

transfer. I am therefore of the opinion that the action of the board of county commissioners in purporting to appropriate such fund for other purposes was not legally authorized.

Specifically answering your inquiry, it is my opinion that:

1. When the board of county commissioners has made a special levy of taxes for county agricultural extension work pursuant to the provisions of Section 9921-1c, General Code, the proceeds of the tax so levied may be used for such purpose only.

2. The board of county commissioners has no legal authority to appropriate tax funds derived from a special levy of taxes for a specific purpose, to any other purpose than that for which such special taxes were levied except as provided in Section 5625-13 paragraph (d).

Respectfully,

JOHN W. BRICKER,

*Attorney General.*

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973.

APPROVAL, NOTES OF BROWHELM TOWNSHIP RURAL SCHOOL DISTRICT, LORAIN COUNTY, OHIO—\$3,800.00.

COLUMBUS, OHIO, June 19, 1933.

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

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974.

FISCAL OFFICER—CERTIFICATE TO COUNTY AUDITOR SHOWING OVERDRAFTS AND REASONS THEREFOR—NO EXPENDITURES AUTHORIZED UNLESS ANNUAL APPROPRIATION MEASURE PASSED—PRIORITY OF CLAIMS AGAINST POLITICAL SUBDIVISION—LIABILITY FOR FILING FALSE CERTIFICATE.

SYLLABUS:

1. *A fiscal officer's certificate to the county auditor made in pursuance of Section 5625-27, General Code, should show the overdrafts of each fund for the current year, if any such overdrafts exist, whether the overdrafts are occasioned by reason of a partial failure of anticipated revenues as shown by the certificate of estimated resources of the budget commission made in the previous year or by reason of unauthorized appropriations made during the current year, or by reason of false and unauthorized certificates of the fiscal officer made in pursuance of Section 5625-33, General Code.*

2. *Where an emergency appropriation measure is passed by the taxing authority of a subdivision or taxing unit, in pursuance of Section 5625-29, General Code, and the passage of the annual appropriation measure is postponed until after April 1st of the current year, no expenditures of any kind can be made and no lawful*

obligations incurred after the said first day of April until the annual appropriation measure is passed.

3. A county budget commission or the Tax Commission of Ohio in case of appeal thereto, in making its amended certificate of estimated resources to the taxing authorities of subdivisions and taxing units within the county in pursuance of Section 5625-27, General Code, should take into consideration existing overdrafts of funds as shown by the fiscal officer's certificates. The amount of such overdrafts as so shown, should be deducted from the total resources available for each such fund had the overdrafts not existed and the amended certificate of estimated resources made accordingly. If such overdrafts in the aggregate, exceed the potential revenues available for any fund the said amended certificate of estimated resources should show that no resources will be available for the fund in which event no appropriations may be made during the ensuing fiscal year for purposes coming within the purview of the fund and no expenditures made or obligations incurred for such purposes, not even for payrolls.

4. In the absence of fraud or collusion, appropriating authorities have a right to rely on the certificate and amended certificate of estimated resources as made by a county budget commission, or in case of appeal by the Tax Commission of Ohio, and may make their appropriations accordingly.

5. No authority exists for a municipality, charter or otherwise, to make expenditures for emergency purposes in a manner different than for other purposes except the authority extended by Section 3965, General Code, to make emergency repairs to a municipal waterworks.

6. No priority exists among claims against a political subdivision based on the false certificate of a fiscal officer. If the fiscal officer's certificate is true, the principle, "prior in time is prior in right" would apply. If no certificate has been issued there can be no valid claim asserted based merely on the verbal orders of a mayor or a head of a department or any other officer.

7. The liability of a fiscal officer of a subdivision for issuing a false certificate, ostensibly in pursuance of the provisions of Section 5625-33, General Code, is fixed by the provisions of Section 5625-37, General Code, and his acting on the advice of his duly constituted legal adviser or the orders of his superior officer will not exonerate him from the liability imposed by this statute.

8. It is incumbent on the appropriating authority of a subdivision or other taxing unit to provide first for all those expenditures made imperative by the Constitution, statutes, charter provisions or ordinance, such as duly fixed salaries of officials, heads of departments and divisions, providing it is possible to do so within the limits of resources available for appropriation.

COLUMBUS, OHIO, June 20, 1933.

