

806.

APPROVAL, FINAL RESOLUTIONS ON ROAD IMPROVEMENTS IN FRANKLIN AND MAHONING COUNTIES.

COLUMBUS, OHIO, August 28, 1929.

HON. ROBERT N. WAID, *Director of Highways, Columbus, Ohio.*

807.

APPROVAL, CONTRACTS FOR ROAD CONSTRUCTION PROJECTS IN MAHONING COUNTY.

COLUMBUS, OHIO, August 28, 1929.

HON. ROBERT N. WAID, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your recent communication, submitting for my examination and approval two certain contracts signed by yourself as Director of Highways and by the Commissioners of Mahoning County, by which said county commissioners, pursuant to the provisions of Section 1214-1, General Code, have assumed and agree to make the assessments fixed by the Director of Highways with respect to the following road construction projects, to-wit:

Mahoning County, S. H., No. 83, Sections H & F.

Mahoning County, S. H. No. 85, Section 1.

An examination of said contracts shows that all the conditions precedent to the authority of the county commissioners of said county to make said respective contracts provided for by said Section 1214-1, General Code, have been complied with, and it appearing further that said contracts, and each of them, as to their terms, are in conformity with the provisions of said Section 1214-1 of the General Code, said contracts are hereby approved as to legality and form and my approval is endorsed on said contracts which are herewith returned.

Respectfully,

GILBERT BETTMAN,
Attorney General.

808.

MERGER—CLERKS OF COUNCIL, BOARD OF CONTROL AND WATERWORKS WITH CITY AUDITOR—CLERK OF BOARD OF TRUSTEES OF PUBLIC AFFAIRS WITH VILLAGE CLERK—ADDITIONAL COMPENSATION PROVIDED SAID AUDITOR AND VILLAGE CLERK, LAWFUL.

SYLLABUS:

1. *When the duties of clerk of council, clerk of the board of control and clerk of the waterworks are merged with those of a city auditor, such city auditor is not, by*

reason of such merger, entitled to the compensation which had theretofore been provided for such clerkship, in addition to his compensation as city auditor.

2. *When the duties of clerk of council, clerk of the board of control, and clerk of the waterworks are merged with those of a city auditor, by authority of Section 4276, General Code, no additional salary may be allowed said city auditor then in office for the performance of the additional duties thus imposed upon him. The salary of the city auditor may under those circumstances be increased, such increase to be effective during the term of the next succeeding city auditor and an equitable portion of such increase in salary may be paid from waterworks funds.*

3. *Upon a merger of positions, authorized by Section 4276, General Code, additional compensation by way of fees may lawfully be provided for the city auditor during his present term of office, Opinions of the Attorney General for 1918, page 775.*

4. *When the duties of the clerk of the board of trustees of public affairs of a village are merged with the duties of the clerk of the village, by authority of amended Section 4281, General Code, provision may be made by council for the payment to the said clerk of additional compensation during his term of office, and said additional compensation may lawfully be paid from waterworks funds.*

COLUMBUS, OHIO, August 28, 1929.

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:

Section 4276, G. C., authorizes the council, in cities having a population of less than 20,000 at the last federal census, to merge the duties of the clerk of the waterworks, etc., with the duties of the city auditor, and provides that additional assistants may be employed, but does not provide for additional compensation for the auditor.

Sections 4213 and 4219, G. C., provide that the compensation of a municipal officer, clerk or employe shall not be increased or diminished during the term for which any such officer, clerk or employe may have been elected or appointed.

The syllabus of Opinion 1162, page 463, Attorney General's Opinions for 1920, reads:

'Municipal Corporation—City Auditor and Duties of Clerk of Waterworks Merged Under Section 4276, G. C.—Salary cannot be paid in whole or in part from waterworks funds.'

The salary of the auditor of a municipality which has merged the duties of the clerk of the waterworks with those of the auditor under Section 4276, G. C., cannot be paid in whole or in part from the waterworks funds referred to in Sections 3955, et seq., G. C.

The Bureau's understanding of the 1920 opinion is that the salary provided by council for the office of city auditor is the total compensation that may be paid to such officer for all duties imposed upon him by statute or by council, including the duties of clerk of the council, clerk of the waterworks and clerk of the board of control when such duties have been properly merged with those of the city auditor.

