2850.

APPROVAL, BONDS FOR FAITHFUL PERFORMANCE OF HIS DUTIES AS DIRECTOR OF HIGHWAYS—O. W. MERRELL.

COLUMBUS, OHIO, January 22, 1931.

HON. O. W. MERRELL, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—You have submitted two bonds each in the penal sum of $5,000.00, upon which your name appears as principal. The name of the Century Indemnity Company appears as surety on one of said bonds, and the name of the Maryland Casualty Company appears as surety on the other. Both of said bonds are conditioned to cover the faithful performance of your duties as Director of Highways.

Section 1179 of the General Code, requires the Director of Highways to give bond in such penal sum as shall be fixed by the Governor, not less in any case than Ten thousand dollars. The section also requires "the security to be approved by the Governor."

I have found said bonds to have been executed in proper legal form and have approved them as to form. It will be necessary however, for the Governor to indorse his approval thereon before they are filed with the Secretary of State.

Said bonds are being returned herewith.

Respectfully,
GILBERT BETTMAN,
Attorney General.

2851.

WORKMEN'S COMPENSATION—MUNICIPALITY'S PORTION OF GASOLINE AND MOTOR VEHICLE LICENSE TAXES USED FOR PAYING CONTRIBUTION TO STATE INSURANCE FUND—WHAT PROPORTION MAY BE USED—GENERAL FUND OF MUNICIPALITY MAY BE REIMBURSED WHEN.

SYLLABUS:

The general fund of a municipality may lawfully be reimbursed out of the municipality's portion of the motor vehicle license tax and the motor vehicle fuel tax receipts for that portion of the contribution to the State Insurance Fund paid by the county auditor for the said municipality, which is directly attributable to the service of employes, workmen and operatives whose compensation is paid from gasoline and motor vehicle license tax receipts distributed to the municipality in accordance with law.

COLUMBUS, OHIO, January 22, 1931.

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

GENTLEMEN:—This will acknowledge receipt of your inquiry which reads as follows:

"The pertinent part of Section 1465-63 G. C., reads:

'The legislative body of any taxing district may reimburse the fund from which such contribution is made by transferring to such fund from any other fund or funds of such taxing district, the proportionate amount of such

contribution that should be chargeable to such fund or funds whether such fund or funds be derived from taxation or otherwise.'

Question: May the general fund be reimbursed out of the municipality's portion of the motor vehicle license and gasoline tax receipts for that portion of the premium paid out of the general fund for workmen's compensation covering persons employed in constructing and repairing streets and paid out of the motor vehicle license and gasoline tax receipts?"

What is commonly called the "Workmen's Compensation Act" was originally enacted in 1911 (102 O. L., 524). The purpose of this act, as expressed in its title, was to create a State Insurance Fund for the benefit of injured and the dependents of killed employes, and to provide for the administration of such fund by a State Liability Board of Awards. The act was amended in 1913 (103 O. L., 72) which amendatory act further defined the powers, duties and jurisdiction of the State Liability Board of Awards with respect to the collection, maintenance and disbursement of the State Insurance Fund for the benefit of injured and the dependents of killed employes, and the requirements with reference to contributions to said fund by employers.

In Section 14 of the amendatory act of 1913, the terms "employe", "workman" and "operative", as used in the act, were so defined as to include every person in the service of the State, or of any county, city, township, incorporated village or school district except officials of the said political subdivisions and policemen and firemen in cities where policemen's and firemen's pension funds were maintained, as well as those in the service of persons, firms, private corporations and public service corporations employing five or more workmen or operatives regularly in the same business, or in or about the same establishment, under any contract of hire.

Section 16 of said act of 1913, which was codified as Section 1465-63, General Code, made provision for contributions to the State Insurance Fund to be made by the State itself and by each county, city, incorporated village, school district or other taxing district of the State, for the purpose of providing the means of making payments to the injured and dependents of killed employes in the service of those taxing subdivisions.

The administration of the law relating to workmen's compensation was later transferred to the Industrial Commission of Ohio.

Said Section 1465-63, General Code, was amended in some respects in 1919 (108 O. L., Part I, p. 555), in 1923 (110 O. L., p. 264) and in 1925 (111 O. L., p. 507). In making these latter amendments referred to, the chief object of the statute was maintained. The changes made related to the percentum to be contributed to the State Insurance Fund by the State and the taxing subdivisions thereof. The provision with reference to reimbursement of the fund from which the contributions are made, which provision is quoted by you in your inquiry, was added by the amendment of 1925 noted above.

