

Note from the Attorney General's Office:

1954 Op. Att'y Gen. No. 4660, syllabus,
paragraph 1, modified by 1979 Am. Sub.
H.B. 760, 138 Ohio Laws, Part II, 3544,
3545-3546 (expanding the dog warden's
enforcement authority to include registered
dogs, with limitation).

4660

1. HUMANE SOCIETY—AUTHORITY OF COUNTY COMMISSIONERS TO CONTRACT—LIMITED TO COMPENSATION FOR SERVICES IN SHELTERING, CARING FOR AND DISPOSING OF UNLICENSED DOGS DELIVERED TO SOCIETY BY COUNTY DOG WARDEN AND DEPUTY WARDENS—SECTIONS 955.15, 1717.01 ET SEQ., R. C.
2. DOG WARDENS AND DEPUTIES—COUNTY COMMISSIONERS REQUIRED BY LAW TO FIX AND PAY COMPENSATION—DOG KENNEL FUND—COMMISSIONERS MAY NOT AUTHORIZE HUMANE SOCIETY TO FIX COMPENSATION AND PAY SAME OUT OF LUMP SUM PAID BY COUNTY—SECTIONS 955.01, R. C., 5652 ET SEQ., G. C.
3. IT WOULD BE ILLEGAL TO PAY ANY AMOUNT TO HUMANE SOCIETY DURING CURRENT YEAR, BASED ON ESTIMATE OF SURPLUS EARNINGS DURING CURRENT YEAR—SURPLUS NOT DETERMINABLE OR PAYABLE UNTIL DECEMBER MEETING OF COUNTY COMMISSIONERS—SECTION 955.27 R. C.

SYLLABUS:

1. The authority of the county commissioners under Section 955.15, Revised Code, formerly Section 5652-8, General Code, to contract with a humane society organized under Section 1717.01, et seq., Revised Code, formerly Section 10062 et seq., General Code, is limited to compensation for services in sheltering, caring for, and disposing of unlicensed dogs delivered to it by the county's dog warden and deputy wardens.

2. The county commissioners are required by law to fix and pay the compensation of the county's dog wardens and deputies out of the dog and kennel fund established under Section 955.01, et seq., Revised Code, formerly Section 5652 et seq., General Code, and may not authorize a humane society to fix such compensation and pay the same out of a lump sum paid to it by the county.

3. If any portion of the amount to be paid a humane society during the current year is based on an estimate of surplus earnings during the current year, such payment, whether payable monthly or otherwise, would be illegal, since such surplus is not determinable or payable under the provisions of Section 955.27, Revised Code, formerly Section 5653, General Code, until the December meeting of the county commissioners.

Columbus, Ohio, December 21, 1954

Hon. Frank T. Cullitan, Prosecuting Attorney
Cuyahoga County, Cleveland, Ohio

Dear Sir :

I have before me your request for my opinion, reading as follows :

“On the 23rd of March 1953, the Board of County Commissioners of Cuyahoga County adopted a resolution, a certified copy of which is hereto attached, by the terms of which said Board entered into an agreement with The Cleveland Animal Protective League, employing said League to furnish and perform all the services provided by law for the seizing, transporting, impounding, feeding, caring for and destroying of unlicensed dogs in the county. In accordance with the provisions of Section 5652-8 G. C., and pursuant to the agreement in said resolution set forth, the Board of County Commissioners on the 23rd day of March 1953, by resolution duly adopted, a certified copy of which is also attached, designated and appointed the chief humane agent of The Cleveland Animal Protective League as Dog Warden of Cuyahoga County, and eighteen other humane agents of said League as deputy dog wardens of said county. You will note that the entire consideration to be paid by the County to the League will be paid in monthly installments from the Dog and Kennel Fund. Included in this consideration for the total services is the matter of compensation to the County Dog Warden and deputy dog wardens.

“For your information, this office approved the legal validity of the agreement, based upon your 1952 Opinion No. 1321.

“Subsequent to the execution of the agreement and the appointment of the Dog Warden and deputy dog wardens, the local office of the Bureau of Inspection and Supervision of Public Offices questioned the validity of the agreement. That office points out that under the provisions of Section 5652-7 G. C., the County Commissioners are required to fix the compensation of the County Dog Warden and deputies. It is contended that such compensation should be paid by the County Commissioners to the Dog Warden and the deputy dog wardens. It is also asserted

that this agreement is in conflict with the second syllabus of the 1938 Opinion of the Attorney General No. 2614, which is not cited or discussed in your above-mentioned 1952 opinion.