We have also understood that no part of said city auditor's salary could ever be paid, under present laws, from waterworks funds, when his duties include those of waterworks clerk.

Question 1. When the duties of clerk of council, clerk of the board of control and clerk of the waterworks are merged with those of the city auditor,

is such city auditor entitled to compensation provided for such clerkships, in addition to his compensation as city auditor?

Question 2. When the duties of these clerkships are imposed upon the city auditor, may council provide additional compensation for such city auditor, and provide that an equitable portion thereof be paid from waterworks funds?

Question 3. When council merges the duties of these clerkships with those of city auditor during the term of the city auditor, and provides for additional compensation, is said city auditor entitled to such additional compensation during his term?

Question 4. When the duties of clerk of the board of trustees of public affairs of a village are merged with the duties of the clerk of the village during the term of such clerk, is such clerk entitled to additional compensation, payable from waterworks funds, pursuant to proper action of council, during his term?"

I think you misinterpreted the Opinion of 1920, referred to in your letter. That opinion goes no further, as I understand it, than to hold that the present salary of the then city auditor, upon merger of the duties of the clerk of the waterworks with those of the city auditor, as provided by Section 4276, General Code, may not be paid in whole or in part, from waterworks funds. The opinion suggests, however, that after the term of the auditor in office at the time the merger expires, the salary provided for the office may be increased and the increase paid from the proper funds. Note the language of the opinion on page 464:

"It is the well settled rule in this state that the imposition of additional duties upon a public officer does not per se entitle him to additional compensation, and a fortiori should this be true when the statute imposing such duties makes provision for the appointment of assistants to perform them. See cases cited in 6 Page's Ohio Digest, pp. 12768, et seq., 3 Supplement, pp. 7702, et seq.

It may not be improper to add that the question under consideration does not involve the power or authority of the city council to increase the salary of the city auditor, and to provide for the payment of the increase from the proper fund. See in this connection 1916 Opinions of Attorney General, Vol. I, p. 597, which holds that where a merger of duties is effected under authority of Section 4276, G. C., there can be no increase in the city auditor's salary or compensation during his term of office; and Section 4213, G. C., which provides that 'the salary of any officer, clerk or employe shall not be increased or diminished during the term for which he was elected or appointed,' etc."

What is meant in the foregoing quotation by *proper fund* is not stated. It seems to be suggested that such increase of salary might be paid from waterworks funds, although if that meaning is to be given to the language, it is inconsistent with the reasons given for holding that no part of the salary of the incumbent of the office of city auditor at the time of the merger with it of the duties of the clerk of the waterworks, may be paid from waterworks funds. The reason given for the holding is that no specific authority exists for such action. In the opinion, Section 3958, General Code, is referred to, by the terms of which it is provided that water rents may be assessed and collected "for the purpose of paying the expenses of conducting and managing the waterworks." After quoting the above provision of the statute and several others relating to the uses for which waterworks funds may be used, the opinion proceeds:

"It will thus be seen from the foregoing resume of the statutes relating to the expenditure and application of waterworks funds, that no provision is made authorizing the use of any part thereof in paying, either in whole or in part, the salary of the city auditor, and, after careful investigation, I have been unable to find any statutory provision that would justify the application of the funds for such purpose."

It occurs to me that that portion of the labors of a city auditor that is performed in exercising the duties of the clerk of the waterworks, after a merger of the two positions, is performed in "conducting and managing the waterworks," and the payment therefor is a legitimate expense that may be paid as an "expense of conducting and managing the waterworks." The opinion itself seems to indicate this, if an increase in the salary of the city auditor is made coincident with the merger of the duties of the clerk of the waterworks with those of the city auditor. A similar question was involved in Opinion No. 630 rendered by me on July 19, 1929, and addressed to your Bureau, in which it was held:

"If the duties of the clerk of a board of trustees of public affairs of a village are merged with the duties of the clerk of the village, and additional compensation allowed to the clerk by reason of such merger, as provided by amended Section 4281, General Code, such additional compensation is payable out of public utility funds derived from the assessment of utility rents made by the board of trustees of public affairs."