Section 1465-64, General Code, relates to the contribution to be made by the State to the State Insurance Fund, for the service of those persons in the employ of the State for whose benefit the insurance fund was created.

By terms of Section 1465-65, General Code, the Auditor of State is directed to prepare, in the month of December of each year, a list for each county of the State, showing the amount of money expended by each township, city, village, school district or other taxing district therein for the service of persons designated by the act as employes, workmen and operatives in the service of the respective taxing subdivisions during the fiscal year last preceding the time of preparing such lists; and to file a copy of each such list with the Auditor of the county for whom such list is made, and copies of all such lists with the Treasurer of State. Section 1465-66, General Code, reads as follows:

"In January of each year following the filing with him of the lists mentioned in the last preceding section hereof, beginning with January, 1914, the auditor of each county shall issue his warrant in favor of the treasurer of state of Ohio on the county treasurer of his county, for the aggregate amount due from such county and from the taxing districts therein, to the state insurance fund, and the county treasurer shall pay the amount called for by such warrant from the county treasury, and the county auditor shall charge the amount so paid to the county itself and the several taxing districts therein as shown by such lists; and the treasurer of state shall immediately upon receiving such money, convert the same into the state insurance fund."

It will be observed, upon consideration of the terms of Section 1465-66, supra, that contributions made to the State Insurance Fund for and on behalf of a municipality, are paid by the county auditor of the county in which the municipality is located, from tax moneys to the credit of said municipality before those moneys are distributed by the county auditor to the municipality. It will thus be seen that in the first instance the payment is not made from any particular municipal fund, as the moneys had not then reached the municipality so as to be available for allotment to any particular municipal fund. Inasmuch, however, as the revenues which must be allotted by a municipality to funds other than the general fund, upon their receipt by the municipality, are fixed by law, and that the general fund is to be credited with revenues derived from the general levy of taxes for current expenses within the fifteen mill limitation, and with revenues derived from any general levy of taxes for current expenses authorized by vote outside the fifteen mill limitation, it is apparent that in the final distribution of tax revenues accruing to a municipality, and upon the allotment by the municipality to the several funds, other than the general fund, of revenues specifically designated by law as belonging to said funds, it is the general fund of the municipality that suffers, by reason of the payment by the county auditor of the contribution to the State Insurance Fund on behalf of said municipality, from tax moneys before distribution to the municipality.

By charging the general fund of the municipality with the entire amount of the contribution to the State Insurance Fund made on account of the service of all municipal employes, workmen and operatives, whether such employes, workmen and operatives are maintained from revenues which are the proceeds of the general tax levy or otherwise, this charge became a general current expense of the municipality, in the nature of a general overhead municipal expense, and inasmuch as no machinery was provided by the legislature, prior to the amendment of 1925 referred to above, whereby any other fund or funds could be made to bear any part of this expense, it clearly was the intent of the legislature, upon the original enactment of the law and until the amendment of 1925, that this contribution should be a general current expense of the municipality and no part of it should be borne by any other fund than the general fund.

By the amendment of 1925, the legislature recognized that a part of the municipality's contribution to the State Insurance Fund, at least, "should be chargeable" to a fund or funds other than the general fund, and thereupon fixed the method of charging the fund or funds which "should be chargeable" with its proper proportion of the contribution.

By this enactment the legislature clearly expressed an intent that thereafter the contribution to the State Insurance Fund made on account of the service of municipal employes, workmen and operatives in the service of municipal departments, and in the prosecution of distinct municipal activities should not all, at least, be a current expense of the municipality generally, or a general overhead charge against the operation of the municipal government, but should be borne by those funds to which it "should be chargeable".

As to the meaning of the clause "the proportionate amount of such contribution that should be chargeable to such fund or funds" as used in the statute we are left completely in the dark, so far as any help may be obtained from the context of the statute, other than it applies to all municipal funds whether derived from taxation or otherwise. In the absence of any provision of law providing to the contrary, it is reasonable, in my opinion, to hold that the fund which "should be chargeable" with the proportionate share of the municipality's contribution to the State Insurance Fund, attributable to the service of any employe, workman or operative, is the fund from which that particular employe, workman or operative is maintained, in other words, the fund from which he is paid. In fact, I am of the opinion that is the only reasonable construction that can be placed upon the words "that should be chargeable to such fund or funds," in the light of the history of the legislation and the language of the statute.

