I prepared the lease in triplicate form; and the same in that form has now been executed and attested by the Governor and Secretary of State on behalf of the state, and has been signed and acknowledged by the Mayor and Dirctor of Public Service on behalf of the city, as well as attested by the City Auditor. I now find on final examination of the lease that it is in proper form and in conformity with the acts mentioned, and that it has been legally executed, both on behalf of the state and on behalf of the city.

Accordingly, I am transmitting to you two of the original triplicate documents, and am forwarding the remaining triplicate to the city of Cincinnati for recording and retention.

I am returning herewith for your files the report of the appraisers, and also a certified copy of a lease to the city of Cincinnati under date August 29, 1912, which copy you forwarded to me for reference.

Respectfully,
JOHN G. PRICE,
Attorney-General.

2968.

GRISWOLD ACT (109 O. L. 336)—MUNICIPAL CORPORATIONS MAY BORROW MONEY OR ISSUE BONDS PRIOR TO JANUARY 1ST, 1924, UNDER GRISWOLD ACT—FIRST, FOR SALARIES OF MUNICIPAL OFFICERS—SECOND, FOR SALARIES OF MEMBERS OF POLICE AND FIRE DEPARTMENTS—THIRD, INSTALLMENTS ON FIRE HYDRANT AND STREET LIGHT RENTAL CONTRACTS WHEN ANY OF THE THREE ABOVE PAYMENTS ARE DUE AND UNPAID.

Under section 3916 *G. C. as amended by House Bill No.* 33, 109 *O. L.* 336 (339) *municipal corporations may borrow money or issue bonds for the payment of salaries of municipal officers due and unpaid, and salaries of members of the police and fire departments serving under civil service rules and regulations when due and unpaid, and for due and unpaid installments on fire hydrant and street light rental contracts made under favor of section* 3808 *of the General Code, if in each case the primary obligation is incurred prior to January* 1, 1924.

COLUMBUS, OHIO, April 6, 1922.

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

GENTLEMEN:—The bureau recently submitted to this department the following questions:

"Will you please advise us on the following:

Question 1: Does section 3916 G. C. suspend the operation of section 2295-7, so as to authorize the council of non-charter municipalities to borrow money to pay current expenses incurred in the years 1922 and 1923; and then to issue bonds to extend the time of payment of the indebtedness created thereby?

Question 2: What does the phrase 'Current Expenses' include? Or concretely, does the phrase 'Current Expenses' include payrolls of the police and fire departments; pay of elective and appointive city officials; and fire hydrant and street light rentals?"

As stated in your letter, the underlying principles upon which the questions are to be answered are laid down in Opinion No. 2728 given by this department to the prosecuting attorney of Richland county under date of December 22, 1921. That opinion entirely covers the first question now submitted; for though the opinion dealt with section 5656 G. C. as amended in what is known as the Griswold Act, its reasoning necessarily applies to section 3916, which is almost identical in purpose with section 5656 G. C. save that the one applies to municipal corporations and the other to other taxing districts. Both sections were amended by the Griswold Act, 109 O. L. 336 (see page 339); the amendments incorporated in the one section are substantially the same as those incorporated in the other; and both sections bear the same relation to the provisions of section 2 (section 2295-7 G. C.) of the same act. So that when it was held as it was in Opinion No. 2728 that section 2295-7 G. C. did not prevent the borrowing of money under section 5656 for the purpose of paying such floating indebtedness other than that evidenced by certificates of indebtedness or bonds as could have been the lawful predicate of such borrowing prior to the enactment of the Griswold Act, until the expiration of the period mentioned therein (the first day of January, 1924), that conclusion applied likewise to the powers of municipal corporations under amended section 3916. It is necessary, therefore, only to state that as a general principle a municipal corporation may borrow money under section 3916 of the General Code either by issuing certificates of indebtedness or notes, or by issuing bonds, for the purpose of extending the time of payment of any indebtedness of whatsoever character created or incurred before the first day of January, 1924, whether such indebtedness consists of items representing "current operating expenses" or not.