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

GENTLEMEN:—You have requested my opinion in answer to several questions submitted to you by the acting Director of Finance of the city of Toledo. These questions are as follows:

"1. In the amended certification of the fiscal officer to the County Budget Commission, is it necessary to state therein the amount of the over-drafts, and if so, what is the effect of these over-drafts on the amount which may be legally appropriated?"

2. What is the effect upon the operation of a city, i. e., the incurring of liabilities for payrolls, supplies, etc., if the annual appropriation measure is not passed by Council until some time subsequent to April 1st, there being in effect for the first three months an emergency appropriation measure in accordance with Section 5625-29, of the General Code, of Ohio?

3. Can a certificate be legally issued by the fiscal officer of the City of Toledo in the face of a General Fund over-draft exceeding the total potential revenues for the current year?

4. If the answer to the foregoing question is no, can any expenditure, other than for payrolls, be made in the face of an over-draft as aforementioned, assuming that appropriations have been duly made by the Council of a total amount not in excess of the Budget Commission's amended certificate of estimated resources, which certificate does not give effect to over-drafts?

5. What authority is there in law for emergency expenditures for repairs or other activities without legislation or certificate, necessary for the safety and/or welfare of citizens and to what monetary extent?

5a. Can emergency repairs be made to a municipal water system without limitation as to the amount, without advertising for bids and without the issuance of a certificate by the fiscal officer?

5b. Can repairs be made to a bridge or other artery of traffic, which has been closed owing to an unsafe condition, without limit as to amount, without advertising for bids, and without the issuance of a certificate by the fiscal officer?

6. What is the priority of liability in the case of expenditures made upon the authority of a director of a department and verbal orders of the Mayor, in cases where no certificate has been issued or there is a question as to legality of the issuance thereof?

7. To what extent should the written opinion of the Law Director be followed by the fiscal officer in the disbursing of funds, when the opinion of the fiscal officer is at variance with that of the Law Director?

8. Is it incumbent upon Council to appropriate for salaries of heads of departments and divisions specified by Charter?"

Toledo is a charter city. Its fiscal officer under the charter, having duties and functions corresponding to those of a city auditor in cities operating under the general law, is styled "the Director of the Department of Finance." He is appointed by the mayor and serves at the pleasure of the mayor.

Upon submitting the questions stated above, by the acting Director of Finance, attention is directed to several sections of the charter of the city of Toledo being Sections 127, 226, 227, 228, 229 and 230 of the said charter. These sections have to do with the letting of contracts, making expenditures and incurring debts by the city. Upon examination of these several charter provisions, I do not regard these charter provisions as being controlling in the consideration of the questions submitted. In my opinion, the matters involved in these questions are controlled by the provisions of the so-called budget law (Sections 5625-1 et seq. of the General Code of Ohio).

Each of these questions, in my opinion, concerns the power of a municipality to incur "debts", as that term is used in Section 6 of Article XIII, and Section 13 of Article XVIII of the Constitution of Ohio.

Section 6 of Article XIII of the Constitution of Ohio, stipulates that the General Assembly shall provide for the organization of cities "and restrict their powers of taxation, assessment, borrowing money, contracting debts and loaning their credit so as to prevent the abuse of such power." Section 13 of Article XVIII of the said instrument provides that "laws may be passed to limit the power if municipalities to \* \* incur debts for local purposes."

Such laws have been enacted by the General Assembly, one of which is known as the Budget Law, contained in Sections 5625-1 to 5625-39, inclusive, of the General Code of Ohio. The limitations and restrictions on the powers of municipalities contained therein apply to all municipalities whether operating under charter or otherwise. *State ex rel. Toledo vs. Cooper*, 97 O. S. 86; *State ex rel. vs. Bish*, 104 O. S. 206; *Berry et al. vs. Columbus*, 104 O. S. 206; *Phillip vs. Hume*, 122 O. S. 11.

I come now to a consideration of the specific questions submitted, which will be taken up in their order:

1. It does not appear just what is meant by "over-drafts" as used in this inquiry. In the orderly administration of government under the statutes in this state, over-drafts of public funds can not occur except as a result of the failure or inability to collect or receive revenues which in the regular course of events should come into the public treasury. When appropriations are made according to law, and obligations against the funds created by these appropriations are incurred strictly according to law, moneys will always be available to meet the obligations unless there is a failure of anticipated revenues against which the appropriation is made or exists.

