

5743.

DEPUTY COUNTY ENGINEER—MAY NOT RECEIVE ANY COMPENSATION FROM THE GASOLINE TAX OR GENERAL DITCH FUNDS.

SYLLABUS:

1. *A deputy county engineer, employed to assist the county engineer in performing the various duties enjoined by law upon the county engineer, may not receive any compensation from the gasoline excise tax fund for the time he is engaged in the construction and maintenance of roads, which work is being paid for from the gasoline excise tax fund.*

2. *A deputy county engineer, employed to assist the county engineer in performing the various duties enjoined by law upon the county engineer, may not receive any compensation from the general ditch fund for the time he is engaged in the survey, construction or cleaning of county ditches, which work is being paid for from the general ditch fund.*

COLUMBUS, OHIO, June 24, 1936.

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

GENTLEMEN: This will acknowledge receipt of your request for my opinion, which reads as follows:

“You are respectfully requested to furnish this department your written opinion upon the following:

Section 2981, General Code, provides for payment of compensation of deputies in the county engineer's office semi-monthly from the county treasury upon warrant of the county auditor.

QUESTION 1: When the deputies are engaged in the construction or maintenance of roads which work is being done with gas tax funds, may their compensation be paid from the gas tax fund?

QUESTION 2: When such deputies are engaged in the survey, construction or cleaning of county ditches in which funds collected by special assessments and by general levy upon the tax duplicates of the county are being used, may such deputies be paid from the general ditch funds?”

By virtue of Section 2782-1, General Code, the title of “county surveyor” has been changed to “county engineer” and wherever the term “county surveyor” appears in the General Code, it should be read as

“county engineer.” Section 2981, General Code, referred to in your letter, reads as follows:

“Such officers may appoint and employ necessary deputies, assistants, clerks, bookkeepers or other employes for their respective offices, fix their compensation, and discharge them, and shall file with the county auditor certificates of such action. Such compensation shall not exceed in the aggregate for each office the amount fixed by the commissioners for such office. When so fixed, the compensation of each duly appointed or employed deputy, assistant, bookkeeper, clerk and other employe shall be paid semi-monthly from the county treasury, upon the warrant of the county auditor. Each of such officers may require such of his employes as he deems proper to give bond to the state in an amount to be fixed by such officer with sureties approved by him, conditioned for the faithful performance of their official duties. Such bond with the approval of such officer, indorsed thereon, shall be deposited with the county treasurer and kept in his office.”

The word “officers” which appears in the first part of the above quoted section, includes the county engineer. See Section 2978, General Code. It is provided by Section 2987 that these deputies and the other associates enumerated in Section 2981, General Code, supra, shall be paid from the appropriate fund or funds upon the warrant of the county auditor.

In a subsequent communication, I am informed that these deputies are regular employes appointed by the county engineer under the provisions of Section 2981, General Code, supra. Their compensation is fixed by the county engineer within the limits of the appropriation by the county commissioners. In other words, in your first question you inquire whether or not the salary of these deputies may partially be appropriated by the county commissioners from the gasoline tax excise fund in so far as these deputies are engaged in the construction and maintenance of roads, which work is being paid for with gasoline tax funds. These deputies are not appointed for a particular job on the roads but are regular employes having other work and performing other duties which are enjoined by law upon the county engineer. A consideration of this question takes us back to the early case of *Longworth v. Cincinnati*, 34 O. S., 101. The second and third branches of the syllabus of that case read as follows:

“2. Where the surveying and engineering of such improvement were performed by the chief engineer of the city and his

assistants, who were officers appointed for a definite period, at a fixed salary, which the law required to be paid out of the general fund of the city, the reasonable cost to the city, of such surveying and engineering, can not be ascertained and assessed upon the abutting property, as a necessary expenditure for the improvement.

3. If a superintendent of such an improvement is necessary, and one is employed by the city for that particular improvement, the amount paid by the city, for his services, may properly be included in the assessment."

An opinion which appears at first blush to be contrary to the above quoted principles, is to be found in Opinions of the Attorney General for 1927, Volume III, Page 1904. The syllabus of that opinion reads as follows:

"Inspectors employed by a county surveyor, for the purpose of inspecting roads or bridges constructed under authority of the county commissioners, may be compensated for their services as such inspectors from funds appropriated for that purpose by the county commissioners from the road or bridge fund of the county."

While the reasoning employed in this opinion would lead one to the conclusion that it is within the discretion of the county commissioners to appropriate from the various county funds for the salaries of the various deputies and assistants in the county offices, it should be noticed from a careful reading of the 1927 opinion that the inspector employed was for a particular job and was not employed by the county engineer for work other than a particular job. In any event, no mention was made of the Longworth case, *supra*, and subsequent opinions of this office have placed a great deal of emphasis upon the soundness of the Longworth case, *supra*. In an opinion to be found in Opinions of the Attorney General for 1929, Volume II, Page 1343, it was held as disclosed by the syllabus:

"The salary of a city superintendent of streets, who performs general duties with reference to streets and sewers, may not legally be paid from the motor vehicle license and gasoline tax receipts, in whole or in part."

This opinion to a great extent was based upon the holding of the Longworth case, *supra*.