This conclusion, however, leaves open the question upon which it is believed that the opinion of this department is desired in response to the second question put by the Bureau, though that question is not exactly in the form in which it might be put in order to elicit the necessary response. For the question asked by the Bureau is whether or not the phrase "current expenses" by which presumably is meant the phrase as used in section 2295-7 of the General Code, includes such items as the payrolls of the police and fire departments; pay of elective and appointive city officials, and fire hydrant and street lighting rentals. When put in this form, one answer only is possible, and that an affirmative one. That is to say, all the items mentioned constitute items of "current expense" and were it not for the temporary exceptions to section 2295-7 worked by section 3916 of the General Code, we would have to say that by virtue of section 2295-7 of the General Code, which specifically prohibits the creation or incurring of any indebtedness for current operating expenses, and which by necessary construction means borrowing money for that purpose, it would be unlawful to borrow money for the purpose of paying the payrolls of the police and fire departments, the pay of elective and appointive city officials, and fire hydrant and street light rental liabilities.

But the prior opinion referred to makes it clear that some (though not all) items of current operating expenses may nevertheless be lawfully made the predicate of borrowing under section 3916 of the General Code as amended if the liability was created or incurred before the first day of January, 1924. Therefore, in order to cover the situation adequately it will be necessary to look further and inquire whether the payrolls of the police and fire departments, the pay of elective and appointive city officials and fire hydrant and street lighting rentals due and unpaid may be made the basis of borrowing under section 3916 if created or incurred before the first day of January, 1924, and this it is believed is the precise question upon which the advice of this department is requested, though the form of the question does not directly so indicate. In order to present the exact question, a statement of it might be re-framed as follows:

> Do the payrolls of the police and fire departments, the accrued pay of the elective and appointive city officials and accrued liabilities for fire hydrant and street light rentals constitute "indebtedness" within the meaning of section 3916 G. C.?

In the first place, it needs to be noted that section 3916 is to be construed in connection with section 3917 G. C. which provides in part that:

> "No indebtedness of such municipal corporation shall be funded, refunded, or extended, unless it shall first be determined to be an existing valid and binding obligation of the corporation by a formal resolution of the council thereof." * * * *

In other words, in order to constitute an "indebtedness" a claim against the municipality must represent an obligation which a municipality was authorized to incur in the way in which it was incurred. As all the items under consideration consist, as they do, of "current expenses," the first difficulty that is encountered is the prohibition of section 2295-7. But this is disposed of on grounds dealt with in the other opinion, namely, that the section properly construed does not prohibit any municipality *from becoming indebted* on account of the rendition of services, the performance of labor or furnishing of materials, etc., but only from borrowing money. So that we must look elsewhere to determine whether or not a municipal corporation may lawfully become indebted in any of the respects covered by the question under consideration before we can determine the application of section 3916. But in so doing we note that the mere fact that a claim is asserted or even the mere fact that a municipal corporation has received the benefit of services rendered, etc., is not enough to establish a lawful indebtedness. Many statutory restrictions govern the incurring of indebtedness by political subdivisions and taxing districts, and where services are rendered or commodities are furnished without compliance with these restrictions, no indebtedness is thereby created however great the moral obligation may be.

> Lancaster vs. Miller, 58 O. S. 558;
> Comstock vs. Nelsonville, 61 O. S. 288.

It is the absence of such statutory restrictions governing the employment of teachers for services in the public schools that makes it possible for a board of education to create an indebtedness in this way, which represents a valid and binding obligation of a school district, subject to be funded by the issuing of notes or bonds under section 5656 G. C., as pointed out in the previous opinion.

