for the payment of any reasonable expense actually incurred in procuring them. The necessity of such action and the expense actually incurred are thus formally recognized by its express will formally given.

As is hereinafter shown the general assembly has recognized that city board members may have expenses which they may pay out of a service fund specifically created, but is silent as to just what those expenses may be.

If the law had set out the scope and character of the expenditures thus provided for so great care and caution might be avoided in the payment of expenses incurred in procuring teachers, yet great care must be taken to prevent any needless expenditure of the funds of the board, and the necessity for such expenss, as you indicate in your questions, should always be acknowledged by a formal action of the board put upon its minutes.

Section 7704 G. C. provides for the creation of a fund known as the "service fund" and says that such fund is to be used only in paying the expense of such members actually incurred in the performance of their duties. The statute does not say what the expenses of the board may be and no where in the statute is to be found specific statements of such expenses.

Your attention is called to the fact that the service fund above mentioned is obtained from the contingent fund of the board, limited in amount to a sum not in excess of five cents for each child enrolled in the schools, and created for the express purpose named in the statute. In the absence of a service fund, the expenses incurred, spoken of in your first and second questions, would be paid from the contingent fund.

Section 7704 G. C. is directory as to the creation of such service fund, but mandatory as to the use of the same when it is once created; that is, restricted to the payment of actual expenses of members of the board incurred in the performance of their duty. In my opinion such fund may be used only for payment of expenses of members of the board actually incurred in the performance of duty as such board members.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1359.

TAXES AND TAXATION—FAILURE OF AUDITOR OF STATE FORMALLY TO CERTIFY ONE MILL LEVY FOR SCHOOL PURPOSES TO BE RETAINED IN COUNTY UNDER SECTION 7575 G. C. AMONG "STATE TAXES"—SAID REFUSAL DOES NOT JUSTIFY COUNTY AUDITOR IN REFUSING TO EXTEND LEVY ON TAX DUPLICATE OF COUNTY.

The failure of the auditor of state formally to certify the one mill levy for school purposes to be retained in the county under section 7575 G. C. among the "state taxes," for the reason that it is not to be settled for with other state taxes, does not justify the county auditor in refusing to extend the levy on the tax duplicate of the county nor in omitting to include the amount of such levy with other state taxes for the purpose of the adjustment of tax levies to be made by the budget commission. Such levy is a state levy in the same sense that it is made directly by the general assembly and is mandatory.

COLUMBUS, OHIO, June 22, 1920.

HON. LOUIS H. CAPELLE, *Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—Receipt is acknowledged of your letter of recent date requesting the opinion of this department interpreting section 7575 of the General Code, as amended in house bill No. 615, with respect to the following facts:

"The county auditor of this county is in receipt of a communication from the auditor of state in which the total state levy is transmitted to him. The additional tax of one mill, provided for in the latter part of the above section, is not included in the state levy by the auditor of state, and in his circular letter the statement is contained that inasmuch as the state of Ohio received none of the money provided for by the additional tax of one mill, it is not a state levy and therefore cannot be included as such.

It occurs to us that inasmuch as both of the levies provided for in the section are to be made on the grand list of the taxable property of the state, to be collected as are other state taxes, the auditor of state's interpretation has little weight, but if he is right in his contention we would be very glad to ascertain from you just what board in this county is authorized by the section to make the levy. It also occurs to us that if the additional tax of one mill is to be made by either the county commissioners, the council of municipal corporations, the trustees of townships, or the board of education, the provisions and limitations of section 5649-3a make the levy subject to revision by the budget commission, inasmuch as the levy is not specifically exempted from any of the limitations placed upon levies for general purposes by that section.

We realize, of course, that if both levies provided for by section 7575 are really state levies, and they should be so certified by the auditor of state to our local auditor, their mandatory provisions exempt them from the operation of the tax limitations."

Section 7575 G. C. as so amended provides as follows:

"For the purpose of affording the advantages of a free education to all the youth of the state, there shall be levied annually a tax of one and eight-tenths mills on the grand list of the taxable property of the state, to be collected as are other state taxes and the proceeds of which shall constitute 'the state common school fund' and an additional tax of one mill the proceeds of which shall be retained in the several counties for the support of the schools therein."

The auditor of state's certificates is made under section 5626 of the General Code, which provides as follows:

"The auditor of state, on or before the first Monday of June, annually, shall give notice to each county auditor of the rate required by law to be levied for the payment of the principal and interest of the public debt, for the support of common schools, for defraying the expenses of the state, and for the other purposes prescribed by law. Such rate shall be levied by the county auditor on the taxable property of each county on the duplicate, and be entered in one column and denominated 'state taxes.' "

The exact interpretation of section 5626 with respect to its application to the kind of levy provided for in the second part of section 7575 as amended is an interesting question, the answer to which is not necessary to the solution of the question raised by you. The auditor of state is doubtless perfectly correct in his statement that it would make for confusion to extend the one mill rate on the duplicate in the column denominated "state taxes," inasmuch as the proceeds of this levy are not to be settled for with the state auditor but are to be retained in the county. On the other hand, you are correct in your statement that in contemplation of law this levy is a state levy as it is uniform on every dollar's worth of taxable property in the state, so that the state is the taxing district though the distribution is by counties.

A fair application of section 5626 would seem to be that the auditor of state should give the notice therein required, but that the levy of one mill should not be entered in the column denominated "state taxes," in other words, the first part of the section would apply, and the latter part would not apply. However, no final opinion is expressed on this question.

There is one additional sense in which the levy in question is clearly a state levy, that is, that it is made directly by law. Section 7575 is not a law authorizing the making of tax levies, it is a law making tax levies. The general assembly is the levying body in the same sense in which county commissioners, for example, are the levying body for county taxes. The clerical work of extending the levy must be done by the county auditor in the one case the same as in the other, but the levying power proper is exerted by the legislative body of the state in the one case and by the administrative authority of the county in the other. This statement makes it clear that it is not incumbent upon any local authority other than the county auditor to take any action whatsoever with respect to this levy, and that the levy, being mandatory, is not subject to revision by the budget commission, though it is to be counted in ascertaining the levies subject to certain limitations of law.

The ultimate question which your letter seems to raise is the effect of the failure of the auditor of state to make formal certificatoin, assuming that he is required by section 5626 to certify this levy with other state levies. This question is settled, it would seem, by the cases of

State ex rel. vs. Edmondson, 89 O. S. 93,
State ex rel. vs. Roose, 90 O. S. 345,

in both of which it was held that the failure of the ministerial officer to take such action as he is required by law to take with respect to levying taxes does not defeat the levy. Technically, it might be that action in mandamus would be necessary to compel the ministerial action before other ministerial action to be predicated upon it could similarly be compelled. But in a case of this kind, where the auditor is given at least informal notice of the levy and all other ministerial officers have such notice of the levy as the law itself affords, there would seem to be no substantial reason for insisting upon more formal action.

It is the opinion of this department therefore that the county auditor should proceed to treat the one mill levy provided for by section 7575 of the General Code as a levy for state purposes to the extent of including it with other state taxes in his statement to the budget commission under section 5649-3c of the General Code and extending the rate on the duplicate, either in the column designated "state taxes" or preferably, in a separate and distinct column apart from all other levies. This latter statement is made merely as a suggestion, inasmuch as it is the duty of another state department to prescribe the form of the tax duplicate.

Respectfully,
JOHN G. PRICE,
Attorney-General.