In an opinion to be found in Opinions of the Attorney General for 1930, Volume I, page 211, the syllabus reads as follows:

“The salary and expenses of a group of engineers employed by a city for the sole purpose of preparing plans, specifications, and supervising the construction of street paving generally, may properly be paid from the proceeds of the motor vehicle and gasoline taxes.”

In this opinion the then Attorney General cited the Longworth case, *supra*, and made the observation that where an engineer is employed for general services, which employment requires services which do not come within the scope of the objects of the gasoline tax, he could not be paid from the gasoline tax excise fund. It was pointed out in the opinion that the question there presented involved employment for the purpose of constructing and repaving streets, which was clearly within the purposes for which the gasoline excise tax was levied.

In an opinion to be found in the Opinions of the Attorney General for 1932, Volume I, page 352, the syllabus reads as follows:

“The expense of the county surveyor and his office, in connection with the cost of the construction of a road improvement, are to be paid from county general funds and such cost cannot be proportioned and paid from the proceeds of a special road tax levy authorized by Section 5625-15, et seq., of the General Code.”

The following appears at page 353:

“From an examination of the above statutes, it is apparent that the entire cost of the office of county engineer is to be paid from the general county fund and no authority exists for such payment, in whole or in part, from any special fund, established from the proceeds arising from a special levy. *Cincinnati v. Longworth*, 34 O. S., 101, Opinions of the Attorney General for 1919, page 955, and Opinions of the Attorney General for 1918, page 103.”

In an opinion to be found in Opinions of the Attorney General for 1933, Volume I, page 159, the second branch of the syllabus reads as follows:

“2. The compensation of a street commissioner in a village, when fixed by council as provided by Section 4219, General Code, should be paid from the general fund of the village, and no part of such compensation may lawfully be paid from the village’s portion of motor vehicle license taxes or motor vehicle

fuel taxes, regardless of whether or not that compensation is fixed on an annual, monthly, per diem or per hour basis.”

In this opinion the Longworth case and the various opinions supra were cited in support of the conclusion reached therein.

In my opinion No. 4150, rendered April 16, 1935, I followed the above 1932 opinion and held, as disclosed by the syllabus:

“The salary of a payroll clerk in the office of a county surveyor must be paid from the general fund of the county and there is no authority in law for the payment of any portion of such salary from the county road and bridge fund.”

No doubt the question you present is prompted by the holding in my Opinion No. 5125, rendered January 30, 1936, wherein I held that a township trustee, who was working on roads, the funds for which came from the gasoline tax, could receive his per diem compensation from the gasoline tax fund. The first two branches of the syllabus of that opinion read as follows:

“1. Township trustees may receive compensation at the rate of \$2.50 per day for their services in connection with the improvement of roads with funds arising from the provisions of Section 5541-8, General Code, so long as such compensation does not exceed the limitation of \$250.00 set forth in Section 3294, General Code.

2. Opinion reported in Annual Report of the Attorney General for 1912, Volume I, pages 283, 284, overruled in so far as it held that the per diem authorized by Section 3294, General Code, to be paid to township trustees as therein set forth is payable solely from the general fund.”

However, it should be noted that the holding in that opinion is not controlling as to the present inquiry and I am of the opinion that the same should not be extended beyond the exact facts presented in that opinion. It would, therefore, appear that your first question should be answered in the negative.

The observations referred to in answering your first inquiry are in effect dispositive of your second inquiry. Section 6492, General Code, provides for a general ditch improvement fund and Section 6493, General Code, provides what may be paid for out of this fund. It should be noted, however, that if the county engineer should charge any fees under Section 6498, General Code, the same would have to be paid into

the county treasury. Without extending this discussion, it is my opinion in specific answer to your inquiries:

1. A deputy county engineer, employed to assist the county engineer in performing the various duties enjoined by law upon the county engineer, may not receive any compensation from the gasoline excise tax fund for the time he is engaged in the construction and maintenance of roads, which work is being paid for from the gasoline excise tax fund.

2. A deputy county engineer, employed to assist the county engineer in performing the various duties enjoined by law upon the county engineer, may not receive any compensation from the general ditch fund for the time he is engaged in the survey, construction or cleaning of county ditches, which work is being paid for from the general ditch fund.

Respectfully,

JOHN W. BRICKER,  
*Attorney General.*

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5744.

APPROVAL—BONDS OF CITY OF LIMA, ALLEN COUNTY,  
OHIO, \$13,000.00.

COLUMBUS, OHIO, June 24, 1936.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*

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5745.

PAROLE—PERSON FROM OHIO REFORMATORY ON PAROLE  
WHO IS CONVICTED OF ANOTHER OFFENSE—SHOULD  
BE TRANSFERRED TO OHIO PENITENTIARY—EFFECT  
OF VIOLATION OF PAROLE.

**SYLLABUS:**

1. *Neither the Department of Public Welfare nor the Board of Parole has the authority or power to stay the execution of a sentence imposed upon a parolee, who while out on parole, has been convicted and sentenced for another crime.*

2. *A person previously sentenced to a state penal institution, even though otherwise eligible for commitment to the Ohio State Reformatory cannot legally be committed to such institution by a sentencing court.*

3. *A parolee, who while out on parole, has been convicted and sen-*