We must look therefore to the laws governing municipal action in the creation of obligations of the kinds inquired about in order to determine what if any restrictions exist. For example, if a municipal corporation should order a hundred tons of coal to heat the city buildings and the coal should be delivered and consumed, the municipality would not be under legal liability to pay for the coal unless the statutory formalities incident to the incurring of such obligation had been complied with. One of these formalities is found in section 3806 of the General Code which provides as follows:

> "No contract, agreement or other obligation involving the expenditure of money shall be entered into, nor shall any ordinance, resolution or order for the expenditure of money, be passed by the council or by any board or

officer of a municipal corporation, unless the auditor or clerk thereof, first certifies to council or to the proper board, as the case may be, that the money required for such contract, agreement or other obligation, or to pay such appropriation or expenditure, is in the treasury to the credit of the fund from which it is to be drawn, and not appropriated for any other purpose, which certificate shall be filed and immediately recorded. The sum so certified shall not thereafter be considered unappropriated until the corporation is discharged from the contract, agreement or obligation, or so long as the ordinance, resolution or order is in force."

This section is followed by section 3807 which provides in part that:

"All contracts, agreements or other obligations, and all ordinances, resolutions and orders entered into or passed, contrary to the provisions of the preceding section shall be void, and no person whatever shall have any claim or demand against the corporation thereunder." * * * .*

These sections are themselves designed to promote the same general object of section 2295-7 of the General Code, viz., to place municipalities upon a cash basis as regards current operating expenditures. Sections 3806 and 3807 impose their limitation at the source of the obligation; section 2295-7 as heretofore construed, deals with the secondary step of borrowing the money.

It will be readily observed that if section 3806 is complied with in spirit as well as in letter, no indebtedness will ever arise in respect of the obligations the incurring of which it regulates; for if the money is in the treasury and not appropriated to any other purpose when the obligation is incurred, there is slight danger that a municipality will ever face a deficiency so far as that particular obligation is concerned. The mere fact that the question is submitted in the form in which it arises suggests the probability that section 3806 has not been complied with with respect to the items about which inquiry is made. The question is thus raised as to whether section 3806 applies to such items.

More specifically, this question may be put in each case as follows:

(1) Does an ordinance fixing the salaries of the elective and appointive city officials or an appropriation ordinance appropriating the money to pay them at a schedule previously fixed, constitute either a "contract, agreement or other obligation involving the expenditure of money," or "an ordinance, resolution or order for the expenditure of money" within the meaning of section 3806 G. C.?

(2) Does a similar ordinance determining the rate of pay of members of the police and fire departments or the number of members of such departments, or an appropriation ordinance providing funds to meet the payrolls on the basis previously established constitute such obligation or ordinance for the expenditure of money?

(3) Does a contract with a private water company or a private electric light company for furnishing water to the fire hydrants of the city or current to light the street lights of the city constitute such a contract as is within the operation of section 3806 G. C.?

The last of these three questions can be answered at once by reference to section 3809 G. C. which provides as follows:

"The council of a city may authorize, and the council of a village may make, a contract with any person, firm or company for lighting the streets, alleys, lands, lanes, squares and public places in the municipal corporation,

> or for furnishing water to such corporation, or for the collection and disposal of garbage in such corporation, or for the leasing of the electric light plant and equipment, or the waterworks plant, or both, of any person, firm, company or municipality or for the purchase of electric current for furnishing light, heat or power to such municipality or the inhabitants thereof for a period not exceeding ten years, and the requirement of a certificate that the necessary money is in the treasury, shall not apply to such contract, and such requirement shall not apply to street improvement contracts extending for one year or more, nor to contracts made by the board of health, nor to contracts made by a village for the employment of legal counsel, nor to contracts by a municipality for the leasing or acquisition of the electric light plant and equipment, or the waterworks plant, or both, of any person, firm or corporation therein situated."

This section is similar to section 5661 of the General Code which contains a like exemption in favor of contracts for employment of teachers and other similar school employes. The effect is to authorize the public authorities to bind the subdivision which they represent by a legal obligation regardless of the presence of money in the treasury or the issuance of any certificate to that effect. When such a contract is entered into the performance of services by the adversary party thereunder gives rise to a fixed liability on the part of the public, which is an "indebtedness" in every sense of the word, "valid and binding" upon the subdivision.

