a matter of common knowledge that some occupations are of much greater danger to human life than others and it would seem that the legislature in the use of the words "of the same class" in association with the words "of equal expectation of life" intended that classification should be based on occupations according to their hazard. I recognize that the proposed plan would probably result in economies to the insurer and that it could afford to insure the employes in question at a rate less than that charged to other persons. However, as has been said heretofore, I think that this is not a proper basis of classification. If it were, then it would be proper for insurance companies transacting industrial insurance on the weekly premium plan to classify its assureds as to whether or not they pay their premiums at the district or home office. This can be legally done, but only because of the proviso hereinabove quoted to Section 12956, General Code. The legislature apparently felt that in the absence of the proviso such practice would fall within the prohibition of the statute; otherwise it would not have added the proviso thereto.

In consonance with the foregoing and in specific answer to your questions, I am therefore of the opinion that:

1. Where insurance is issued to employes of a common employer in the form of one-year renewable term policies and is restricted to employes of employers having less than fifty employes, and where the premiums paid therefor are lower than those charged for similar contracts of insurance to other individuals, the provisions of Section 9426-1 to 9426-4, inclusive, General Code, are not violated thereby.

2. Where insurance is issued to employes of a common employer in the form of one-year renewable term policies and is restricted to employes of employers having less than fifty employes, and where the premiums paid therefor are lower than those charged for similar contracts of insurance to other individuals, the provisions of Sections 9403, 9404 and 12956, General Code, are violated.

Respectfully,
THOMAS J. HERBERT,
Attorney General.

1206.

CONTRACT — CITY — PARTNERSHIP — CORPORATION — WHERE CONTRACT FOR CONSTRUCTION OF IMPROVEMENT MADE ON "COST PLUS" BASIS, ITEM OF $25.00 PER DIEM AS COMPENSATION OR SALARY TO PARTNER OR OFFICER OR CORPORATION MAY NOT BE INCLUDED—FINDING.

SYLLABUS:

When a city enters into a contract with a partnership or corporation for the construction of an improvement on a "cost plus" basis, such city

may not include an item of Twenty-Five Dollars per diem to such partner or the president as his compensation or salary.

COLUMBUS, OHIO, September 19, 1939.

Bureau of Inspection and Supervision of Public Offices, State House Annex, Columbus, Ohio.

GENTLEMEN: I am in receipt of your request for my opinion concerning the following inquiry:

> "Would this Bureau be justified in rendering a finding for recovery against a partnership or corporation that entered into a contract with the City of C. to do certain work upon a cost plus 15% basis, wherein an item of cost of $25.00 per diem for services of an active partner or the president of said corporation was invoiced to and paid by the City?"

From the report of your examiner it would appear that a contract was entered into between the city and a contractor for the construction of an improvement; that at the time of the execution of the contract, the contracting firm was a partnership, but during the progress of the construction, the firm became incorporated; that the managing partner, concerning whose compensation you inquire, became the president of the corporation when it was organized.

You do not enclose a copy of the contract between the city and the contractor. I, therefore, base my opinion on the proposition that the contract under which the construction services were performed contained no stipulations defining the items that are to be included within the meaning of cost.

Since you do not enclose a copy of the contract and do not set forth a statement of facts with reference to the entering into the contract, I am assuming, for the purposes of this opinion, that all statutory provisions with reference to the letting and entering into contracts have been complied with. I express no opinion as to the validity of the contract under which the work in question was performed nor as to whether a city may or may not enter into a "cost plus" contract.

From the information furnished, it is made to appear that one of the partners, during the time the contractor operated as a partnership, charged, as a part of the cost of construction, for his services in superintending or overseeing the construction at the rate of twenty-five dollars per day; that when the contractor was incorporated, this same partner became the president of the contracting corporation and charged for his services at the same rate of twenty-five dollars per day.

