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1. UTILITY BOARD, PUBLIC—CREATED BY MUNICIPAL COUNCIL—BOARD SUCCEEDS TO ALL POWERS OF DIRECTOR OF PUBLIC SERVICE AS TO MANAGEMENT AND OPERATION OF UTILITIES—SECTIONS 3956, 4326 G. C.—CONTRACTS—DIRECTOR OF PUBLIC SERVICE—SECTIONS 4326-1, 4328 ET SEQ., G. C.

2. MUNICIPAL COUNCIL — PUBLIC UTILITIES BOARD CREATED—COUNCIL MAY IMPOSE ON BOARD DUTIES IN ADDITION TO THOSE IMPOSED BY LAW ON DIRECTOR OF PUBLIC SERVICE—MAY NOT RELIEVE BOARD FROM ANY REQUIREMENTS AND RESTRICTIONS PLACED UPON DIRECTOR OF PUBLIC SERVICE BY SECTION 4328 ET SEQ., G. C. AS TO PUBLIC UTILITIES BELONGING TO MUNICIPALITY—MAY NOT CONFER UPON DIRECTOR OF PUBLIC SERVICE ANY AUTHORITY TO MAKE SUCH CONTRACTS—SECTION 4326-1 G. C.

SYLLABUS:

1. When a public utility board is created by a municipal council pursuant to the provisions of Section 4326-1, General Code, such board succeeds to all the powers of the director of public service relative to the management and operation of the public utilities of such municipality mentioned in Sections 3956 and 4326 of the General Code, including the power to make all necessary contracts relative thereto; and in the making of such contracts such board is subject to the requirements and limitations contained in Section 4328 et seq. applying to those utilities when in the hands of the director of public service.

2. A municipal council having, pursuant to Section 4326-1, General Code, created a public utilities board, may impose upon such board duties in addition to those imposed by law on the director of public service, but may not relieve such board from any of the requirements and restrictions placed upon the director of public service by Section 4328 et seq., General Code, relative to the making of contracts required in the management and operation of the public utilities belonging to such municipality, and may not confer upon the director of public service any authority to make such contracts.

Columbus, Ohio, January 5, 1949

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen.

I have before me your communication, in which you request my opinion, your letter reading as follows:

"We are in receipt of a request from the officials of the City of Sidney, Ohio, through their Solicitor, Mr. Roland E. Beery, asking for interpretation of the provisions of Section 4326-1, of the General Code. Said statute was enacted by the 95th General Assembly through the passage of H. B. No. 246, which became effective August 11, 1943.

"Enclosed herewith are a copy of the letter received from the city solicitor and a copy of Ordinance No. 2400, passed by the council of the city of Sidney, January 5, 1948, creating a Board of Public Utilities under authority of Section 4326-1, General Code.

"Inasmuch as the aforesaid Section 4326-1, General Code, is a comparatively new statute, and the question involved in the interpretations thereof have not been previously considered and ruled upon by either the courts or your office, we respectfully request that you consider the enclosures and give us your formal opinion in answer to the following questions:

1. Does a Public Utilities Board, created under authority of Section 4326-1, General Code, possess all of the powers of a Director of Public Service with respect to the management and operation of municipally owned public utilities, or, are the powers vested in such board limited to those duties only as specified under Sections 3956 and 4326 of the General Code?
2. If the authority to make contracts is vested in the Board, is there a limitation on the amount they can spend without authority from Council, and without advertising for bids?
3. Does Council, under the provisions of Section 4326-1, General Code, have the authority to designate the powers and duties of the Public Utilities Board, and to delegate to such Board the power to execute contracts in the manner provided under Section 4328 of the General Code?

4. In the absence of any provision by ordinance of Council, relative to the powers and duties of the Public Utilities Board in the making of contracts for materials and services required by the utility departments under their supervision, how shall such contracts be authorized and made?

5. If the authority to make public contracts is found to be vested in a Board of Public Utilities created under Section 4326-1, General Code, may Council lawfully, by ordinance, limit the powers of the Board and vest such authority in the Director of Public Service?"

I note upon examination of the ordinance referred to, that it undertakes to commit to the board of public utilities which it creates, the management and control of the following departments or activities, to-wit:

"1. Municipally owned sewers, sewer works, disposal work, sewer construction, service and engineering, sewer billing and all other sub-departments or activities pertaining to, or connected with the municipal sewer system, including both sanitary and storm sewers.