As pointed out in the other opinion, section 2295-7 of the General Code does not in the opinion of this department repeal the statutes now under examination by implication, and the retention of sections 3916 and 5656 of the General Code in their amended form authorizes the borrowing of money to meet accrued liabilities of this character if incurred prior to the first of January, 1924.

The conclusion is therefore forced that accrued liabilities (not anticipated ones, it must be observed) of the character indicated by the words "fire hydrant and street light rentals" are by reason of section 3809 of the General Code, and assuming all other applicable statutory formalities to have been complied with, the proper predicate of the exercise of the power to borrow money under section 3916 of the General Code within the time limits therein designated, notwithstanding the provisions of section 2295-7 of the General Code.

But the very grounds on which this conclusion has been reached, suggest, if they do not compel, a contrary answer to the other two subsidiary questions; for while it must be admitted that there are some implied exceptions to the sweeping language of section 3806 of the General Code, and while also that language may conceivably not include every species of legal obligation that a municipality might incur, yet it is likewise believed that an expenditure of the character still to be examined into is not expressly withdrawn from the operation of section 3806 by section 3809; while certain similar expenditures are so expressly withdrawn from the application of the other section.

Generally speaking, it has been held that section 3806 applies only to obligations to be discharged through the exercise of the power of taxation.

> Kerr vs. Bellefontaine, 59 O. S. 446;
> Comstock vs. Nelsonville, supra;
> Emmett vs. Elyria, 74 O. S. 185;
> Akron vs. Dobson, 81 O. S. 66.

But whatever may have been the case when the police department was supported

largely from the proceeds of the tax on the business of trafficking in intoxicating liquors, it is clear at the present time at least that this implied exception is of no moment because the salaries of elective or appointive municipal officers and those of the members of the police and fire departments may be assumed to be a charge on the general revenue of the municipality.

On the other hand, as previously pointed out, section 3809 dealing with the exceptions to the requirements of section 3806, specifically mentions contracts made by the board of health and contracts made by a village for the employment of legal counsel. These specific exceptions show that the general assembly did not contemplate other exceptions of the same general character. Therefore, the mere fact that an obligation represents service under an employment of a continuing character or otherwise does not take the case out of the operation of section 3806. We must seek further if we are to find a basis upon which the exemption of the payrolls of city officers and members of the police and fire departments from the operation of the so-called Burns law can be based.

One thought that suggests itself is that section 3806 is limited to contractual obligations. Such a limitation is fairly inferable so far as the first clause of the section is concerned, viz., "no contract or agreement or other obligation involving the expenditure of money shall be entered into." It might be argued, though it is not decided, that the words "other obligation" are to be construed as indicating other obligations based upon contract. So that the section thus far deals only with contract cases. If that is so, then it remains to be inquired whether the obligation of a municipality to pay its officers the salaries fixed by its ordinances or the obligation of a municipality to pay the members of the police and fire department their salaries, is contractual in character. This question may be briefly considered as to each of these cases before dealing with the remainder of section 3806.

Let us take first the cases of members of the police and fire departments. As is well known, members of such departments are employed for an indefinite period, being subject to the civil service law. They have police powers and in a general sense may be termed "officers" of the municipality or the state rather than mere employes. It has been held by the Supreme Court (Cleveland vs. Luttner, 92 O. S. 493) that a police officer unlawfully dismissed from office is entitled to recover the difference between his salary for the interval during which he was separated from his service to the city and the amount he was able to earn by exercising due diligence during that period. The exact ground of this decision does not appear in the *Per Curiam* opinion of the majority in that case. But it seems that such a decision could scarcely have been predicated upon any other ground than that a contractual obligation existed. Indeed, the court does say that:

> "A public officer is a public servant, whether he be a policeman of a municipality or the president of the United States. His candidacy for appointment or election, his commission, his oath, in connection with the law under which he serves, and the emoluments of his office constitute the contract between him and the public he serves."

If this dictum be taken literally, or even the implication from the actual decision be given due weight, it would seem arguable that in this state the employment of a policeman or fireman partakes of a contractual character, at least within the scope of the phrase "other obligation" appearing in section 3806. Indeed, the reasoning there also goes far enough to stamp the powers of municipal officers as resting upon contract.