Appropriations, of course, must necessarily be made in the light of anticipated revenues of taxes levied and in process of collection, of proceeds of bonds sold and in process of delivery or of other anticipated revenues shown by an official certification of estimated resources as certified from the Budget Commission to the taxing authority which estimate as so certified, is the basis of the appropriation measure later adopted by the said taxing authority. (Sections 5625-29, 5625-30 and 5625-32, General Code. It is possible, of course, that some of these "estimated resources" may fail, or fall short of the full amount estimated. This may come about because of delinquencies in the collection of taxes or because a certain tax levy or tax levies is enjoined. As stated by Sater, Judge, in the case of the *Ohio Fuel & Supply Company et al. vs. Paxton et al.*, U. S. District Court, Southern District of Ohio, 22 O. L. R. 573: "The Ohio statutes give no assurance to taxing authorities that they will receive in taxes the full amount assessed." Such a shortage in revenues may also occur when a bond issue is enjoined after the bonds have been sold and when in process of delivery. Other estimated resources may fail for various reasons.

Inasmuch as appropriations may be made, and may only be made lawfully, in anticipation of "estimated resources" as certified by the Budget Commission, and such resources may be regarded as being in process of collection, fiscal officers of subdivisions may lawfully certify under authority of Section 5625-33, General Code, that such funds as appropriated, are in process of collection, and obligations and expenditures may lawfully be incurred up to the amount of such estimated resources. When such certifications are made, there may exist lawful and enforceable obligations of a subdivision or taxing unit for the liquidation of which, funds are not immediately available, in the event there is a failure of these resources for any reason. A deficit in available funds, brought about as outlined above, may therefore exist at times and if such deficit should exist

at the end of a fiscal year, there would exist lawful and enforceable obligations of the subdivision or taxing unit which it was legally bound to meet and which might be described as "over-drafts".

A situation of this kind should not be confused with a situation where, at the end of a fiscal year, balances of encumbered appropriations exist and the moneys to meet the encumbrances are actually on hand, but the obligation for which the encumbrance was made remain for some reason or other unliquidated on the first day of January. In that case no additional appropriation need be made to authorize its payment, as will be hereinafter shown.

In some cases, fiscal officers have issued the certificates spoken of in Section 5625-33, General Code, to the effect that the amount required to meet a certain obligation or expenditure has been lawfully appropriated and is in the treasury of the subdivision or in process of collection, without any regard to the real facts of the situation. This has been done sometimes even when no appropriation exists. Other times when an appropriation of sufficient amount to cover the certificate exists, but sufficient funds to meet the obligation or expenditure are neither in the treasury nor in process of collection. Occasionally appropriating authorities have made appropriations illegally without regard to the certificate of estimated resources made by the budget commission. In such cases, claims made on these false certificates or as a result of such illegal appropriations have been referred to as "over-drafts."

Moneys expended ostensibly from a given fund in payment of obligations arising out of purposes falling within the purview of the particular fund may be regarded as an "over-draft" of that fund to the extent that there is not sufficient moneys to the credit of the fund to meet the expenditure at the time it is paid.

Likewise, a contractual obligation charged against a given fund as evidenced by the fiscal officer's certificate made at the time the obligation is incurred, being an obligation which could be met from that particular fund alone, may be regarded as creating an "over-draft" of the fund to the extent that sufficient moneys are not actually in the fund or in process of collection to meet the obligation when it is incurred.

In both such cases, the fiscal officer's certificates must necessarily have been false to the extent that such over-drafts were created, as either there was not an appropriation to meet the expenditure or the obligation or the appropriation has been made wrongfully and without regard to the estimated resources.

If an appropriation for any fund or for any purpose within such fund is made strictly according to law, that is, for no more in the aggregate than the estimated resources available for the said fund or purpose and no more fiscal officers' certificates in the aggregate are charged against the appropriation than the appropriation warrants, "over-drafts" of this latter kind will not be created.

