

599.

FEDERAL BUREAU OF PUBLIC ROADS — APPROVAL REQUIRED TO PAY ITEMS FROM NATIONAL INDUSTRIAL RECOVERY HIGHWAY FUND-TRUST ACCOUNT—WHERE FUNDS PAID—DISALLOWED BY SAID BUREAU—HOW AUDITOR OF STATE MAY PAY — PROCEDURE — PROJECTS— ACCOUNTING — STATE FUNDS — STATE HIGHWAY SYSTEM—SECTION 1228 G. C.

SYLLABUS:

1. *Only such items as are approved by the Federal Bureau of Public Roads may be paid from the National Industrial Recovery Highway Fund-Trust Account.*

2. *In the event funds are paid from said account, which are disallowed by said Bureau, upon proof of such payments and vouchers presented by the Director of Highways, the Auditor of State should draw a warrant to reimburse said Trust Fund.*

3. *Where the State has paid the cost of a preliminary survey in excess of the amount approved by the Federal Bureau of Public Roads upon a given project, the transaction may be closed by paying into the State treasury such sum as the Bureau approves.*

4. *In case of a disallowance by the Bureau of a sum claimed by the State upon a given project, the same may properly be offset by sums due the State from another project, if said projects involve roads on the State highway systems.*

5. *In view of the provisions of Section 1228, General Code, which sets forth the conditions of the acceptance of the Federal grants, no method of accounting may be adopted which results in State funds being used upon projects not on the State highway system.*

COLUMBUS, OHIO, May 17, 1939.

HON. ROBERT S. BEIGHTLER, *Director of Highways, Columbus, Ohio.*

DEAR SIR: Acknowledgment is made of your communication requesting my opinion, which reads as follows:

“Under date of December 9, 1938 this department addressed an inquiry relative to the above project to your office, to which a reply was received, dated January 7, 1939.

Apparently the inquiry of December 9th was not sufficiently clear for the assumption (paragraph four) ‘that \$2,193.85 was paid from the State Highway Improvement Fund for certain preliminary expenditures’ is not correct. Only \$1,409.33 was paid from state funds. The items totaling \$784.52 which were dis-

allowed by the Bureau of Public Roads were paid from the National Industrial Recovery Highway Fund-Trust Account and such disallowances have created a deficiency in the Trust Account.

There are two methods of handling this matter from an accounting standpoint, viz :

1. To issue cheques against the Trust Account for \$1,409.33 and pay such cheque into appropriated state funds. This method perpetuates the deficiency of \$784.52 which, as indicated in the second paragraph of the letter of December 9th, cannot be taken care of in the manner suggested by your department's communication of July 13, 1938 owing to the refusal of the State Auditor to issue his warrant in reimbursement of the Trust Account.

2. To issue a cheque against the Trust Account for \$624.81 (\$1,409.33 less \$784.52) and pay such cheque into appropriated state funds. This method would accomplish the same result as if the \$1,409.33 were paid into state funds and the Auditor of State were to issue his warrant for \$784.52 to pay into the Trust Account.

If the latter method is legal as to transactions involving but one project, would it be equally proper to offset a disallowance on project "A" against the amount claimed for reimbursement to state funds on project "B"? If it is proper in either one or both cases, would it be proper if the project were not on the state highway system?

It is true the off-set method would operate to deprive the Auditor of State of a review of the transaction. On the other hand, the fact that any reimbursements are to be made to state funds is due to the very existence of these federal projects and to the voluntary diligence exercised by this department in making the claims for such reimbursement."

Your request necessitates the consideration of the National Industrial Recovery Act, approved June 16, 1933, the Federal Highway Act, approved November 9, 1921, as amended and supplemented, and Section 1228 of the General Code, as enacted by the General Assembly in 116 O. L., p. 315, which was an enabling Act to authorize the Department of Highways to cooperate with the Federal Government with reference to the expenditure of Federal funds allotted for the construction of highways.

