Certainly if the board of education attempted or sought to purchase from the municipality lands which are not owned by it for the purpose of a school building there could be no contention that the city could not make a charge for the real estate transferred. The streets and alleys of a municipality are dedicated to the public and as such are under the control of the municipality and it would seem only equitable that in relinguishing their control in lands in such streets and alleys that the board of education or other persons who gain additional real estate by such vacation should pay the costs of such proceedings.

You are therefore advised that a municipality may demand a fee from the board of education for the payment of publication of notices and the necessary engineering connected with the proceedings to vacate a street or alley in connection with the purchase of a school site and the board of education may legally pay such fee.

Respectfully,
C. C. CRABBE,
Attorney-General.

3755.

CLERK HIRE FOR UNOFFICIAL AND OFFICIAL COUNT OF AUGUST PRIMARIES DISCUSSED.

SYLLABUS:

Clerk hire for unofficial and official count of August primaries in Montgomery County discussed. Opinion of City Solicitor of Dayton concurred in.

COLUMBUS, OHIO, October 27, 1926.

HON. ALBERT H. SCHARRER, *Prosecuting Attorney, Dayton, Ohio.*

DEAR SIR:—In your recent communication you present the following inquiry:

> "The deputy state supervisors and inspectors of elections for Montgomery county have requested an opinion as to how to pay the necessary expense of clerk hire in conducting the unofficial and official count of the August primaries of this year.
>
> They prepared vouchers for one-half of the necessary clerk hire, as provided by section 4821 of the General Code, and submitted same to the city of Dayton for payment, submitting the other half to the county commissioners. The county commissioners allowed the amount submitted to them but the city of Dayton has refused to honor the vouchers, based upon an opinion of the city solicitor, a copy of which we submit to you herewith, and which copy we request you return to our office when you will have finished with same.
>
> Should the board of elections submit the vouchers under section 4877 or section 4821?
>
> A perusal of the opinion of the city solicitor will give you the questions which have been raised."

The opinion of the solicitor, a copy of which you enclosed, contains a comprehensive discussion of the law relating to the subject of your inquiry, and is as follows:

"The following is in response to your verbal request for advice concerning certain questions pertaining to payment by the city of expense of the board of elections as hereinafter indicated.

We understand from your inquiry the board of elections has prepared and submitted a number of vouchers in favor of various persons who rendered services in various

capacities in connection with the unofficial and the official counts made pursuant to the primary election held August 10, 1926. All of these vouchers are dated August 25, 1926, but as you inform us may be classified as follows:

1. 50 vouchers, in amounts varying from $3.12 to $31.87, totaling $797.19, each voucher specifying that it is for one-half salary for services in tabulating either the official or unofficial count, as the case may be,—so many hours, at $1.25 per hour.

2. 1 voucher for one-half salary tabulating unofficial and official count 51 hours @ $1.25 per hour and 1 day assistant clerk, August 9th @ $5.00 per day. Total $34.37.

3. 1 voucher for one-half salary tabulating unofficial count 8 hours @ $1.25 per hour and 4 days August 9th, 12th, 13th and 14th, 1926 @ $5.00 per day. Total $15.00.

4. 3 vouchers for one-half salary tabulating unofficial count and furnishing comptometer, each in sum of $10.00. Total $30.00.

Each of these matters will be considered hereinafter, but before doing that it should be said that we find the election laws more or less of a patchwork, with resultant confusion, so that if the board of elections has experienced any difficulty in determining as between the city and county which is to bear certain items of expense we can sympathize with them.

Further, the law imposes upon the city certain expenses on account of elections, the maintenance of the board and the machinery necessary to carry on the duties imposed by law, which may not be accepted generally as being fair to the city. The only source of remedy in these instances is the legislature.

Again, a practical point of view should be taken in considering the duties devolving upon the board in making a count of the votes cast at an election. It is always a matter of great public interest, the public demands that the result be known as quickly as possible; to meet the situation it is evident that extra help must be employed. Such employees must be paid. The manner in which they may be paid and by whom, and, in certain instances, the rate of pay, are fixed by law, and cannot be done otherwise. This opinion will be confined to certain of these later points.

The first question which presents itself is—Can the board of deputy supervisors and inspectors of elections in Montgomery county, which contains a city in which the law required general registration of voters, employ assistants for the tabulation of the official and unofficial count of the votes cast at the Primary election held in August of this year, being a primary in an even numbered year?