The statutes are not entirely clear as to how these various kinds of so-called over-drafts arising in the various funds in the year 1932 should be handled after January 1, 1933, and as to their effect or bearing upon the authority to appropriate for the current fiscal year. A decision of this question must, in my judgment, be based upon a construction of Sections 5625-32 and 5625-33, General Code. Section 5625-32 provides, inter alia:

"\* \* \* \* At the close of each fiscal year, the unencumbered balance of each appropriation shall revert to the respective fund from which it was appropriated and shall be subject to future appropriations; pro-

vided, however, that funds unexpended at the end of such fiscal year and which had heretofore been appropriated for the payment or performance of obligations unliquidated and outstanding, shall not be required to be re-appropriated, but such unexpended funds shall not be included by any budget making body or board or any county budget commission in estimating the balance or balances available for the purposes of the next or any succeeding fiscal year.

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In the event of an over-draft in a given fund arising as a result of tax delinquencies, occasioning a shortage in such fund less than the amount theretofore estimated to be received and occurring as a result of certificates lawfully issued under Section 5625-33, it is relatively clear that the foregoing language of Section 5625-32 precludes the necessity of reappropriating for the current fiscal year. In this case, the shortage is still appropriated to the credit of the given fund in which such overdraft exists and is to be treated as an unexpended fund which shall not be included in estimating the balance available for such fund for the current fiscal year.

A more difficult question arises in the event of a so-called over-draft existing in a specific fund, which over-draft is occasioned by unlawful appropriations during the past year from such fund, in excess of the amount available for appropriation to such fund as shown by the official certificate of estimated resources or any amendments thereto, or occasioned by certificates having been issued under Section 5625-33 which were false. It becomes necessary to determine the effect of a false certificate of a fiscal officer attached to a contract or order involving the expenditure of money, reciting that the amount required to meet the same in the year 1932 has been lawfully appropriated for such purposes and is in the treasury or in process of collection to the credit of a given fund, free from any previous encumbrances.

Section 5625-33 provides that any such certificate of the fiscal officer attached to a contract "shall be binding upon the political subdivision as to the facts set forth therein." The Court of Appeals of Summit County had under consideration a certificate of a fiscal officer required by Section 5625-33, which was false, in the case of *Carmichael vs. Board of Education*, 32 O. A. 520. In this case, decided October 3, 1929, the court held as set forth in the syllabus:

"In the absence of fraud, the certificate of a fiscal officer, required by Section 5625-33, General Code (112 Ohio Laws, 406), attached to a contract, certifying that the amount required to meet the same is in the treasury or in process of collection, is, as to the facts set forth therein, binding upon the political subdivision and upon the taxpayers of said subdivision, though the statements set forth in said certificate are not true."

In the earlier case of *State, ex rel. vs. Cleveland Trinidad Paving Co.*, decided by the Court of Appeals of Franklin County March 28, 1929, 35 O. A. 118, the court in effect held a certificate issued under Section 33 of the Budget Act, which was false, not to be binding upon the political subdivision, but in that case the contract to which the false certificate was attached was held to be invalid. This decision of the Court of Appeals of Franklin County is clearly distinguishable from the later case of *Carmichael vs. Board of Education, supra*, and is not controlling as to the point here under consideration.

In view of the language of Section 5625-33, General Code, and the decision in the Carmichael Case, *supra*, it must be concluded that certificates of the fiscal officer attached to any contract or order involving the expenditure of money, reciting that the amount required to meet the same has been lawfully appropriated and is in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances, in the absence of fraud or collusion, is binding upon the subdivision and the taxpayers thereof, even though the certificate was false and such moneys were not in the fund or in process of collection. As stated in the case of *State ex rel. vs. Cleveland Trinidad Paving Co.*, with respect to this matter "when the certificate of the public officer to that effect is made the amount of the contract is thereupon charged against the fund."

In view of the binding effect upon the subdivision and the taxpayers thereof of false certificates issued under Section 5625-33, it must follow that such certificates constitute the same charge against the fund over-drawn as though they had been issued in compliance with law. The result is that over-drafts occasioned by binding obligations having been incurred against a given fund in excess of the amount appearing in the amended certificate of estimated resources as having been available for such fund, are in the same category as valid charges against such fund as are over-drafts occasioned by delinquencies in tax collections. All such over-drafts under Section 5625-32, *supra*, must be treated as against funds in process of collection unexpended at the end of the fiscal year and theretofore appropriated for the payment or performance of unliquidated and outstanding obligations. They need not be reappropriated and "shall not be included by any budget-making body or board or any county budget commission in estimating the balance or balances available for the purposes of the next or any succeeding fiscal year."