But here we encounter another difficulty, for if this part of section 3806 applies,

an absurdity results. Whatever may be the rule as to policemen and firemen (see State vs. Painesville, 13 C. C. (N. S.) 577, a case of doubtful authority), it is at least clear that a general officer of the municipality elected or appointed for a definite term under a salary fixed at the time of his election or appointment, cannot have his salary changed during that term. This results from the express provisions of section 4213 of the General Code. If this be so, then so far as the general officers are concerned, they cannot be regarded as "hired" from year to year, or even as holding an indefinite tenure for more than a year subject to removal or dismissal in case of inadequacy of municipal revenue. Now, it would be simply absurd to require that upon the induction of a mayor into office the city auditor or village clerk should certify that the money required to pay his salary is in the treasury to the credit of the proper fund and not appropriated to any other purpose. The absurdity is so apparent that the non-application of the first sentence of section 3806 to such a case must be assumed without more, notwithstanding the exception of certain perennial contracts in section 3809. In other words, it is the opinion of this department that the appointment of a public officer holding a definite term does not constitute a "contract, agreement or other obligation involving the expenditure of money" in the payment of his salary within the meaning of section 3806 whatever may be the general contractual aspect of such a transaction.

But this conclusion applies with less certainty to the cases of members of the police and fire department than to the cases of the general officers of the city. In the first place it is not clear that these officers are covered by section 4213 G. C. A case has been cited in which it has been held that they were, but this decision has never been followed by this department. See on the contrary—

State vs. Massillon, 2 C. C. (N. S.) 167;
State vs. Bish, 12 N. P. (N. S.) 369;
State vs. Coughlin, 12 N. P. (N. S.) 419;
State vs. Madigan, 16 C. C. (N. S.) 202.

Therefore, on the authority of these cases, the salaries of policemen and firemen may be increased or diminished after their appointment. They therefore do not have any right to the continuance of their salaries as fixed at the time they were appointed, if the reasoning above applied to the cases of the general officers as applied to the cases of policemen and firemen.

It is thus to be concluded that while an implied exception to the first part of section 3806 may be deemed to exist in the case of general officers of the municipality, it does not necessarily follow that similar exceptions are to be made in cases of employment or appointment of policemen and firemen. But the remainder of section 3806 remains to be considered. The section also provides that,

> "nor shall any ordinance, resolution or order for the expenditure of money, be passed by the council or by any board or officer of a municipal corporation"

without the necessary certificate. This language following as it does the first part of the section which deals with the restrictive class of obligations sounding in contract must be given a broader scope in order to have any meaning at all. Yet its application to the administration of the police and fire departments or to the payment of salaries of general officers is not clear.

Taking the case of police and fire departments as an example, the following statutes may be cited to show their procedure:

Under section 4214 of the General Code, council is authorized "except as otherwise provided in this title" * * * "by ordinance or resolution" to "determine the number of officers, clerks and employes in each department of the city government," and to "fix by ordinance or resolution their respective salaries and compensation." The director of public safety who is the head of the police and fire departments, is not given power to determine the number of employes therein nor to fix their salaries. It therefore follows that the personnel of the police and fire departments is fixed by council under section 4214 of the General Code (this is specifically provided as to the personnel of the police department by section 4374, and to that of the fire department by section 4373 G. C., but the power of council to fix their salaries seems to be referable to section 4214).

The power of appointment seems to be vested in the director of public safety under the direction of the mayor. See sections 4368, 4374 and 4377, except as to emergency patrolmen in the police department who are to be appointed by the mayor (section 4373 G. C.).

It seems difficult to characterize the ordinance fixing the personnel of the police and fire departments as one for the expenditure of money. True, it involves expenditure of money (a phrase used in section 3806), but it does not immediately direct the expenditure of money, nor authorize it. On the other hand, the exercise of the appointing power, though it likewise involves the expenditure of money, does not seem to be an ordinance for the expenditure of money.