Possibly this may be done:

(1) By employing 'assistant clerks', G. C. 4877.

Certainly it can be done:

(2) By employing help as a 'proper and necessary' expense of the board—G. C. 4821.

The general public interest which must be served and the generally recognized demand that this tabulation work must be done as promptly as possible are sufficient reasons for making the expense of such employment a 'proper and necessary' expense of the board, on the one hand or may be sufficient necessity for appointing assistant clerks on the other, provided it is found that temporary assistants may be appointed as assistant clerks.

> G. C. 4877 provides in part: 'When *necessary*, the board may employ * * * one or more assistant clerks at a salary of not to exceed the rate * * * in all counties having cities where registration is required not exceeding one hundred and fifty dollars per month each * * * The period for which they are so employed must always be fixed in the order authorizing their employment but they may be discharged sooner at the pleasure of the board. * * * The compensation of the deputy clerk and the assistant clerks shall be equally divided between the city and county.'

There is room for the contention that the assistant clerks authorized by this section are intended to be employees of a greater degree of permanency than merely to assist in making an unofficial and official count, which requires but a few days at most. Support for this contention is found in the fact that when G. C. 4877 was amended in 1917 the legislature expressly changed the term 'temporary assistants' to read 'also one or more assistant clerks,' but owing to the decidedly general character of the language used, together with the express authority given the board to discharge such assistant clerks 'at the pleasure of the board,' which opens the way to a wide range of possibilities under the statute, and not finding any court decision construing this statute, some hesitancy is felt in taking the positive position that the courts would say that temporary employment cannot be effected by the board pursuant to this statute, yet in the light of the history of the elimination of the term 'temporary assistants,' and the subsequent amendment which placed the statute in its present form at least does suggest that there is some doubt whether temporary assistants may be employed as assistant clerks pursuant to this statute. See 1922 Attorney General Opinion Vol. 2, p. 1119, at 1124.

G. C. 4821 provides in part:

> 'All proper and necessary expenses of the board of deputy state supervisors shall be paid from the county treasury as other county expenses * * *'

In support of our position that the above section supplies authority for the employment of these temporary employes the opinion of Attorney-General Hogan, Vol. 1, 1912, Opinions, page 306, is cited as follows:

> 'The term "all proper and necessary expenses of the board," in my opinion will include the compensation of persons who are necessarily employed to assist in compiling and tabulating the returns. It will not, however, authorize the board to create a position of assistant clerk and pay him a stipulated salary as is done in case of a clerk.'

The language is clear and explicit. Temporary employments are authorized, but the last sentence guards against an abuse of the privilege granted, and holds that permanent positions cannot be created under this section.

Likewise in support of our view, opinion of Attorney-General Edward C. Turner, 1916 Opinions, Vol. II, 1644, is cited. It holds that when it is necessary for the board of deputy state supervisors and inspectors of elections to employ a night watchman same shall be paid from the county treasury upon allowance of the county commissioners, pursuant to G. C. 4821. The opinion states:

> 'If then, the employment of a night watchman is necessary, a question to be determined in the first instance by the board of deputy supervisors of elections, the compensation of such employee, would then constitute a necessary and proper expense of the board and is required to be paid from the county treasury as other county expenses. That is to say, upon the allowance of the county commissioners and the warrant of the county auditor.'

Also the opinion of Attorney-General Price, 1920, Vol. 1, page 3, at page 8, wherein court costs resulting from an injunction suit brought against the board of elections of Franklin County were held as being properly payable out of the county treasury, pursuant to G. C. 4821.

That this is the only election law covering general expenses not otherwise specifically provided for, see Attorney-General's Opinions 1921, Vol 1, page 262.

The question may be raised that inasmuch as the language of G. C. 4821 refers to 'the board of deputy supervisors' it has no application to 'boards of deputy state

supervisors and inspectors of elections' and therefore does not apply to the Montgomery County board which is known by the later title. Any such position is untenable because by G. C. Section 4802 it is provided that in laws of the title in which G. C. 4821 appears and 'other laws relating to elections' the use of one of these terms comprehends the other unless otherwise expressly provided in the statute.

In the light of G. C. 4877, if it is found that the board may make temporary appointments thereunder, and, if these temporary employees were appointed in the regular way by the board for a definite period of time as assistant clerks, their salaries are payable half by the city and half by the county; but if they were merely taken on as temporary employees as 'a necessary and proper expense of the board' their pay, obedient to G. C. 4821, must come from the county alone. Thus, before any such vouchers are honored by the city each voucher should show that the payee named therein was a duly and regularly appointed assistant clerk of the board. This does not apply if appointments were under G. C. 4877.

