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TURNPIKE COMMISSION, OHIO, THE—AUTHORITY TO EMPLOY ATTORNEYS OTHER THAN IN CLASSIFIED SERVICE—IN TECHNICAL SENSE, ASSISTANTS DESIGNATED BY ATTORNEY GENERAL, MAY BE PLACED ON COMMISSION'S PAY ROLL—PAID FOR SERVICES TO COMMISSION FROM FUNDS RECEIVED AS PROCEEDS OF TURNPIKE REVENUE BONDS OR AS TOLLS—PAYMENT TO SPECIAL COUNSEL, INCLUDING BOND COUNSEL—EMPLOYED IN TECHNICAL SENSE.

## SYLLABUS:

The Ohio Turnpike Commission has authority to employ attorneys, other than those in the classified service, only in the technical sense that assistants designated by the Attorney General may be placed on the commission's pay roll and paid for services rendered to the commission only from funds received by the commission as proceeds of turnpike revenue bonds or as tolls; and that special counsel, including bond counsel, whose services are required for special purposes in connection with proceedings to issue turnpike revenue bonds, or in litigation in connection therewith, may be employed by the commission only in the technical sense that such special counsel designated by the Attorney General for that purpose may be paid for their services only from funds received by the commission as proceeds of turnpike revenue bonds or as tolls.

Columbus, Ohio, April 3, 1951

Hon. James W. Shocknessy, Chairman, Ohio Turnpike Commission  
Columbus, Ohio

Dear Sir:

This will acknowledge receipt of your request for my "opinion, consultation and advice" relative to a resolution now under consideration by your Commission, which resolution reads in pertinent part as follows:

"NOW, THEREFORE BE IT RESOLVED by the Ohio Turnpike Commission of Ohio:

"Section 1. That the law firm of ..... be and the same hereby is employed by the Ohio Turnpike Commission to serve as Bond Counsel of said Commission with respect to the project of the Commission known as Ohio Turnpike Project No. 1, approved for study by the Commission by Resolution adopted on August 15, 1950, and as the same may be amended.

"Section 2. Said law firm as such Bond Counsel shall consult with and advise the Commission with respect to all proceedings looking towards or authorizing the issuance of Turnpike Revenue Bonds of the State of Ohio, payable solely from revenues for the purpose of paying the cost of such project No. 1, the issuance and sale of such bonds and all legal matters related thereto, including such proceedings in the Supreme Court of Ohio or elsewhere as may be deemed to be necessary and advisable to establish the power and authority of the Commission to issue such bonds and to permit the sale thereof, and the rendition of an unqualified opinion or opinions approving such bonds.

"Section 3. Said firm shall be paid a reasonable compensation for all such services in such amount as shall be hereafter determined by the Commission, the same to be payable solely

from the proceeds of such Turnpike Bonds or from the revenues of the Ohio Turnpike Commission derived from said Project No. 1."

The question presented by this resolution first requires an examination of the authority of the commission to employ attorneys at law, and of the relationship between your commission and the office of the Attorney General.

The authority of your commission to employ attorneys is found in Section 1205(1), General Code. This section reads in part as follows:

"The commission is hereby authorized and empowered:

\* \* \* "(1) To employ consulting engineers, superintendents, managers, and such other engineers, construction and accounting experts, attorneys, and other employes and agents as may be necessary in its judgment, and to fix their compensation; provided, that all such expenses shall be payable solely from the proceeds of turnpike revenue bonds issued under the provisions of this act or from revenues;"

The functions of the Attorney General as the chief law officer of the state are indicated by the provisions of Section 333, General Code. This section reads as follows:

"The attorney-general shall be the chief law officer for the state and all its departments. No state officer, board, or the head of a department or institution of the state shall employ, or be represented by, other counsel or attorneys-at-law. The attorney-general shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state may be directly or indirectly interested. When required by the Governor or the general assembly, he shall appear for the state in any court or tribunal in a cause in which the state is a party, or in which the state is directly interested. Upon the written request of the governor, he shall prosecute any person indicted for a crime."

Before examining further the extent, if any, to which this latter section is amended or repealed by implication by the later legislation found in the turnpike act, it is appropriate first to note the constitutional nature of the Attorney General's office and to observe what effect, if any, this has on the question at hand. In this connection it should be observed that there is to be found some considerable judicial authority, particularly in the decisions of the Supreme Courts of Pennsylvania

and Illinois, for the proposition that where the office of Attorney General is created either by a constitutional or statutory provision, which refers to the office under its well known common law designation, the office so created has thereby engrafted upon it all the powers and duties of Attorney General as known at common law. It has been held as a corollary to this that the state legislature, where the office has been established by constitutional provision, may properly confer additional powers and impose additional duties upon such officer but is lacking in power to strip him of any of his common law powers and duties as the chief law officer of the state.

Although it appears to be entirely within the realm of logic and probability that this same rule is applicable in Ohio, especially since in this state, like Illinois, the office of Attorney General was originally created by statute and later provided for in the state constitution, I do not deem it necessary in this instance to consider the constitutional question further, believing it possible to answer your inquiry solely by reference to the pertinent statutory provisions.

The specific question here involved, as indicated above, is the extent, if any, to which subparagraph (1) of Section 1205, General Code, is in irreconcilable conflict with the provisions of Section 333, General Code. It is to be noted that in Section 333, General Code, there are three distinct provisions, pertinent to this inquiry, relative to the position of the Attorney General with respect to other state departments. These provisions are, first, that the Attorney General shall be the chief law officer for the state and all its departments; second, that no state officer, board or head of a department or institution of the state shall *employ* other counsel or attorneys at law; and finally that no state officer, board, or head of a department or institution of the state shall be *represented* by other counsel or attorneys at law.