I am aware of the fact that in case the general fund has been substantially over-drawn in a given fiscal year the activities of the subdivision which are carried on by appropriations from the general fund must necessarily be extensively curtailed during the ensuing fiscal year, but, adhering to the opinion of the Court of Appeals that false certificates issued under Section 5625-33 are binding upon the political subdivision and its taxpayers, and to the language of Section 5625-32, it is my judgment that no other conclusion may be reached. In requiring subdivisions to follow budgetary procedure in the handling of public moneys, the legislature evidently intended that shortages in the various funds must be taken care of before additional moneys may be expended from such funds. It may be observed that the legislature has provided relief under such circumstances by authorizing the electors to vote additional levies for current expenses or for other governmental purposes as set forth in Section 5625-15, *et seq.*, General Code. Such emergencies might well have been the motivating cause for the enactment of such sections.

Inasmuch as the manifest purpose of the official certification of estimated resources made by a county budget commission to the taxing authority of a subdivision or taxing unit as directed by Section 5625-26 and 5625-27, General Code, is to fix the limitations of lawful appropriations to be made by the said taxing authority, within which limits obligations may be incurred and expenditures made during the fiscal year for which the appropriation is made, it follows that it is necessary for the budget commission to take into consideration such "over drafts" in making its official certificate of estimate resources for the subdivision or taxing unit. In order for the budget commission to take into consideration such over-drafts, it is necessary that they be officially brought to the budget

commission's attention. This is the purpose of the fiscal officer's certificate to the budget commission provided for by section 5625-27, General Code.

I am of the opinion that over-drafts of funds should be noted by the fiscal officer in making his certificate.

(2) By the terms of Section 5625-29, General Code, authority is extended to the taxing authority of a subdivision or taxing unit to postpone the passage of its annual appropriation measure until an amended certificate of the Budget Commission, showing actual balances is received, and in the meantime, to pass a temporary appropriation measure for meeting the ordinary expenses of the subdivision until not later than April 1st of the current year. Any appropriation existing by virtue of this temporary appropriation measure will lapse on April 1st and although this date should no doubt be regarded as directory in so far as the legality of an annual appropriation measure passed subsequent to that date is concerned, no expenditure of any kind may lawfully be made after April 1st until the annual appropriation measure is passed.

(3) It is difficult to conceive of the City of Toledo having an overdraft of its general fund at the end of the fiscal year of 1932 exceeding the total potential revenues that normally would be available for this fund for the fiscal year 1933. If such is the case, however, it is clear that the certificate of estimated resources of the budget commission, if made properly, would show that there were no resources available for appropriation to that fund. If there is no appropriation, there of course can be no true and lawful fiscal officers' certificates issued against the fund in pursuance of Section 5625-33, General Code. No expenditures for purposes coming within the purview of the general fund can therefore be made and no contracts requiring an expenditure of moneys normally chargeable to the fund can lawfully be entered into, providing the budget commission in making their certificate of estimated resources had taken into consideration the over-drafts.

(4) In answer to the last question it was shown that if over-drafts exceeded potential revenues there could not properly be certified by the budget commission that there were any resources available for appropriation or expenditure during the next fiscal year. In that case no expenditure could be made for payrolls or anything else as, clearly, there could be no lawful appropriation made.

You assume in this question, however, that the certificate of estimated resources made by the budget commission did show substantial resources available for appropriations made in pursuance of this estimate. The budget commission, in making its certificate, apparently did not take into consideration over-drafts, although it should have done so. This could be corrected, in my opinion, by proper action taken by a taxpayer or proper official. Until so corrected, however, the municipal authorities have a right to rely on the certificate of estimated resources as made and may make appropriations and expenditures accordingly.

(5) Section 669 of the City Code of the City of Toledo provides as follows:

"If an emergency shall arise in any of the departments requiring the immediate purchase of any supplies or materials, and not then possessed by the Commissioner of Purchases and Supplies, the head of said department, with the written approval of the Mayor, shall present to said Commissioner of Purchases and Supplies a requisition for such supplies or materials as are needed, together with a statement in writing of the facts creating such emergency, and the Commissioner of Purchases and Supplies shall have power, if in his judgment such emergency exists, to



immediately purchase such supplies and materials without advertising for bids therefor. The reason for such action by the Commissioner of Purchases and Supplies without advertising shall be communicated to the Director of Finance by said Commissioner of Purchases and Supplies, within ten days from the date of such purchase."