With this construction in mind it seems conclusive that by authority of amended Section 1465-63, General Code, the general fund of a municipality may be reimbursed from the municipality's portion of the motor vehicle license tax and gasoline excise tax receipts to the extent of the proportionate share of the municipality's contribution to the State Insurance Fund attributable to the service of those municipal employes, workmen and operatives who are paid from said funds, unless the law providing for the collection of the motor vehicle license tax and the gasoline excise tax limits the use of the proceeds of these taxes in such a way as to preclude their being used for the purpose mentioned, or, unless in doing so, the law relating to transfer of funds is violated.

By the terms of Section 5, of Article XII of the Constitution of Ohio all taxes, whether property taxes or excise taxes, are limited to uses within the purposes for which the taxes are levied and collected, as expressed in the legislation providing for the levy and collection of the tax.

The motor vehicle license tax and the motor vehicle fuel tax, commonly called the gasoline tax, are excise taxes collected by the State and distributable in part to municipalities. The portions of the motor vehicle license tax and the first gasoline tax distributable to municipalities are limited in their use to the sole purpose of maintaining, repairing, constructing and repaving the public streets and roads within the said municipalities to which the funds are distributed.

Sections 5537 and 6309-2, General Code.

Section 5541-8, General Code, which relates to the distribution of the so-called second gasoline excise tax, provides that the portion of said tax distributed to municipalities shall be expended by each municipal corporation for the sole purpose of constructing, maintaining, widening and reconstructing public streets and roads within such municipal corporation.

This office has been called upon, on a number of occasions, to determine just what municipal expenses may be paid from the proceeds of these taxes. That is, just what is included within the provisions that the taxes shall be used for the sole purpose of maintenance, repair, construction, repaving, widening and reconstruction of public streets. It has been generally held that any municipal expenses looking directly and solely to the maintenance, repair, construction, repaving, widening and reconstruction of public streets and roads within a municipal corporation may be paid from these taxes according to the purpose for which the tax is levied. Unless, however, the expense is solely for the purposes mentioned the funds derived from the proceeds of the taxes can not lawfully be charged with its payment. For instance, it was held in an opinion found in the Opinions of the Attorney General for 1929, page 1343, that the salary of a city superintendent of streets who performs general duties with reference to streets and sewers can not legally be paid from the motor vehicle license and gasoline tax receipts, either in whole or in part. However, in a later opinion, being Opinion 1491 rendered under date of February 5, 1930, it is held as stated in the syllabus:

"The salary and expenses of a group of engineers employed by a city for the sole purpose of preparing plans, specifications, and supervising the construction of street paving generally, may properly be paid from the proceeds of the motor vehicle and gasoline taxes."

In an earlier opinion, found in the Opinions of the Attorney General for 1924, page 254, it was held that expenses of providing engineering for the special purpose of maintenance under the provisions of Section 6309-2, General Code, may lawfully be paid out of such maintenance and repair fund. In these opinions the principle laid down by the Supreme Court in the case of *Longworth* v. *Cincinnati*, 34 O. S., 101 was followed. It is the general trend of the holdings with reference to this subject that any expenses directly incident to maintenance, repair, construction, reconstruction, widening or repaving of streets and roads in a municipality may be paid from the municipality's share of these taxes. Unless, however, such expense is directly and solely concerned with the purposes mentioned, the funds may not properly bear the expense.

In Opinion 1896, rendered under date of May 22, 1930, it was held that the cost of metal disks inserted in municipal streets to mark safety zones, could properly be paid from the receipts of the gasoline and motor vehicle license taxes.

In Opinion 2210 rendered under date of August 6, 1930, it was held that the cost of paint for marking parking zones may be properly paid from the proceeds of these taxes. On the other hand, it is held in Opinion 2795, rendered under date of January 5, 1931, that the cost of street signs is not a charge within the purposes for which the gasoline tax and the motor vehicle tax are levied.