"2. Municipally owned water works, pumping stations, storage facilities, treatment plants, waterworks construction, service and engineering, water billing and all other sub-departments or activities pertaining to or connected with the municipal waterworks system, and including the fire protection system.

"3. Municipally owned garbage collection and incinerator service, collection facilities for refuse and garbage, treatment plants, disposal facilities, service and billing and all sub-departments and activities pertaining to, or connected with the collection of refuse and garbage and the disposal thereof by or through municipally owned facilities."

Section 6 of said ordinance, provides as follows:

"All power, authority, responsibility, management, and control of the public utilities defined in Sections 4 and 5 hereof, or pertaining thereto, heretofore granted to or exercised by the director of public service, shall, and does hereby vest in said Board of Public Utilities."

Section 4326-1, General Code, reads as follows:

"Whenever in any municipal corporation, the council or governing body thereof, shall, by ordinance, declare it to be essential to the best interests of such municipal corporation, *the duties relating to the management and operation of municipally owned*

public utilities conferred upon the director of public service by sections 3956 and 4326 of the General Code, shall be vested in a board composed of three members. The mayor, with the consent of the council or governing body of such municipal corporation, shall appoint one member for a term of two years, one member for a term of four years and one member for a term of six years. At the expiration of each term of office an appointment shall be made for a term of six years. In case of vacancy by death, resignation or removal from the municipal corporation of a member of such board, the mayor with the consent of the council or governing body of such municipal corporation shall immediately appoint a successor to fill the vacancy for the unexpired term. The council or governing body of such municipal corporation shall designate the compensation, if any, to be paid to said members; their duties, authority and powers; and also it shall designate whether such members shall be required to give bond, and, if so, in what amount. The cost of any required bond shall be borne by the municipal corporation."

(Emphasis added.)

Section 3956, General Code, reads:

"The director of public service shall manage, conduct and control the water works, furnish supplies of water, *collect water rents* and appoint necessary officers and agents.

(Emphasis added.)

Section 4326, General Code, reads as follows:

"The director of public service shall manage municipal water, lighting, heating, power, garbage and other undertakings of the city, parks, baths, play grounds, market houses, cemeteries, crematories, sewage disposal plants and farms, and shall make and preserve surveys, maps, plans, drawings and estimates. He shall supervise the construction and have charge of the maintenance of public buildings and other property of the corporation not otherwise provided for in this title. He shall have the management of all other matters provided by the council in connection with the public service of the city."

The one question that appears to underlie your inquiry is whether the reference in said Section 4326-1 to Sections 3956 and 4326, General Code, and the omission of any reference to Section 4328 et seq., General Code, which outline his procedure in making contracts deprives the public utilities board, when created, of any power of contract and leaves the power of making contracts as to such utilities in the hands of the director of public service. It is true as you state, that there have been no adjudica-

tions either by the courts or by this office, as to Section 4326-1. My opinion must therefore be one of first impression. It is quite obvious that the public utilities belonging to a municipality, could not be managed and operated without making contracts and incurring obligations and expenditures. Management and operation of a public utility would evidently result in speedy ruin if no one were vested with the right to make such contracts as may be necessary for their construction and their proper maintenance, repair and extension, as well as the employment of necessary personnel for their operation. In my opinion, when power is conferred or duty enjoined upon an officer or board to manage and operate a public institution, the power to contract with reference thereto follows as a necessary incident. Accordingly, we can not ascribe to the legislature so gross an absurdity as to assume that it intended to clothe this newly created board with the duty, without vesting either in it or some other officer the power to make the contracts requisite to its operation.

It will be noted that it is only the public utility features of Section 4326 which are by the provisions of Section 4326-1 *supra*, taken out of the hands of the director of public service and committed to the public utilities board. There are left to the director a number of other activities.

We turn now to Section 4328, General Code, which reads as follows:

"The director of public service may make any contract or purchase supplies or material or provide labor for any work *under the supervision of that department* not involving more than five hundred dollars. When an expenditure *within the department*, other than the compensation of persons employed therein, exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of council. When so authorized and directed, the director of public service shall make a written contract with the lowest and best bidder after advertisement for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the city."

