in the ordinances, the board of county commissioners, by accepting services from the municipal utility, has implicitly agreed to pay for the services at the established rates and, thus, to pay late charges on overdue payments. See Pfau, 142 Ohi St. at 105, 50 N.E.2d at 174 (by maintaining utility service, plaintiff held to have implicitly accepted the terms set out in ordinance).

For the reasons discussed above, I conclude that municipal corporations have the authority to operate a utility and set the utility's rates, including penalty charges for overdue payments. As stated above, a board of county commissioners has the authority to acquire utility services at the applicable charges. Extensive research has uncovered nothing in the Ohio Constitution, the Revised Code, or case law which would prohibit a county from paying late charges. Neither is there anything in those sources to indicate that a county is exempt from paying such charges.

Therefore, it is my opinion, and you are hereby advised, that a board of county commissioners is not exempted by law from paying penalty charges for overdue payments for utility services purchased from a municipality where the municipal ordinances establishing rates for the services provide for such penalty charges.

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[1]The fact that the contracts between the City of Medina and the county for utility services have not been reduced to writing creates no problem, as this contract does not fall under the Ohio Statute of Frauds. See R.C. Chapter 1335.