In interpreting a written contract, the purpose is to determine the intention of the parties as therein expressed. Where words are used they

are to be given the ordinarily accepted meaning in the community in which the contract is entered into (4 page on the Law of Contracts, 3492, Section 2024; Methodist Episcopal Church & Society vs. Ashtabula Water Co., 2 O. C. C., 478) that is, unless the context shows that a different meaning was intended.

It is not to be denied that the cost to a corporation or partnership of the performance of a contract may include some portion of the office expense or general overhead of the office. The performance of the contract, if profitable, may increase the tax expense of the corporation. Are such items considered generally as a part of the cost of construction of an improvement being installed by the corporation? If so, they should be considered as such in computing the compensation of a contractor under a "cost plus contract".

The so-called "cost plus" contracts of the type mentioned in your inquiry became quite popular during the period between 1912 and 1920 and have been the cause of much litigation. In the case of Shaw vs. G. B. Beaumont Co., 88 N. J. Eq., 333, the court was called upon to construe the meaning of the phrase "to receive for its entire compensation for its services in so doing (i. e., building) a sum equal to ten per cent of the entire cost of such building". The court held that such clause did not entitle the contractor to receive for its services a proportion of the salaries of its officers and office employes as compensation for their services "while supervising the construction of the building".

In the case of Lytle, Campbell & Co., Inc., vs. Somers, Filles & Todd Co., 276 Pa., 409, the court held that salaries of executive or administrative officials are a part of "overhead expenses" and should not be included in "cost" in computing the compensation due to the contractor on a cost plus contract.

A similar view was taken by the court in the case of Isaacs v. Reeve, N. J. Eq., 4 Atl. 1, wherein the court observed that "the ten per cent was intended to cover that very service (salaries of administrative officers and overhead).

In Menlenberg v. Coe, 160 N. Y. Supp., 581, the court held that an individual contractor was not entitled to charge for his own time spent in superintending the construction under a "cost plus" contract.

The proposition that salaries of executive efficers of a corporation are not a part of the cost of construction of an improvement being made by such corporation by virtue of a contract, as such term is ordinarily used in cost plus contracts, is not only supported by the decisions of courts, but by reason. The ordinary "cost plus" contract provides for a payment to the contractor of ten per cent or some other percentage of the cost of material and labor. The percentage above cost is presumably in payment for something rather than as a gratuity. The courts in the cases above cited have taken the view that such percentage is in payment of the overhead expense of the contractor, which includes not only the

heat, light and other expense of the general office of the contractor, but as well the expense of executive officers, clerks and other employes having general superintendence of the work of the corporation.

My examination of the authorities persuades me to be of the opinion that salaries of officers of a partnership or corporation performing a construction contract are not generally considered as a part of the "cost" of construction under such contract. In view of such fact, it appears to me that your inquiry should be answered in the affirmative.

Specifically answering your inquiry, it is my opinion that: When a city enters into a contract with a partnership or corporation for the construction of an improvement on a "cost plus" basis, such city may not include an item of twenty-five dollars per diem to such partner or the president as his compensation or salary.

Respectfully,
THOMAS J. HERBERT,
Attorney General.

1207.

BONDS—CITY OF AKRON, SUMMIT COUNTY, $5,000.00.

COLUMBUS, OHIO, September 19, 1939.

Retirement Board, Public Employes Retirement System, Columbus, Ohio.

GENTLEMEN:

RE: Bonds of the City of Akron, Summit County, Ohio, $5,000.00.

I have examined the transcript of proceedings relative to the above bonds purchased by you. These bonds comprise part of an issue of sewage disposal bonds in the aggregate amount of $700,000.00, dated February 1, 1923, and bearing interest at the rate of 4¾% per annum.

For this examination, in the light of the law under authority of which the above bonds have been authorized, I am of the opinion that bonds issued under these proceedings constitute valid and legal obligations of said city.

Respectfully,
THOMAS J. HERBERT,
Attorney General.