The National Industrial Recovery Act above referred to, in Section 204 authorizes the President to make grants to the Highway Departments of the several states in an amount not less than four hundred million dollars, to be expended in accordance with the provisions of the Federal Highway Act, approved November 9, 1921, as amended and supplemented. Said National Industrial Recovery Act, however, with reference to the

manner of expenditures, contains certain exceptions, some of which are as follows:

“(1) For expenditure in emergency construction on the Federal-aid highway system and extensions thereof into and through municipalities. The amount apportioned to any State under this paragraph may be used to pay all or any part of the cost of surveys, plans, and of highway and bridge construction including the elimination of hazards to highway traffic, such as the separation of grades at crossing, the reconstruction of existing railroad grade crossing structures, the relocation of highways to eliminate railroad crossings, the widening of narrow bridges and roadways, the building of footpaths, the replacement of unsafe bridges, the construction of routes to avoid congested areas, the construction of facilities to improve accessibility and the free flow of traffic, and the cost of any other construction that will provide safer traffic facilities or definitely eliminate existing hazards to pedestrian or vehicular traffic. No funds made available by this title shall be used for the acquisition of any land, right of way, or easement in connection with any railroad grade elimination project.

(2) For expenditure in emergency construction on secondary or feeder roads to be agreed upon by the State Highway departments and the Secretary of Agriculture: Provided, That the State or responsible political subdivision shall provide for the proper maintenance of said roads. Such grants shall be available for payment of the full cost of surveys, plans, improvement, and construction of secondary or feeder roads, on which projects shall be submitted by the State highway department and approved by the Secretary of Agriculture.”

In Paragraph “D” of said Section 204 above referred to, it is provided that limitations of the Federal Highway Act, approved November 9, 1921 as to amounts per mile, shall not apply.

Section 209 of said National Recovery Act provides:

“The President is authorized to prescribe such rules and regulations as may be necessary to carry out the purposes of this title, and any violation of any such rule or regulation shall be punishable by fine of not to exceed \$500 or imprisonment not to exceed six months, or both.”

Section 1228 of the General Code of Ohio, as last enacted, assents to the acts of Congress providing aid to the States in the construction of rural post roads and for other purposes and “the Emergency Relief Appropriation Act of 1935, approved April 8, 1935, and all acts amendatory thereof and supplemental thereto.” Said section further provides:

“* * * The department of highways is hereby authorized to enter into all contracts and agreements with the United States government, relating to the construction and maintenance of rural post roads under the provisions of the said act of congress, to submit such programs of construction and maintenance as may be required by the secretary of agriculture and do all other things necessary fully to carry out the co-operation contemplated and provided by the said acts and acts amendatory thereof. The good faith of the state is hereby pledged to make available funds sufficient for any biennium to enable the state or its political subdivisions to comply with the requirements of the federal government concerning the sums apportioned to the state by or under the United States government during each of the years for which federal funds are appropriated by such acts and to maintain the roads constructed under the provisions of such acts, and to make adequate provisions for carrying out such maintenance. All moneys accruing to the state highway fund created by law and available for expenditure in the construction and maintenance of highways, and all federal funds apportioned to this state for highway improvement purposes under such acts of congress, shall be expended upon the highways comprising the state highway system of roads, or upon the extension of such roads into or through municipalities except that where funds are allocated to this state from any appropriations made by congress for such purposes and which allocation provides that a fixed per centum shall be expended upon secondary roads, including U. S. post roads, school bus routes and farm-to-market roads, such percentage so allocated by federal legislation shall be so expended upon secondary or feeder roads as defined by federal law or ruling of the secretary of agriculture of the United States. * * *”

While the acts hereinbefore referred to are voluminous and it is impossible to discuss all of the many provisions thereof herein, it may be briefly stated that said act authorizes the Federal Government to make certain allocations of funds to be used by the Department of Highways in connection with the construction of certain roads. It further appears that the President was authorized to make rules and regulations governing the handling of such funds.

Moreover, it appears that such rules and regulations have been adopted establishing procedure and accounting requirements for advances of such funds. Among other things, such regulations provide that the custodian of such funds “must agree to deposit the advance funds and all reimbursements thereto in a special account, or any special accounts designated ‘Trust Account-National Industrial Recovery Highway Fund’.”