In the case of *City of Dayton vs. Bish, Auditor*, 104 O. S. 206, it was held as stated in the syllabus:

"The power of a municipality both to incur debts and to levy taxes may be restricted or limited by law and a municipality by adopting a charter cannot escape from limitations imposed thereon by the General Assembly."

In *Phillips vs. Hume*, 122 O. S. 11, the first branch of the syllabus recites:

"The power of municipalities to incur debts may be limited or restricted by general laws. Such limitations or restrictions are warranted by Section 6, Article XIII of the Constitution adopted in 1851 and also by Section 13 of Article XVIII of the amendments adopted in 1912. Such limitations or restrictions apply to all municipalities whether operating under charter or otherwise."

In *Phillips vs. Hume, supra*, where there were under consideration purchases of supplies without advertising as provided by the statutes of Ohio, made by the purchasing agent for the city of Lima, a charter city wherein provision was made for a purchasing agent with power to make purchases of supplies for the city in a manner different than that provided by general law, Judge Jones, in his opinion, said:

"It cannot successfully be disputed that the purchases and contracts for supplies made by the purchasing agent became debts; and the requirement for advertising contained in the statute was a restriction and a limitation upon the power of the municipality to incur debts."

I find no provision of general law authorizing municipalities to make purchases for emergency repairs or to make any other emergency expenditures different in manner from that of making other expenditures, except the provisions of Section 3965, General Code, relating to emergency repairs to a municipal waterworks. Whether such emergency expenditures in connection with the operation of other public utilities may be made without advertising, is a matter upon which I do not wish to be understood as expressing an opinion.

(5a) Section 4328, General Code, provides that for all expenditures of a municipality in excess of \$500.00 bids must be taken after due advertising therefor, I am of the opinion the provisions of this statute must be followed by a municipality in all cases involving the expenditure of more than \$500.00, regardless of the emergency character of the expenditure, except for repairs to a municipal waterworks and possibly in connection with the operation of other municipal utilities if warranted by proper municipal legislation or charter provision. Nowhere will be found any provision of general law exempting a municipality under any circumstances, from the requirements contained in Section 5625-33, General Code, as to the fiscal officer's certificate in the purchase of supplies or the making of expenditures regardless of whether or not an emergency exists.

The above statute makes an exception to the provisions of Section 4328, General Code, as to advertising for bids when an emergency arises in the operation of municipal waterworks. The emergency must be declared by a two-thirds vote of the municipal council which may authorize expenditures for such declared emergency purposes without advertising.

Nothing whatever is provided therein with reference to the fiscal officer's certificate.

I am informed this question as it applies specifically to purchases of this character made by the commissioner of purchases and supplies in Toledo is involved in litigation now pending in Lucas County. It therefore would be highly improper for me to express an opinion on the matter one way or the other.

(5b) Matters involved in this question are covered in the consideration of question No. 5, above.

(6) Where the certificate of the fiscal officer of a subdivision or taxing unit that funds have been duly appropriated and are in the treasury or in process of collection is properly and lawfully made, such certificate creates an encumbrance on the appropriation as of the date of its issuance, and the priority of liability on account of the contract or expenditure to which it refers, so far as payment from funds created by the particular appropriation is concerned, would be determined by the date of the said certificate. Prior in time would be prior in right. This is necessarily true because the certificate itself recites that the amount to meet the contract or expenditure has been duly appropriated and is in the treasury or in process of collection to the credit of an appropriate fund "*free from any previous encumbrance.*" (Section 5625-33, General Code.) If the amount covered by a later certificate is not "free from any previous encumbrance" the certificate is not true or valid. A fiscal officer's certificate as to funds being appropriated and in the treasury, if drawn against a valid appropriation, creates by its own force an encumbrance of the appropriation to the extent of the amount included therein.

Should an appropriation fail in whole or in part, because of a shortage in estimated resources upon which the appropriation is based, and as a consequence thereof the contract can not be met or the expenditure made from the current appropriation even though the fiscal officer's certificate be true and payment thereof is postponed for that reason until a succeeding fiscal year, those obligations bearing the earlier date would have precedence over those bearing a later date.