Until you have the information from the board as to which statute, whether 4877 or 4821 is depended upon as its authority in the matter, it is not apparent that the city can take any action in the matter other than to attempt to get the necessary information from the board.

If it develops that the board has sought to employ this temporary help as assistant clerks, under G. C. 4877, then the rate of pay is fixed by the statute and cannot exceed the rate of $150.00 per month. As is stated in the 2nd syllabus to 1913 Attorney-General Opinions, Vol. 1, page 407:

> 'There is no authority to exceed this maximum. The compensation is fixed by the month and not on a per diem basis and extra work done cannot be taken into consideration. Extra allowances are not authorized by law.'

Also in Attorney-General's Opinion 1915, Vol. III, page 2123, it is stated at page 2126:

> 'The calculation of the portion of the monthly compensation which may be paid for a period of less than a month should be based upon the actual number of days in the calendar month in which such service is rendered.'

And the same opinion holds, page 2129:

> '* * * the compensation of all temporary clerks and assistants of either of such boards is limited to the rate of not to exceed one hundred dollars (statute since amended, amount raised to $150) per month for the time actually employed, to be computed upon the basis of the actual number of days in the calendar month in which he serves.'

Thus, they cannot be paid upon an hourly rate or in such manner as to compensate for extra hours served during any one day. They may be paid for the calendar days in which they worked and the rate per calendar day is the quotient of $150 divided by 31, as August contains 31 days, and the law does not make any provision for paying any more in the event the employee worked more than 8 hours during any calendar day; that is of course if they were appointed as assistant clerks.

If they were employed pursuant to G. C. 4821 the rate of pay is a matter for the board of elections to fix upon approval of the county commissioners who must approve the bills before they may be paid.

Attorney General Opinions 1913, Vol. II, page 1401.

However, even in this instance, it is possible that the limitation at the rate of $150 per month may apply. See:

Attorney General Opinions 1915, Vol. III, 2123, but as this is a question in which the city will not be an interested party no opinion upon this point is hereby expressed.

From the facts at hand we see no opportunity for the application of G. C. 5052 and 5053, in so far as they provide for any charges to be made back by the county against the city. While G. C. 5053 expressly speaks of November elections, the Attorney General has held that it applies to primaries also.

Attorney General's Opinions for 1920, page 1284, yet, as stated the facts herein do not bring these sections into operation.

Coming now to the comptometer service, in the fourth class of the vouchers in question, attention is called to the provisions of G. C. 4946, requiring that the city, if it be an annual registration city, must pay for the furnishings, supplies and general office for the board of elections, same to be paid for direct by the city in both odd and even numbered years, is a proper charge against the city and these vouchers may be paid.

Attorney General's Opinions 1912 Vol. 1, page 200 at 212.

Attorney-General's Opinions 1916 Vol. 2, page 1001.

Attorney-General's Opinions 1925 Vol. 1, page 107.

To summarize:

(1) As to the 50 vouchers for temporary assistants, (a) if it develops that the board appointed each one as an assistant clerk for a certain period then the salary must not be in excess of at the rate of $150 per month and no one can draw pay in excess of the rate per day based upon the monthly rate of $150 for more than the actual number of calendar days employed, the city to pay one-half. The right to employ temporary assistants as assistant clerks is doubted, and before any payments are actually made on this basis to *temporary employees* this department should be consulted for further opinion. (b) If the employment is pursuant to G. C. 4821 then the county must be looked to for payment.

(2) The one voucher in this class should be investigated to determine just what the status of the employe is—whether assistant clerk or not. The voucher calls for 1 day as assistant clerk and 51 hours service in tabulating. If it be found that this person is an assistant clerk duly appointed, his pay is for the actual number of calendar days employed on the basis of $150 for a 31 day month, assuming that he worked less than a full month.

(3) What has been said in (1) and (2) above applies to his case.

(4) The three vouchers for comptometer service may be paid."

After a careful consideration of your inquiry and the opinion as above set forth, you are advised that this department concurs in the conclusions therein set forth. However, in specific reply to your inquiry as to whether the bills should be presented under section 4877 or section 4821, this would appear to depend upon the manner of employment as determined from all of the circumstances, and therefore is a question of fact that this department cannot undertake to determine.

Respectfully,
C. C. CRABBE,
Attorney-General.