“The specific question we wish to submit for your opinion is the following:

“Where the Board of County Commissioners enters into an agreement with a humane society organized as provided by Sections 10062-10067 G. C., employing said society to furnish and perform all the services provided by law for the seizing, transporting, impounding, feeding, caring for and destroying of unlicensed dogs in the county for a total fixed consideration which includes compensation to the County Dog Warden and deputies, and where the Board of County Commissioners, acting under authority of Section 5652-8 G. C. and pursuant to such agreement, designate and appoint officers regularly employed by such society to act as County Dog Warden and deputy dog wardens, is such society precluded from paying the compensation of such Dog Warden and deputies from the total fixed consideration received by it from the county, or must such compensation be paid by the Commissioners to such Dog Warden and deputies out of the Dog and Kennel Fund?”

While your request appears to present the single question as to the right of the county commissioners under a contract with a Humane Society to permit such society to fix and pay the salaries of the dog warden and deputies out of funds turned over to such society by the county, I deem it necessary to consider all of the statutes relative to the allowable relations between the commissioners and such society.

The statutes relative to the seizing and disposition of dogs are found in Section 955.01 et seq., Revised Code, Section 5652 et seq., General Code. Section 955.12, Revised Code, former Section 5652-7, General Code, requires the county commissioners to appoint or employ a dog warden and deputies. That section reads in part as follows:

“The board of county commissioners *shall appoint or employ a county dog warden and deputies* to such number, for such periods of time, and at such compensation as such board deems necessary to enforce sections 955.01 to 955.27, inclusive, and 955.29 to 955.38, inclusive, of the Revised Code.

“Such warden and deputies shall each give bond in a sum not less than five hundred dollars and not more than two thousand dollars conditioned for the faithful performance of their duties. * * *”

It will be noted that this duty to appoint or employ the warden and deputies is mandatory in its wording. It will further be noted that it is the duty of the commissioners to fix the compensation of these appointees. Let it be noted further that these appointees are treated as other officers and employes, in that they are required to give bond for the faithful performance of their duties.

Without quoting at length, it will be noted that this section further provides that these officers are to keep records and make weekly reports in writing to the county commissioners. They are given the same police powers as are conferred on sheriffs and police officers in the performance of their duties; including power to summon bystanders to their assistance; and authority to serve writs and other legal process.

Section 955.15, Revised Code, formerly Section 5652-8, General Code, requires the county commissioners to provide special facilities for seizing dogs and also a special place for impounding and devices for destroying them. The portion of this section bearing on these duties reads as follows:

*“The board of county commissioners shall provide nets and other suitable devices for the taking of dogs, in a humane manner, provide a suitable place for impounding dogs, make proper provision for feeding and caring for the same, and provide humane devices and methods for destroying dogs. In any county in which there is a society for the prevention of cruelty to children and animals, having one or more agents and maintaining an animal shelter suitable for a dog pound and devices for humanely destroying dogs, the board need not furnish a dog pound, but the county dog warden shall deliver all dogs seized by him and his deputies to such society at its animal shelter, there to be dealt with in accordance with law. The board shall provide for the payment of reasonable compensation to such society for its services so performed out of the dog and kennel fund. * * *”*

(Emphasis added.)

I call special attention to the fact that the above provision authorizes the commissioners to contract with a society of the character named, for the *sheltering* of dogs that are taken and for their *humane destruction*, and where such arrangement has been made it is the duty of the county dog warden to “deliver all dogs seized by him and his deputies to such society * * * there to be dealt with in accordance with law.” The county commissioners are authorized to “provide for the payment of reasonable compensation to such society for its services so performed out of the dog

and kennel fund." There is nothing in this provision that goes any further or that authorizes the commissioners to contract with such society for seizing the dogs, but the power of contract appears clearly to be limited to services of the society in caring for them in its animal shelter and disposing of them.

I do not find in this section or in any other provision of the statutes any authority whereby the county commissioners may turn over to such society all of the duties of the commissioners, and their control over the dog warden and deputies in seizing and disposing of dogs.