But the annual appropriation of council passed under authority and direction of section 3797 does seem to be an ordinance for the expenditure of money as applied to the police and fire department payroll for which appropriation is made. Yet there are strong reasons for the contrary conclusion. The application of section 3806 to these three steps will now be dealt with briefly. In the first place, the ordinance fixing the personnel of each of the subdivisions of that department can scarcely be the kind of ordinance to which section 3806 is intended to refer, because it is required that it be passed annually, and if it contemplates the expenditure of money at all, it must contemplate the expenditure of money for an indefinite period of time, i. e., until it is amended, and that being the case the amount of money it represents as an expenditure cannot be ascertained, and of course no certificate can be issued.

Again, the employment or appointment of a person as policeman or fireman can scarcely be an order for the expenditure of money "passed" by the director of public safety as an officer of a municipal corporation because the tenure of the policeman or fireman being indefinite under the civil service act, there is no sum certain which can be certified against it.

This particular difficulty disappears if the semi-annual appropriation ordinance be regarded as the predicate of the certificate for the amount appropriated for the police and fire departments for a particular year is certain, and can be made the subject of a certificate. At the same time, however, section 3797 authorizes appropriations to be made not only from moneys known to be in the treasury, but from those estimated to come into it during the six months next ensuing from the collection of taxes and all other sources of revenue, whereas section 3806 requires that the money be actually in the treasury. It has been held by this department that section 3797 in this respect was not superseded by section 5649-3d of the General Code, a part of the Smith One Per Cent law. Inasmuch as appropriations are authorized to be made from estimated revenues as well as revenues on hand, it is clear that an appropriation ordinance is not the kind of an "ordinance for the expenditure of money" against which a certificate that funds are actually in the treasury is required to be made.

These arguments all tend to show not only that the salaries of the regular officers of the municipality are not within the intendment of section 3806 of the General Code, but also that the salaries of members of the police and fire departments are likewise excepted. This conclusion is to some degree inconsistent with

> Pittinger vs. Wellsville, 75 O. S. 508;
> State vs. Hoffman, 25 O. S. 328; and
> Urig vs. Reading, 11 O. D. 704.

but these cases were all decided before the application to municipal corporations of the civil service laws, and were uninfluenced by any such law. They all involved employment by the month or some other period of time less than a year, and in holding that the Burns law certificate applied to the act of making such employment encountered no such difficulty as has been encountered herein in dealing with the civil service laws which by making tenure uncertain likewise make the amount involved so uncertain that it cannot be certified to.

It is worthy of note that in Pittinger vs. Wellsville, supra, the city solicitor admitted (see page 515) that the appointment or election of a city officer was not subject to the Burns law.

For all these reasons, it is concluded that the necessarily implied exceptions exist in favor of practically all permanent civil service employes on the one hand and all established municipal officers on the other hand, so that section 3806 applies only to the employment of casual and temporary employes as to which employment the amount of money involved can be definitely ascertained. If section 3806 does not apply then it must follow that when an ordinance is passed by council creating a municipal office, or when a like ordinance is passed establishing the personnel of the police and fire departments, and persons are elected, appointed or employed to fill any position thus established, at salaries fixed by ordinance of council, a potential liability exists against the municipality without any compliance with section 3806 of the General Code. That being the case, the tenure of the office or the faithful rendition of service under the appointment creates an accrued liability against the city or municipality which the municipality is bound to pay. The municipality is, in short, "indebted," and no reason is perceived why section 3916 of the General Code does not authorize the borrowing of money to pay any such accrued liability incurred prior to January, 1924.

The second question as re-framed by this department is therefore answered in the affirmative.

Respectfully,
JOHN G. PRICE,
Attorney-General.

2969.

APPROVAL, BONDS OF JACKSON TOWNSHIP RURAL SCHOOL DISTRICT, FRANKLIN COUNTY, IN AMOUNT OF $28,000.

COLUMBUS, OHIO, April 6, 1922.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.