The regulations further require such funds to be deposited in banks

authorized by the State law to accept such deposits, a bond or collateral of market value equal to the amount of the deposit is required to be given to secure such fund, and that the depository shall agree in writing to accept the accounts under the provision of the application. In accord with such regulations, it appears that the funds under consideration were deposited in the Ohio National Bank of Columbus.

Paragraphs 4 and 5 of said rules and regulations provide:

“4. That all payments made by the Highway Department from the special trust fund hereunder shall be subject to audit by the Federal Government, and if the work for which any such payment has been made does not receive the approval of the Bureau of Public Roads the Highway Department, from its own available funds, shall reimburse said special trust fund the amount of such payment. If no such funds are legally available to the Highway Department for making such reimbursement, an equivalent amount will be withheld from their apportionment.

5. That all funds advanced and all reimbursements made thereto by the Bureau for work performed on projects under Section 204 of the National Industrial Recovery Act, including funds paid on such projects from unobligated balances of previous apportionments of regular Federal aid appropriations, shall be placed in the said special trust fund and shall be subject to all of the conditions and requirements of the Bureau of Public Roads respecting the disbursement of and accountability for such fund.”

In pursuance to said Acts hereinbefore referred to and the regulations established thereunder on the second day of November, 1932, O. W. Merrill, the then Director of Highways of the State of Ohio, made application to the United State Department of Agriculture, Bureau of Public Roads, for advances for funds in pursuance to Section 204, Title (2) of the National Industrial Recovery Act. Accompanying the application for such fund was the certificate of Harry S. Day, the then Treasurer of the State of Ohio, in accordance with the rules and regulations. The Chief of the Bureau of Public Roads of the United States, Department of Agriculture, approved the application hereinbefore referred to.

On the 25th day of September, 1935 John Jaster, Jr., the then Director of Highways, filed a modification of application of the State of Ohio relating to advance funds, etc., the purpose of said modification being:

“To provide for using said advances and secure additional advances of funds for projects financed under the Emergency Relief Appropriation Act of 1935. * * *”

The modification was approved on the 29th day of October, 1935. Under the rules, regulations and applications made in pursuance thereof, such advances from the Federal Government constitute a trust fund to be paid upon the order of the Department of Highways. It is further required that all payments made from such fund be subject to audit by the Federal Government and the approval of the Federal Bureau of Public Roads and it is further specifically provided that any payment which has been made and not approved by the Bureau of Public Roads will be reimbursed by the Highway Department from funds available for such purpose. It is also required that if funds are drawn from such trust account and unapproved, and there are no available funds to reimburse the trust account from the State, that an equivalent amount will be withheld from the apportionment to be made to the State.

It is further provided that the Highway Department shall keep an accurate record of all funds received and disbursed in such manner as may be prescribed by the Bureau of Public Roads.

From the foregoing, it will be seen that the trust account referred to in your communication is to be expended by the Director of Highways, subject to the rules and regulations and approval of the Bureau of Public Roads and no State agency has a check upon such account. The Auditor of State is neither authorized nor required to participate in any manner in the auditing or distribution of such trust account.

It further appears to be clear that in the event an expenditure is made which does not meet the approval of the Bureau of Public Roads, it is the duty of the State of Ohio to reimburse said funds from the monies appropriated to the Department of Highways. Upon proper proof of such expenditure and a voucher properly drawn by the Director of Highways and presented to the Auditor of State, it is his duty to draw a warrant to reimburse said fund. However, in the case you present, it seems that \$1409.33 was paid out of the State Treasury for preliminary surveys with reference to a road project. You first inquire whether the proper method would be to pay this sum from the trust account into the State Treasury and then pay back \$784.52 to the trust account. Of course, this method would balance the trust account. However, you state that the Auditor of State is not willing to co-operate in drawing the proper warrant. You further suggest, in view of the facts stated, that instead of paying the total amount into the State treasury and receiving a check from the State to reimburse the trust fund, that a check for the sum of \$624.81 be drawn from the trust account, payable to the State treasury.