A question somewhat similar to that here presented was considered by one of my predecessors, the Honorable Joseph McGhee, in an opinion dated May 8, 1917. In that instance the question was the legal effect of an item in an appropriation act, as applicable to the state fire marshal's department, for "special attorneys." In the course of that opinion the then Attorney General said:

"The question naturally suggests itself as to whether or not the general assembly, in passing this appropriation, intended to

set aside, during the biennium and as to this department, the provisions of the general law. Certainly such an intention is to be presumed against, especially in the case of appropriations for the current expenses of state departments.

“The casual insertion of the phrase ‘special attorneys’ in the above context should not, in my opinion, be regarded as equivalent to a formal authorization to the state fire marshal to employ special attorneys, in the teeth of the prohibition contained in the general law, unless such conclusion is inevitable.”

An examination of the history of Section 333, General Code, discloses that the statutory prohibition of the representation of a state officer, board or department head, by an attorney or counsel other than the Attorney General, was enacted as early as 1904. It may be said, therefore, to represent the established policy of the state. By reasoning similar to that of my predecessor, quoted above, it can hardly be supposed that the casual insertion in the turnpike act of authority to employ “attorneys, and other employes and agents,” should be regarded as the legal equivalent of repeal, as to the turnpike commission, of the general provision in Section 333, General Code, expressly prohibiting the *representation* of state officers, boards and department heads by attorneys other than the Attorney General, his assistants and special counsel designated by him. Accordingly, since the language employed in Section 1205(1), General Code, purports merely to authorize the commission to *employ* attorneys, and since repeals by implication except in cases of irreconcilable conflict are not favored, it follows that the only effect of the later legislation here under consideration is to effect an amendment of Section 333, General Code, with respect only to the prohibition of *employment* of counsel or attorneys at law by the turnpike commission. It follows that the Attorney General is still constituted the chief law officer of that department; and that the commission may not be *represented* by counsel or attorneys at law other than the Attorney General, his assistants and special counsel designated by him.

We are thus confronted with a somewhat anomalous situation. The question which first suggests itself is the nature of the duties to be performed by attorneys employed by the commission since they may not, merely by virtue of such employment, represent that body in the conduct of legal proceedings incident to the exercise of its several powers and

functions. In this connection it may be noted that under the provisions of Section 486-7a, General Code, provision is made for inclusion in the state service of five types of attorney-employees. These include claims investigators, court marshal, trust agent, attorney examiner and assistant attorney general. It is obvious that under the provisions of this section your commission would be authorized to employ attorney examiners, for example, without the necessity of any special statutory provision therefor, and Section 486-7a, General Code, it should be observed, was enacted by the same General Assembly which enacted the Ohio turnpike act. This indicates that the purpose of including this special provision in the turnpike act must be found elsewhere.

An examination of the act clearly reveals that the commission, in the exercise of its several functions, and especially in the acquisition of rights-of-way and other interests in land through appropriation proceedings, will require extensive legal services which, in many instances, will involve litigation. In all such litigation there will be the necessity for the services of attorneys who will actually represent the commission. It is obvious also that in connection with proceedings to authorize issues of turnpike revenue bonds the services of special counsel will be required by the commission, possibly including the prosecution of actions to establish the legality of the particular terms of such issues, and that after the sale of such bonds such special counsel will possibly be required from time to time to represent the commission in litigation pertaining to such bonds.

It cannot be doubted that the General Assembly realized that the rendition of such legal services would require provision for considerable items of expense. In this connection it is the very evident legislative intent, expressed throughout the turnpike act, that all expenses in connection with any turnpike project should be paid from funds realized by the commission as proceeds of the sale of turnpike revenue bonds, or from the tolls collected by the commission in the operation of turnpike projects. Section 1204(c), General Code, provides a very broad definition of the word "cost" as applied to a turnpike project, and it is indicated in this definition that the General Assembly intended that no part of the cost of a turnpike project shall be paid from funds in the state treasury. Indeed, it is provided in Section 1220, General Code, that even those state funds advanced through expenditures by the Director

of Highways in the preliminary studies of a turnpike project shall be repaid from proceeds of the sale of turnpike revenue bonds.

It is the evident intent of the legislature, therefore, that any of the services rendered to the commission by the Attorney General or his assistants, or special counsel appointed by him, shall be paid from the funds of the commission rather than from funds in the state treasury; and this leads me to the conclusion that the General Assembly has included in Section 1205(1), General Code, a provision for the employment of attorneys by the commission as a means of insuring that the expense of legal services performed for the commission by the Attorney General, his assistants, and special counsel designated by him, will be so defrayed.

From this I conclude that the Ohio Turnpike Commission has authority to employ attorneys, other than those in the classified service, only in the technical sense that assistants designated by the Attorney General may be placed on the commission's pay roll and paid for services rendered to the commission only from funds received by the commission as proceeds of turnpike revenue bonds or as tolls; and that special counsel, including bond counsel, whose services are required for special purposes in connection with proceedings to issue turnpike revenue bonds, or in litigation in connection therewith, may be employed by the commission only in the technical sense that such special counsel designated by the Attorney General for that purpose may be paid for their services only from funds received by the commission as proceeds of turnpike revenue bonds or as tolls.

With reference to your proposal to employ a particular firm of attorneys as bond counsel, I think it is appropriate and desirable to arrange for a conference between the members of the commission and me for the purpose of considering the nature and extent of the legal services which the commission will require and the desirable qualifications of the attorneys to be designated by the Attorney General to perform such services. For this purpose I shall be glad to make myself available at such time and place which we shall find to be mutually convenient.

Respectfully,

C. WILLIAM O'NEILL

Attorney General