Of course no increases in salary for a city auditor could lawfully be provided during his term of office because of the inhibition thereon contained in Section 4213, General Code. If before the merger a salary had been fixed for the clerk of the waterworks, the auditor after the merger could not lawfully be given that salary in addition to that provided for the auditor, as that would be increasing his salary during his term of office. See Opinions of the Attorney General for 1916, page 597.

The auditor remains the auditor after the merger of the positions, the position of clerk of the waterworks is abolished upon merger, the auditor continues to draw the salary provided for the auditor and unless other legislation is enacted increasing the salary for the auditor, the next succeeding auditor will continue to draw the same salary, although before the merger a salary had been provided for the clerk of the waterworks and the auditor became charged with his duties. If certain fees have been provided for a clerk of the waterworks, in addition to his salary, and a merger of his duties with those of the auditor is effected, a different question is presented. In my opinion, there is no doubt but that under those circumstances, the auditor does not *ipso facto* become entitled to the fees, in addition to his salary because of the fact that he is still the auditor only, although charged with additional duties, and can only draw the salary and compensation provided for the auditor. See Opinions of 1916 referred to above. If the proper legislation is enacted after the merger, providing that certain fees be allowed the auditor in addition to his salary, it may be made effective during his term. This, it has been held, would not be increasing his salary during his term. It will be observed that neither Section 4213, General Code, nor any other provision of law prohibits the increase in compensation of the salary of an officer of the city during his term. It is the salary only that may not be increased. An allowance of fees, in addition to salary is not an increase in salary. See Opinions of the Attorney General for 1918, page 775, *Gobrecht vs. Cincinnati*, 51 O. S. 68. The same principle applies when the duties of the clerk of the board of control and those of the clerk of the city council are merged with those of the city auditor.

Section 4219, General Code, applicable to villages, provides generally, that council

shall fix the compensation and bonds of all officers, clerks and employes of the village government except as otherwise provided by law, and that the compensation so fixed shall not be increased or diminished during the term for which any officer, clerk or employe may have been elected or appointed.

Section 4281, General Code, as amended by the 88th General Assembly, provides as follows:

"The clerk shall keep the books of the village, exhibit accurate statements of all moneys received and expended of all the property owned by the village and the income derived therefrom and of all taxes and assessments, and the village council may by majority vote, merge the duties of the clerk of the board of trustees of public affairs with the duties of the clerk of the village, allowing said clerk of the village such additional assistance in performing such additional duties as the council may determine, and such additional compensation for such additional duties as may be provided by the action of the council."

In my opinion, the terms of Section 4281, as amended by the 88th General Assembly serve to make an exception to the general provisions of Section 4219, General Code, and when the duties of the clerk of the board of trustees of public affairs of the village are merged with the duties of the clerk of the village and additional compensation is provided for the clerk on account thereof, such additional compensation may be paid to the clerk during the term of the clerk then in office.

In specific answer to your question, therefore, I am of the opinion:

First, when the duties of clerk of council, clerk of the board of control and clerk of the waterworks are merged with those of a city auditor, such city auditor is not, by reason of such merger, entitled to the salary which had theretofore been provided for such clerkship, in addition to his salary as city auditor.

Second, when the duties of clerk of council, clerk of the board of control and clerk of the waterworks are merged with those of a city auditor, by authority of Section 4276, General Code, no additional salary may be allowed said city auditor then in office for the performance of the additional duties thus imposed upon him. The salary of the city auditor may under those circumstances, be increased, such increase to be effective during the term of the next succeeding city auditor and an equitable portion of such increase in salary may be paid from waterworks funds.

Third, upon a merger of positions authorized by Section 4276, General Code, additional compensation by way of fees may lawfully be provided for the city auditor during his present term of office. Opinions of the Attorney General for 1918, page 775.

Fourth, when the duties of the clerk of the board of trustees of public affairs of a village are merged with the duties of the clerk of the village, by authority of amended Section 4281, General Code, provision may be made by council for the payment to the said clerk of additional compensation during his term of office, and said additional compensation may lawfully be paid from waterworks funds.

Respectfully,

GILBERT BETTMAN,
Attorney General.