The reasons for this rule do not exist, however, where the facts stated in a fiscal officer's certificate are false, and although claims based on such false certificates are valid and binding obligations of the subdivision and may be enforced, in the absence of fraud or collusion, no priority exists among such claims, except as priority might be created by order of court.

If no fiscal officer's certificate is made, asserted obligation based upon the verbal orders of the mayor or head of a department are entirely void, and no question of priority arises.

7. A fiscal officer's liability for issuing false certificates is fixed by section 5625-37, General Code, which reads as follows.

"Any officer, employe or other person who issues any order contrary to the provisions of section 33 of this act (G. C. 5625-33), or who expends or authorizes the expenditure of any public funds, or who authorizes or executes any contract contrary to the provisions of this act

(G. C. §§ 5625-1 to 5625-39), unless payments thereon are subsequently ordered as provided in section 33, or expends or authorizes the expenditure of any public funds on any such void contract, obligation or order, unless subsequently approved as provided in such section, or issues a certificate under the provisions thereof, which contains any false statements, shall be liable to the political subdivision for the full amount paid from the funds of such subdivision on any such order, contract or obligation. Such officer, employe or other persons shall be jointly and severally liable in person and upon any official bond that he may have given to such subdivision to the extent of any payments of such void claim. The prosecuting attorney of the county or the city solicitor, or other chief law officer of the subdivision, shall enforce this liability by civil action brought in any court of appropriate jurisdiction in the name of and on behalf of the municipality, county or subdivision. In case the prosecuting attorney, city solicitor or other chief law officer of the subdivision fails upon the written request of any taxpayer to institute action for the enforcement of such liability, such taxpayer may institute suit in his own name in behalf of the subdivision."

With respect to matters dealt with in the above statute the responsibility and liability of public officers, employes and other persons in the administration of the law relating to the expenditure of public money, is definitely and clearly set out in language that can not be misunderstood. The responsibility and liability of public officers and employes, as fixed by the statute, is personal to the officer, employe or other person coming within its terms, and ignorance of the law or action taken upon the advice of someone else, be he the lawfully constituted legal adviser of such officer, employe or other person, or not, does not exonerate him from such responsibility or liability. It will be observed upon a reading of the above statute that the liability therein fixed upon a public officer or employe is not predicated upon knowledge or lack of knowledge of his duties. He is presumed to know his duties and the limitations thereof under the law.

The Director of Law of the City of Toledo, by the terms of Sections 109 and 112 of the charter of said city is, for administrative purposes, constituted the legal adviser and counsel for the city and for all officers and departments of the city, in matters relating to their official duties, but I know of no rule of law that permits a public officer to hide behind "advice of counsel" to avoid the consequences of positive violations of a law such as Section 5625-37, General Code.

(8) In the consideration of this question, I assume that the salaries mentioned have been duly and definitely fixed by law either by specific statutory or charter provisions or by ordinance.

Salaries so fixed are liabilities for which appropriations must be made within possible limitations, without the exercise of any discretion whatever on the part of the appropriating authority, and such appropriations should be definite and specific. Section 5625-29, General Code, provides *inter alia* :

"Appropriation measures shall be so classified as separately to set forth the amounts appropriated for each office, department and division and within each the amount appropriated for personal service."

There are, of course, limitations within which appropriations may be made as hereinbefore pointed out. These are set forth in Section 5625-30, General Code,

which provides in substance, that the total amount of appropriations from each fund shall not exceed the total of the estimated revenue available for expenditures therefrom as certified by the Budget Commission, or in case of appeal by the Tax Commission of Ohio. It is also provided therein that an appropriation measure shall not be effective until the county auditor certifies that the appropriation does not exceed estimated revenues as so certified. As I have no facts before me to the contrary, I assume that appropriations for the salaries mentioned may be made within possible limitations.

In support of the assertion that fixed salaries as well as other fixed liabilities of a political subdivision call for an appropriation to be made by the appropriating authority without the exercise of any discretion whatever about the matter, reference may be made to the case of *Jenkins, Aud., vs. State ex rel. Jackson County Agricultural Society*, 40 O. App. 312. It is held in this case as stated in the syllabus:

“In preparing an appropriation measure under Section 5625-29, General Code, the taxing authority is bound to provide first for all those expenditures made imperative by statute.”

