

In view of what has been said, I am of the opinion that the services rendered by the chairman of the board of trustees of the township as a member of a general health board are in connection with the business of the township and accordingly for such services the president is entitled to \$2.50 for each day of such service, provided the maximum amount paid to him as a township trustee shall not exceed \$250.00 in any year.

Respectfully,
 GILBERT BETTMAN,
Attorney General.

292.

MAYOR—VILLAGE—MAY CAST VOTE TO BREAK TIE WHEN RESOLUTION OR ORDINANCE OF COUNCIL EMPLOYS ATTORNEY—CANNOT VOTE WHEN ORDINANCE GENERAL OR PERMANENT.

SYLLABUS:

1. *When the council of a village casts a tie vote upon a resolution or ordinance involving the employment of an attorney and fixing his compensation under the provisions of Section 4220 of the General Code, the mayor of such village may cast the deciding vote. Opinion, Attorney General, No. 1911 for the year 1928, approved and followed.*

2. *Under the authority of the case of Wuebker vs. Hopkins, 29 O. App. 386, when council takes action of a general or permanent nature, the same should be done by ordinance, and a majority of council must concur therein, and in case of a tie the mayor cannot cast the deciding vote.*

COLUMBUS, OHIO, April 11, 1929.

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

GENTLEMEN:—Acknowledgment is made of your recent communication which reads:

“The syllabus of Opinion No. 1911, dated March 29th, 1928, reads:

“Therefore, unless there be some provision in the particular municipality upon the subject, I am of the opinion that by virtue of Section 4255, General Code, whenever the members of a village council are equally divided in their votes upon any measure, including action under Section 4220, General Code, the mayor of the village may cast the deciding vote.”

In the case of *Wuebker vs. Hopkins, et al.*, decided by the Court of Appeals for Cuyahoga County on June 25, 1928, and published in the State Bar Association Report of December 4th, 1928, Volume 1, page 386, it was decided that the mayor of a village did not have a vote in case of a tie vote by members of a village council on the passage of an ordinance.

In view of this decision, the Bureau will appreciate a reconsideration of the question of the right of a mayor of a village to cast the deciding vote in case of a tie vote by members of council.”

The opinion, No. 1911, dated March 29, 1928, to which you refer, held, as disclosed by the syllabus, that:

"When the council of a village casts a tie vote for and against the passage of an ordinance employing an attorney and fixing his compensation, as provided in Section 4220, General Code, the mayor of such village may cast the deciding vote."

This opinion was based upon an opinion found in Opinions of the Attorney General for the year 1914, page 307, which indicated that the mayor of a village could cast a vote in case of a tie in any case. In said 1928 Opinion it was pointed out that the question is not so definitely decided. However, the authority of the mayor in this respect was compared to the constitutional provision which authorizes the lieutenant governor to preside over the senate and vote only when the senate is equally divided. Section 16 of Article III of the Ohio Constitution provides for the casting of such a tie vote by the lieutenant governor, whereas Section 9 of Article II of said Constitution provides that no law shall be passed in either house without the concurrence of a majority of the members elected thereto. By analogy the statutes relating to the action of the mayor in cases of a tie are the same as those provided by the Constitution in reference to passage of laws. However, the Court of Appeals case which you mention held, as disclosed by the headnotes, that:

"1. Where council is required to act by passage of ordinance, majority of council must concur therein, and mayor, in case of tie, cannot cast deciding vote.

2. Under Section 4224, General Code, providing council may act either by ordinance or by resolution, unless statute prescribes one or other method of procedure, adoption of resolution is proper procedure for informal enactment providing for disposition of particular item of business, while passage of ordinance is proper procedure for enactment of regulation of general or permanent nature.

3. Where council was not taking action of general or permanent nature, but was simply making contract for employment of legal counsel, recognized under Section 3809, General Code, as nothing more than contract, only resolution was required, in which case mayor had right to break tie by casting determining vote under Section 4255, regardless whether act of council was called an ordinance.

4. Council has no power by calling resolution an ordinance to divest mayor of authority to break tie by casting determining vote under Section 4255, General Code, that he would have had if measure had been properly denominated."

It will be observed that the court in its decision differentiates between resolutions of a village council and ordinances of such a council. Section 4224 expressly provides that ordinances shall be passed by a majority of the members of council. This latter provision is authority for the distinction between resolutions and ordinances as made by the court in its said opinion. However, it will be observed that in that case it was the employment of an attorney for the village which gave rise to the question before the court. There apparently had been a tie vote and the mayor had decided in favor of such employment. An action had been taken apparently by ordinance. The court, however, pointed out that a resolution was all that was necessary, as such action was nothing more than a contract, and the fact that such action was designated an ordinance did not change the situation. While said opinion apparently is inconsistent in certain respects with some former rulings in reference to the action of council, it is not in conflict with the holding in the opinion to which you refer when limited to the employment of counsel under Section 4220.

In view of what has been said herein, I entertain considerable doubt as to the soundness of said court opinion to the effect that an ordinance of a permanent nature may not be passed with the aid of the mayor in case of a tie vote by members of council. Sections 4224 and 4255, hereinbefore referred to, were enacted in the same form in the same act, in so far as the question being considered herein is concerned, by the 75th General Assembly in an act to provide for the organization of cities, villages, etc., 96 O. L. 20. However, in the opinion of the Attorney General, found in Opinions, Attorney General, 1925, page 563, and cited in the 1928 opinion of the Attorney General hereinbefore mentioned, it was held in substance that the village mayor cannot cast the deciding vote when the votes of the members of council tie upon a resolution or ordinance of the village when such action involves the expenditure of money. That opinion proceeds upon the theory, apparently, that there may be certain actions that can be taken by resolution in which a mayor may cast the deciding vote in case of a tie. Said opinion pointed out that when a contract is involved, the same should be authorized by ordinance, which undoubtedly affected the conclusion reached. It is apparent that the two sections may be harmonized by holding, as was held in *Wuebker vs. Hopkins*, *supra*, that in certain cases where action is taken not of a permanent character, a mayor may cast the deciding vote in case of a tie, and in other cases where ordinances are required to be passed to disclose the action of council on matters of a permanent nature, etc., a mayor may not cast the deciding vote.

Former decisions of the courts and rulings of the Attorney General are not in accord upon the question, and in view of the specific holding of the court in the case above mentioned, it is believed that the same should be followed unless and until some equal or higher authority has given a different expression upon the subject.

Based upon the foregoing, it is my opinion that :

1. When the council of a village casts a tie vote upon a resolution or ordinance involving the employment of an attorney and fixing his compensation under the provisions of Section 4220 of the General Code, the mayor of such village may cast the deciding vote.
2. Under the authority of the case of *Wuebker vs. Hopkins*, 29 O. App. 386, when council takes action of a general or permanent nature, the same should be done by ordinance, and a majority of council must concur therein, and in case of a tie the mayor cannot cast the deciding vote.

Respectfully,
GILBERT BETTMAN,
Attorney General.

293.

EASEMENT—GRANTED TO ELECTRIC LIGHT COMPANY BY STATE OFFICER WITHOUT STATUTORY AUTHORITY— INVALID—NO ESTOPPEL TO DENY VALIDITY IN ABSENCE OF RATIFICATION BY LEGISLATURE.

SYLLABUS:

Where an officer or agent of the state without statutory authority therefor assumes to grant to an electric light and power company the right, easement and privilege of erecting a transmission line and the necessary poles and fixtures thereof in and across lands of the state under the control and management of such officer or agent,