No question has ever been made as to the legality of paying the wages or salaries of workmen employed exclusively upon work looking to the maintenance, repair, widening, constructing and repaving of public streets, from the proceeds of these taxes, and I cannot conceive of any reason why the cost of the contribution to the State Insurance Fund incident to the service of these men is not as properly a charge against the fund as the wages of the workmen, and the cost of tools for the use of the men and the cost of machinery used in the making of the repairs or the maintenance and construction of the road.

It is well settled that the cost of machinery and tools used exclusively for the purposes authorized for the use of receipts from motor vehicle license tax and motor vehicle fuel tax is a proper charge against the funds arising from the receipt of those taxes. State ex rel. Crabbe, *Attorney General* v. *City of Columbus*, 21 O. A. 119; Opinions of the Attorney General for 1927, pages 154 and 475; Opinion No. 1540, dated February 19, 1930.

In approaching this subject, due consideration should be given to the provisions of the budget law, Sections 5625-1 et seq., and especially Section 5625-13 of the General Code, as to the transfer of funds, and also to the terms of the motor vehicle license law in that respect.

Section 5625-13, General Code, which is a later enactment than Section 1465-63, General Code, provides in substance that no transfers shall be made from one fund of a subdivision to another fund, by order of court or otherwise, except as enumerated therein. The circumstances therein enumerated under which transfers may be made do not include circumstances such as we are here considering.

Section 6309-2, General Code, provides specifically with respect to the portion of the motor vehicle license tax distributable to municipal corporations that it "shall not be subject to transfer to any other fund."

In my opinion the reimbursement of the general fund of a political subdivision for a part of the subdivision's contribution to the State Insurance Fund, theretofore made from the general fund to another fund of a subdivision to which that part of the contri-

bution "should be chargeable" in the first place, does not constitute a transfer of funds in the sense that transfers are spoken of in Sections 5625-13 and 6309-2 of the General Code, even though the word "transferring" is used in Section 1465-63, General Code, as descriptive of the process of reimbursing the fund from which the contribution is originally made.

It is nothing more nor less than a refund from the fund to which the contribution should be chargeable to the fund from which the legislature found it to be most practicable to make the contribution in the first instance.

It frequently happens in the ordinary administration of government that payments of current bills and the like are inadvertently made by administrative officers from the wrong fund. Upon discovery of such inadvertent payment by the Bureau of Inspection and Supervision of Public Offices, the Bureau with full authority orders a refunder in favor of the fund from which the payment was wrongfully made as against the fund from which it should have been made. In a sense the making of a refund involves a transfer of funds. It could not be made otherwise. I have never heard, however, of any one so bold as to contend that such a refunder was prohibited by the provisions of law respecting transfer of funds.

The process here under consideration consists simply of reimbursing the fund for what is taken from it for the use and benefit of another fund against which the legislature says the expenditure should be chargeable. I am not impressed with the contention that the provisions of the statute here under consideration are no longer workable because of the provisions of the budget law prohibiting the transfer of funds such as this statute authorizes, if in fact the reimbursement spoken of constitutes a transfer such as is spoken of in the budget law and in Section 6309-2 of the General Code.

Since the legislature, by the terms of the amendment of Section 1465-63, General Code, noted above, recognizing that other funds than the general fund of a political subdivision "should be chargeable" with their proper proportionate share of the contribution made by the subdivision to the State Insurance Fund and has thereby provided for the reimbursement of the general fund which bears this expenditure in the first instance from the funds properly chargeable with their respective portions of the contribution, I am of the opinion, in specific answer to your question, that the general fund of a municipality may lawfully be reimbursed out of the municipality's portion of the motor vehicle license tax and the motor vehicle fuel tax receipts for that portion of the contribution to the State Insurance Fund paid by the county auditor for the said municipality, which is directly attributable to the service of employes, workmen and operatives whose compensation is paid from moneys distributed to the municipality by authority of Sections 5537, 5541-8 and 6309-2 of the General Code.

Respectfully,
GILBERT BETTMAN,
Attorney General.

2852.

INDIGENT SICK—HOSPITAL SERVICE—COUNTY COMMISSIONERS MAY CONTRACT THEREFOR—SUCH SERVICE NOT LIMITED TO INMATES OF COUNTY INFIRMARY.

SYLLABUS:

County commissioners, by reason of the express authority under Section 3138-1 *of the General Code, may contract for hospital service for the care of the indigent poor of the*