(Emphasis added.)

The sections which immediately follow, relate to the making of the contract when authorized.

It should be especially noted that Section 4328 gives the director of public service authority to make contracts relative to work "under the supervision of that department," and nothing else. Obviously, therefore, if by invoking the provisions of Section 4326-1, General Code, the council of a municipality has deemed it proper to create a public utility board,

the duties relating to the management and operation of municipally owned public utilities are thereby entirely removed from the director of public service, and he is stripped of any power to make any contract relative to such utility, because they are no longer "under the supervision of his department." Accordingly, I have no hesitancy in arriving at the conclusion that under the provisions of Section 4326-1 supra, the powers of making all contracts requisite to the management and operation of public utilities which have been transferred to a public utility board, are vested in such board.

This leaves only the question whether in the making of such contracts said board is governed and limited by the provisions of Section 4328 supra. However, it seems obvious that the sole purpose of this new legislation is to transfer the management and operation of these important functions of municipal activity from one office to another. The reasons for the limitation on making contracts and the expenditure of public money remain just as strong as before. Furthermore, I do not consider Section 4328 supra as pertaining in its purpose so much to the director of public service as it does to those important departments of the public business which normally fall under his supervision. In other words, the provisions of said Section 4328 et seq. are safeguards imposed for the better management of those public enterprises and are not personal to the director. And these safeguards follow the transfer of the control.

Sections 3956 and 4326 of the General Code do not purport to specify all of the duties of the director of public service in the operation of those activities which are committed to him by those sections. Section 4326, particularly, contains merely an enumeration of the matters which are committed to his management. So that it seems to me that the provision of Section 4326-1, supra, might well be construed as though it read "all duties relating to the management and operation of the municipally owned public utilities enumerated in Sections 3956 and 4326 of the General Code shall be vested in a board," etc. Furthermore, it would be a fair implication that these duties are to be performed in the manner prescribed by law for the management and operation of those public utilities. This certainly includes the provision of Section 4328, General Code, requiring the authorization of council and advertising for bids where a proposed expenditure involves more than five hundred dollars.

The above appears to be a sufficient answer to your first and second

questions. The remaining three may be treated together. Since we have concluded that the procedure set forth by the legislature in Section 4328 et seq. controls the action of the public utilities board, it is obvious that the council in establishing such board has no duty to perform in that regard, and that it could not waive or reduce those requirements. The authority given the council by the latter part of Section 4326-1, supra, to "designate * * * their duties, authority and powers," would authorize the council to define more particularly the duties of the board and probably add duties not mentioned in the statutes. I cannot believe that it was intended to throw down the bars as to municipal contracts and permit the council to give the board a free hand to make contracts and incur obligations without any of the safeguards which the law almost invariably throws around public spending. The opposite policy is indicated by the holding of the supreme court in *Phillips v. Hume*, 122 O. S. 11, that a city could not, by adopting a charter, escape the restrictions upon making contracts which the legislature has imposed in Section 4328, General Code. It would seem that that declaration of public policy would apply with even greater force to an attempt by council to incur large obligations and make large expenditures without any restriction. Furthermore, it appears clear where a public utilities board has been duly created, the council could not take away from the board the powers which are given it by law and confer them on the director of public service.

Accordingly, in specific answer to the questions submitted, it is my opinion, and you are advised :

1. When a public utility board is created by a municipal council pursuant to the provisions of Section 4326-1, General Code, such board succeeds to all the powers of the director of public service relative to the management and operation of the public utilities of such municipality mentioned in sections 3956 and 4326 of the General Code, including the power to make all necessary contracts relative thereto; and in the making of such contracts such board is subject to the requirements and limitations contained in Section 4328 et seq., applying to those utilities when in the hands of the director of public service.

2. A municipal council having, pursuant to Section 4326-1, General Code, created a public utilities board, may impose upon such board duties in addition to those imposed by law on the director of public service, but may not relieve such board from any of the requirements and restrictions

placed upon the director of public service by Section 4328 et seq., General Code, relative to the making of contracts required in the management and operation of the public utilities belonging to such municipality, and may not confer upon the director of public service any authority to make such contracts.

Respectfully,

HUGH S. JENKINS,
Attorney General.