Relative to the employment of the agents of the society as dog wardens and deputies, this same Section 955.15, Revised Code, formerly Section 5652-8, General Code, provides:

" * * The board may designate and appoint any officers regularly employed by any society organized under section 1717.02 to 1717.05, inclusive, of the Revised Code, to act as county dog warden or deputies for the purpose of carrying out sections 955.01 to 955.27, inclusive, and 955.29 to 955.38, inclusive, of the Revised Code, if such society whose agents are so employed owns or controls a suitable place for keeping and destroying dogs."*

(Emphasis added.)

Bearing in mind that the commissioners have a primary duty to appoint or employ a dog warden and deputies and fix their compensation, and that these men so appointed are treated by the law as public officers and given extensive powers, and having in mind the provisions of the portion of the statutes last quoted, it seems to me very clear that the powers of the county commissioners in this respect begin and end with the right to select as its appointees the same persons who have been appointed as officers of such society. But they do not thereby cease to be public employes, and there is nothing in the law which authorizes the whole operation of the seizing and disposing of dogs to be turned over en masse to the society. Furthermore, I find no authority whereby the commissioners may authorize such society to fix and pay the compensation of the county's officers out of a lump sum to be paid to the society either monthly or otherwise.

In Opinion 2614, Opinions of the Attorney General for 1938, page 1234, to which your letter refers, there was presented to my predecessor a contract between the county commissioners of your county and the Cleveland Animal Protective League, which appears to be quite similar

to the one which you now present with your letter between the same parties. That contract provided in effect that the entire administration of the dog law in said county was turned over to the league for a fixed compensation, to be paid by the county at the rate of \$5,000 per month, and one of the questions asked was :

“Does Section 5652-8, General Code, authorize the county commissioners to contract with the Society for the entire administration of the dog law or only for the housing, feeding, and disposition of dogs?”

It was held as disclosed by the second paragraph of the syllabus :

“Neither under the provisions of Section 5652-8, General Code, nor under the provisions of any other section, are the county commissioners authorized to contract with any private society or organization of any kind for the entire administration of the law relating to the licensing of dogs and kennels.”

Commenting on this proposition it was said at page 1240, of the opinion :

“Under the foregoing section, the General Assembly has seen fit to enact two provisos to the general requirement that the county commissioners shall provide all equipment for the taking, housing and destruction of dogs. The first is to the requirement that the commissioners provide a suitable place for impounding and caring for dogs and also humane devices and methods for destroying dogs, to wit, that under the circumstances therein set forth, the commissioners shall be relieved of this obligation and deliver all dogs seized by the dog warden and his deputies to the society having such facilities. There is clearly no authority in this proviso for delegating to any private organization the administration of the dog and kennel license law. The second proviso merely authorizes the designation and appointment of any officer or officers regularly employed by any society therein referred to, to act as dog wardens or deputies, providing such society has a suitable place for keeping and destroying dogs.

“It is perfectly manifest that neither under the provisions of Section 5652-8, General Code, nor under the provisions of any other section, are the county commissioners authorized to contract with any private society or organization of any kind for the entire administration of the law relating to the licensing of dogs and kennels.”

The contract which you have submitted with your request appears in effect to attempt what that opinion held could not be done. I note your

statement that the present agreement was approved on the basis of my Opinion 1321, dated April 4, 1952, Opinions of Attorney General for 1952, page 263. That opinion was rendered to the Bureau of Inspection and Supervision of Public Offices, and was in answer to a number of questions submitted, and was intended as a guide to the Bureau in reference to certain proposed findings.

I assume that your conclusion that present contract was authorized by the opinion just referred to, would grow out of a reading of the first and second paragraphs of the syllabus, which were as follows:

"1. Section 5652-8, General Code, grants authority to county commissioners to designate and appoint an officer or officers regularly employed by a humane society organized as provided by Sections 10062 and 10067, General Code, to act as county dog warden or deputy county dog wardens, to perform all the duties prescribed by law to be performed by such dog warden and deputies in seizing, impounding, redeeming and destroying unlicensed dogs, if such society owns or maintains a suitable place for keeping and destroying dogs.

"2. Where an officer or officers of a humane society are designated and appointed by a board of county commissioners, pursuant to Section 5652-8, General Code, to act as county dog warden or deputy dog warden, the amounts that may be expended by the county commissioners from the dog and kennel fund to reimburse such society for the expenses incurred in seizing, impounding and destroying dogs are only limited by the provisions of Section 5652-13, General Code, to the extent that there be reserved for the payment of animal claims referred to in Section 5653, General Code, a sum equal to the total amount of animal claims filed in said calendar year, or an amount equal to the total amount of animal claims paid or allowed the preceding year, whichever amount is larger."