The latter method would seem proper and the most logical. The former method would evidently produce the same result but involve unnecessary bookkeeping. In other words, the State has already paid a sum which it had authority to do in connection with the construction of roads and it can receive from the trust fund as its reimbursement only such amounts as the Bureau of Public Roads will approve.

You again inquire whether it would be proper to offset a disallowance on Project "A" against the amount allowed from State funds on Project "B". It is believed that as a practical matter of accounting on certain projects, reimbursements will be due the trust fund from the State. On other projects, sums may be due to the State from the trust account. No logical reason is seen why a balance may not be struck determining the sum due, in view of the various payments and transactions which, of course, would in effect amount to a set-off. However, it is believed that there is one exception to such a procedure. This exception has to do with expenditures made in connection with roads that are not a part of the State Highway system. That is to say, Section 1228, supra, seems to limit the expenditures of the funds of the State to expenditures, "upon highways comprising the State Highway system of roads, or upon the extension of such roads into or through municipalities * * *". Said section further provides that monies allocated by the Federal Government shall be expended upon secondary roads, including United States post roads, school bus routes, family market roads, etc.

In view of the language used in said Section 1228, accepting Federal advancements, it is believed that the State of Ohio has no lawful authority to expend funds of the State on roads other than those that form a part of the State Highway system. It would follow that no method of set-off which would result in the State paying from its treasury money in connection with such road, would be legal.

Based upon the foregoing citations and discussions, and in specific reply to the interrogatories propounded, you are advised that:

1. Only such items as are approved by the Federal Bureau of Public Roads may be paid from the National Industrial Recovery Highway Fund-Trust Account.

2. In the event funds are paid from said account, which are disallowed by said Bureau, upon proof of such payments and vouchers presented by the Director of Highways, the Auditor of State should draw a warrant to reimburse said Trust Fund.

3. Where the State has paid the cost of a preliminary survey in excess of the amount approved by the Federal Bureau of Public Roads upon a given project, the transaction may be closed by paying into the State treasury such sum as the Bureau approves.

4. In case of a disallowance by the Bureau of a sum claimed by the State upon a given project, the same may properly be offset by sums due the State from another project, if said projects involve roads on the State highway systems.

5. In view of the provisions of Section 1228, General Code, which sets forth the conditions of the acceptance of the Federal grants, no

method of accounting may be adopted which results in State funds being used upon projects not on the State highway system.

Respectfully,

THOMAS J. HERBERT,
Attorney General.

600.

COUNTY AND MUNICIPALITY—JOINT OWNERSHIP OF POLICE BROADCASTING SYSTEM—RIGHT TO CONTRACT MUST BE PROVIDED BY STATUTE—LEASE—COUNTY MAY CONTRACT WITH MUNICIPALITY FOR AGREED SUM TO RECEIVE INFORMATION FOR COUNTY SHERIFF OVER MUNICIPAL BROADCASTING SYSTEM.

SYLLABUS:

1. *A county and a municipality may not legally enter into a contract for joint ownership of a police broadcasting system unless such joint ownership is specifically provided for by statute.*

2. *A municipality may not lease to the county the use, either in whole or in part, of a municipal police broadcasting system in the absence of a showing that such broadcasting system is not needed for municipal purposes.*

3. *A municipality may, by contract with the county commissioners, furnish information for the county sheriff over the municipal broadcasting system for a sum to be agreed upon between the municipal authorities and the county commissioners.*

COLUMBUS, OHIO, May 18, 1939.

HON. LESTER S. REID, *Prosecuting Attorney, Chillicothe, Ohio.*

DEAR SIR: I am in receipt of your recent communication which reads as follows:

“The City of Chillicothe and the Board of County Commissioners of Ross County are desirous of some kind of an arrangement with reference to a broadcasting set to be purchased and set up in police department of the City of Chillicothe in order that there may be close co-ordination between the police of the City of Chillicothe, and the office of the Sheriff.

The questions which I desire to have answered on behalf of the Board of County Commissioners of this County are as follows:

Could the County and City legally enter into a contract for joint ownership of said broadcasting station,