Although this case did not involve an appropriation for salaries, but rather the payment from the county treasury to a county agricultural society for the purpose of encouraging agricultural fairs as provided by Section 9894, General Code, the court said in the course of his opinion:

“At the time the new budget law was passed there were many sections of which 9894 was but one, creating fixed and inescapable liabilities of a county, *such as salaries of county officers*, and it is unthinkable that it was the purpose of the legislature to make any claims of this character subject to the action or non-action of the county commissioners. Such a construction would impose legislative functions on the commissioners and render the act of doubtful certainty.”

See also *State ex rel. Justice vs. Thomas, Auditor*, 35 O. App. 250.

It clearly follows, in my opinion, that it is incumbent upon the council of a municipality to appropriate for salaries of heads of departments and divisions specified by charter as well as for other expenditures fixed and made imperative by law, charter provisions or ordinance, including amounts necessary to pay final judgments against the subdivision except in condemnation of property cases (Section 5625-8, General Code.) Of course, such appropriations are limited to the estimated resources as shown by the budget commission's certificate, and if no resources are shown, no appropriation can be made.

Basing my answers on a situation where the general fund of a municipality is overdrawn in one fiscal year in an amount exceeding potential revenues which would normally be available for the uses of this general fund during the succeeding fiscal year had no overdrafts on the fund existed, as spoken of in your third question, I am of the opinion, in specific answer to your questions:

1. A fiscal officer's certificate to the budget commission made in pursuance of Section 5625-27, General Code, should show the overdrafts of each fund as they exist. The effect thereof, in the event such overdrafts in the aggregate exceed the potential revenues available for the uses of the particular fund during the ensuing fiscal year is to require the budget commission to certify that there

are no estimated resources available for appropriation to that fund during the next fiscal year.

2. Where an emergency appropriation measure is made by the taxing authority of a subdivision or other taxing unit in pursuance of Section 5625-29, General Code, and the passage of the annual appropriation measure is postponed until after April 1, of the current year, no expenditure of any kind can be made after the said first of April until the annual appropriation measure is passed.

3. Fiscal officers in issuing certificates in pursuance of Section 5625-33, General Code, are limited by the appropriations and the appropriations are limited by the estimated resources. Appropriating authorities are not bound, in my opinion, to look back of the certificate of estimated resources as made to it by the budget commission. Even though circumstances are such that sufficient resources do not exist on account of overdrafts to merit the budget commission in certifying that there are "estimated resources" in accordance with which appropriations may be made, if it does so certify, appropriating authorities may appropriate in accordance with such certification, until it is corrected, and fiscal officers may regard such appropriations as having been properly made.

If the budget commission takes into consideration the overdrafts and certifies accordingly, assuming that the overdrafts exceed the potential revenues for the ensuing fiscal year no fiscal officer's certificates in pursuance of Section 5625-33, General Code, may lawfully be made.

4. Assuming that the budget commission did not take into consideration the overdrafts, expenditures for any lawful purpose may be made within the limits of the appropriation made in reliance on the budget commission's certificate.

5. No authority exists for a municipality, charter or otherwise, to make expenditures for emergency purposes in a manner different than for other purposes except the authority extended by Section 3965, General Code, to make emergency repairs to a municipal waterworks.

5a. Matters involved in this question as it applies to the city of Toledo, are now in litigation.

5b. This question is answered under the head of question No. 5.

6. No priority exists among claims against a political subdivision based on the false certificate of a fiscal officer. If the fiscal officers certificate is true, the principle, prior in time is prior in right, would apply. If no certificate had been issued there can be no valid claim asserted, based merely on the verbal orders of the mayor or the head of a department.

7. The liability of a fiscal officer of a subdivision for issuing a false certificate, ostensibly in pursuance of the provisions of Section 5625-33, General Code, is fixed by the provisions of Section 5625-37, General Code, and his acting on the advice of the law director or on the orders of the mayor will not exonerate him from the liability imposed by this statute.

8. It is incumbent on the appropriating authority of a municipality to provide first for all those expenditures made imperative by statute, charter provision or ordinance, such as salaries of heads of departments and divisions specified by charter, providing it is possible to do so within the limits of resources available for appropriation.

Respectfully,

JOHN W. BRICKER,

*Attorney General.*