In the light of the foregoing analysis of the pertinent statutes, the word "seizing" should be deleted from the second paragraph of the syllabus, and also from that portion of the opinion leading to the conclusion thus stated, and I hereby modify the opinion in that respect.

The second question propounded by the Bureau was:

"If such agents may be appointed, and the county commissioners determine to pay a portion of the dog and kennel receipts to the humane society to reimburse the society for expense incurred in fulfilling their agreement, would such payments to the society come within the meaning of Section 5652-13, General

Code, and as such be limited to the amount designated by this section to be used for seizing, impounding and destroying dogs?"

Upon further reexamination of the opinion, I am now convinced that the answer to this second question and the syllabus above quoted did not completely cover the question. That answer merely quoted Section 5652-13, General Code, now Section 955.20, Revised Code, and discussed the effect of the amendment of 1949, whereby the last paragraph was added, authorizing the commissioners to appropriate more than the original 50% of the gross receipts of the dog and kennel fund for the use and purpose of the dog warden in administering the general provisions of the law.

This section, in effect, provided for the payment out of the dog and kennel fund of all expenses relative to the licensing of dogs, the expense of seizing and disposing of unlicensed dogs, and the payment of animal claims. Included, of course, would be such sum as would lawfully be paid pursuant to contract with a society such as the law specifies, for housing and disposing of dogs which have been seized and turned over to such society by the dog warden and his deputies. To cover the question fully, attention might properly have been directed to the provisions of Section 5653, General Code, now Section 955.27, Revised Code, which authorized the payment of certain sums to a society of the character referred to, *but only after it has been determined at the December session of the county commissioners that there was a certain balance in the dog and kennel fund over and above the amounts which must have been provided for under Section 5652-13, General Code.* Section 955.27, Revised Code, formerly Section 5653, General Code, reads as follows:

"After paying all necessary expenses of administering the sections of the Revised Code relating to the registration, licensing, seizing, impounding, and destroying of dogs, making compensation for injuries to livestock inflicted by dogs, and after paying all horse, sheep, cattle, swine, mule and goat claims, the board of county commissioners *at the December session*, if there remains more than two thousand dollars in the dog and kennel fund for such year in a county in which there is a society for the prevention of cruelty to children and animals, incorporated and organized by law, and having one or more agents appointed pursuant to law, or any other society organized as provided in sections 1717.02 to 1717.05, inclusive, of the Revised Code, that owns or controls a suitable dog kennel or a place for the keeping and destroying of dogs which has one or more agents appointed and

employed pursuant to law, shall pay to the treasurer of such society, upon warrant of the county auditor, *all such excess as the board deems necessary for the uses and purposes of such society.*

“In a county in which there is such a society, after the board has paid the society such excess as it deems necessary, or in any county in which there is no such society, if there remains in such fund a sum in excess of ten thousand dollars, after all expenses chargeable to such fund have been paid, such excess shall be transferred to the county general fund.”

(Emphasis added.)

Aside from this provision in Section 955.27, Revised Code, formerly Section 5653, General Code, and the authority given in Section 955.12, Revised Code, formerly Section 5652-8, General Code, which I have already discussed, to pay the society for housing, caring for, and disposing of dogs, I do not find anything in the statutes which authorizes payments to be made to the society, and certainly not for their services in seizing stray dogs or for administering any or all of the other features of the dog law.

Further referring to the 1952 opinion, in its answer to the third submitted question, I call your attention to what was said under paragraph (c). After quoting a portion of Section 5653, *supra*, now Section 955.27, Revised Code, the opinion continues with this statement:

“Your question relative to this action appears to be whether the county commissioners may make such payment monthly, or only after determination of the excess in such fund at the December meeting of the county commissioners. In view of the clear language of this section, providing that this action may be taken at the December session, and in view of the obvious fact that until that time they cannot determine that there is such a balance, or its amount, the answer to your question appears to me to be very clear that such payments cannot be made monthly, but only after the December meeting of the county commissioners.”

I again direct attention to the provisions of Section 955.27, Revised Code, formerly section 5653, General Code. That section clearly provides for the payment of a subsidy to a society such as has been mentioned. This subsidy has nothing to do with the amount that may have been paid such society for its services in housing and disposing of dogs pursuant to the authority of Section 955.15, Revised Code, formerly Section 5652-8, General Code. Nor does it necessarily have anything to do with dogs.

Such society organized under the provisions of Section 1717.01, et seq., Revised Code, is what is designated as a humane society, and its general purposes are described in Section 1717.02, Revised Code, formerly Section 1006, General Code:

“The objects of the Ohio humane society, and all societies organized under Section 1717.05 of the Revised Code, shall be the inculcation of humane principles and the enforcement of laws for the prevention of cruelty, especially to children and animals. To promote those objects such societies may acquire property, real or personal, by purchase or gift.” * * *

It will be seen that these provisions have nothing to do with the seizing of unlicensed dogs or with the payment which the county commissioners are authorized to make to such society pursuant to contract for its services in disposing of such dogs, and such contract and payments thereunder are not to be confused with the subsidy authorized by the section last referred to.

We may therefore by way of recapitulation undertake to state the entire plan contemplated by law as to the dog and kennel fund, and the uses to which it may be put.

This fund arises under Section 955.01, Revised Code, formerly Section 5652, General Code, by the imposition of a registration fee for all dogs, and under Section 955.04, Revised Code, formerly Section 5652-1, General Code, a registration fee on dog kennels.

Section 955.12, Revised Code, formerly Section 5652-7, General Code, requires the commissioners to appoint a dog warden and deputies to enforce the provisions of the law relative to the licensing of dogs, the impounding and destruction of unlicensed dogs, and the payment of claims for damages inflicted on livestock by dogs, and requires the county commissioners to fix the compensation of such officers.

Section 955.15, Revised Code, formerly Section 5652-8, General Code, requires the commissioners to provide devices for the taking of dogs, and to provide a suitable place for impounding them, and suitable devices for destroying them in a humane manner. However, it allows the commissioners in any county in which there is a humane society, having a dog pound and having facilities for destroying dogs, to contract with such society for caring for and destroying them. The right of contract goes no further. The section requires that the county dog warden shall deliver

all dogs seized by him and his deputies, to such society for such care and disposition.

The same section authorizes the county commissioners to designate and appoint as its *dog warden and deputies* officers or agents who are regularly employed by such society.

Section 955.20, Revised Code, formerly Section 5652-13, General Code, provides for the expenditures from the dog and kennel fund, to wit, payment of the general overhead, all expenses incident to the seizing, caring for, and disposing of unlicensed dogs, including the salaries of its own employes and the amount paid by contract with the society for its services above specified and payment of claims for livestock injured or killed by dogs.

Section 955.27, Revised Code, formerly Section 5653, General Code, provides for the disposition of a surplus arising after all of the foregoing expenses have been paid, including the grant of a subsidy to such humane society "for the uses and purposes of such society."

It is not easy to determine just how far the contract which you submit exceeds the power of the county commissioners. It does appear clear that to the extent that it undertakes to turn over to the society the task of seizing and transporting the dogs, it is beyond the power authorized by law.

Furthermore, in so far as it permits the society to fix the compensation of the dog warden and deputies, and pay them out of the lump sum to be paid by the county to the society, it is beyond the granted power.

Whether or not the amount to be paid the society monthly during the contract year is based in any degree upon the idea of the subsidy grant permitted by Section 955.27, Revised Code, is difficult to determine. To the extent that the amount to be paid pursuant to such contract is in excess of the reasonable value of the service which the society may lawfully render, such payment would be illegal.

Accordingly, it is my opinion and you are advised:

1. The authority of the county commissioners under Section 955.15, Revised Code, formerly Section 5652-8, General Code, to contract with a humane society organized under Section 1717.01, et seq., Revised Code, formerly Section 10062 et seq., General Code, is limited to compensation

for services in sheltering, caring for, and disposing of unlicensed dogs delivered to it by the county's dog warden and deputy wardens.

2. The county commissioners are required by law to fix and pay the compensation of the county's dog wardens and deputies out of the dog and kennel fund established under Section 955.01, et seq., Revised Code, formerly Section 5652 et seq., General Code, and may not authorize a humane society to fix such compensation and pay the same out of a lump sum paid to it by the county.

3. If any portion of the amount to be paid a humane society during the current year is based on an estimate of surplus earnings during the current year, such payment, whether payable monthly or otherwise, would be illegal, since such surplus is not determinable or payable under the provisions of Section 955.27, Revised Code, formerly Section 5653, General Code, until the December meeting of the county commissioners.

Respectfully,

C. WILLIAM O'NEILL

Attorney General