

OPINION NO. 80-106**Syllabus:**

Pursuant to R.C. 1905.35, a municipal corporation must pay the expenses incurred in sustaining violators of municipal ordinances who are confined in the county jail. No contract or ordinance is required to be executed by the municipal corporation in order for such obligation to arise. In order to make such payment, however, the legislative authority must comply with R.C. 753.02, which requires that a municipal corporation pass an ordinance providing for the payment of expenses incurred in sustaining all municipal prisoners wherever confined.

To: Arthur Elk, Ashland County Pros. Atty., Ashland, Ohio
By: William J. Brown, Attorney General, December 31, 1980

I have before me your request for my opinion concerning the interpretation of R.C. 1905.35 and R.C. 753.02. Your specific question reads as follows:

Does a municipality have the legal responsibility to pay the expenses of prisoners housed by the county on violations of municipal ordinances if there is no municipal ordinance authorizing such a payment or a contract specifying the amount of the payment?

It is well settled under Ohio law that one who has been charged with or sentenced for violation of a municipal ordinance is a municipal prisoner and responsibility for the sustenance and care of such a prisoner rests with the municipality. 1978 Op. Att'y Gen. No. 78-019; 1976 Op. Att'y Gen. No. 76-012; 1955 Op. Att'y Gen. No. 5561, p. 317; 1952 Op. Att'y Gen. No. 1138, p. 121.

R.C. 1905.35 states that a municipal prisoner may be imprisoned in the county jail at the expense of the municipal corporation.

Imprisonment under the ordinances of a municipal corporation shall be in the workhouse or other jail of the municipal corporation. Any municipal corporation not provided with a workhouse, or other jail, may for the purpose of imprisonment, use the county jail, at the expense of the municipal corporation, until the municipal corporation is provided with a prison, house of correction, or workhouse. Persons so imprisoned in the county jail are under the charge of the sheriff. Such sheriff shall receive and hold such persons in the manner prescribed by the ordinances of the municipal corporation, until such persons are legally discharged. (Emphasis added.)

R.C. 1905.35 permits a municipal corporation that is without a penal institution of its own to incarcerate its prisoners in the jail of the county. It also gives the sheriff the authority to accept such prisoners and places them "under the charge of the sheriff."

The amount to be allowed a sheriff for the cost of maintaining persons within his charge is not based upon municipal ordinance or contractual agreement, but rather, is established by statute. R.C. 311.20 sets forth the procedure to be followed by the sheriff and board of county commissioners in dealing with the expenses incurred in keeping and feeding prisoners and other persons in the charge of the sheriff and provides in part as follows:

On the fifth day of each month the sheriff shall render to the board an itemized and accurate account, with all bills attached, showing the actual cost of keeping and feeding prisoners and other persons placed in his charge and the number of meals served to each such prisoner or other person during the preceding month. The number of days for which allowance shall be made shall be computed on the basis of one day for each three meals actually served. In counties where the daily average number of prisoners or other persons confined in the county jail during the year next preceding, as shown by the statistics compiled by the sheriff under sections 341.02 and 341.03 of the Revised Code, did not exceed twenty in number, the board shall allow the sheriff not less than fifty cents per meal. Such bills, when approved by the board, shall be paid out of the county treasury on the warrant of the county auditor. The sheriff shall furnish, at the expense of the county, to all prisoners or other persons confined in the jail, fuel, soap, disinfectants, bed, clothing, washing, and nursing, when required, and other necessaries as the court, in its rules, designates. The jail register and the books of accounts, together with bills for the feeding of prisoners and other persons in the jail, shall be open to public inspection at all reasonable hours.

R.C. 311.20 thus sets forth the duty of the sheriff to maintain prisoners and other persons confined in the jail and states that his duty will be performed at the expense of the county. One of my predecessors opined in 1955 Op. No. 5561 at 319, that "[t]hese provisions, however, only relate to the primary duty, which would doubtless arise from the principle of humanity, independent of any law and do not determine the question of ultimate liability."

Although the provisions of R.C. 311.20 do not determine the question of ultimate liability, they are relevant for the purpose of determining the amount which a sheriff is entitled to receive for housing prisoners. Unless otherwise provided by law, R.C. 311.20 makes it clear that a sheriff is to receive only the "actual" costs incurred in maintaining persons in his charge (subject to the fifty-cent per meal minimum provided in certain circumstances). Hence, in the absence of statutory authority to the contrary, there is no need for an ordinance or contract, and any ordinance or contract between the county and a municipality within that county providing for any amount other than the actual costs incurred in connection with the incarceration of municipal prisoners in the county jail would be void as contrary to law. See 1959 Op. Att'y Gen. No. 322, p. 180 (providing that the correct rate at which the county should be reimbursed for the care of military prisoners is actual costs). It has been held that G.C. 4564 (R.C. 1905.35) obligates the county to accept prisoners of the municipal corporations of such county that have no penal institutions of their own, and also obligates the municipal corporation to pay the expenses incurred by the county in housing such prisoners. The court has also held that this statutory liability exists independent of the contracts and ordinances referred to by G.C. 4126 and 4127 (presently R.C. 753.02 and 753.03). Richland County v. City of Mansfield, 27 Ohio N.P. (n.s.) 293 (C.P. Richland County 1929).

You have advised that the municipality in your situation has not passed an ordinance requiring it to pay the expenses of municipal prisoners housed by the county, nor has it provided for the amount of the payment by contract with the county. As stated above, R.C. 1905.35 does not require either an ordinance or contract in order to impose liability upon the municipal corporation for payment of the expenses incurred in housing its prisoners.

You have stated that the statutory liability imposed by R.C. 1905.35 appears to conflict with the requirements set forth in R.C. 753.02, which provides as follows:

The legislative authority of a municipal corporation shall provide by ordinance for sustaining all persons sentenced to or confined in a prison or station house at the expense of the municipal corporation, and in counties where prisons or station houses are in quarters leased from the board of county commissioners, may contract with the board for the care and maintenance of such persons by the sheriff or other person charged with the care and maintenance of county prisoners.
(Emphasis added.)

R.C. 753.02 does not require that a municipal corporation pass an ordinance in order for persons to be confined at the expense of the corporation, but, rather, requires that the legislative authority of a municipal corporation provide for sustaining all persons who have been sentenced under the ordinances of the municipality and have therefore become the responsibility of such municipality. In 1955 Op. Att'y Gen. No. 5561 one of my predecessors discussed the duty imposed by R.C. 753.02 and opined that the duty extends to all municipal prisoners who are confined and cared for in a prison or jail not maintained by the municipality. In that opinion the then Attorney General opined as follows:

While this section [R.C. 753.02] is somewhat vague, yet it appears clearly that the legislature intended to place the responsibility on the municipality for the cost of maintaining prisoners who would be the natural responsibility of the municipality but who for one reason or another are confined and cared for in a prison or jail not maintained by the municipality. Note the generality of the language "sentenced to or confined in." Section 1905.35 Revised Code, also recognizes certain circumstances under which municipal prisoners may be confined in a county jail, and places the responsibility for the cost of their maintenance on the municipality.

1955 Op. Att'y Gen. No. 5561 at 320.

Thus, it appears obvious that since R.C. 1905.35 states that violators of municipal ordinances may be confined in the county jail at the expense of the municipal corporation, the requirement of R.C. 753.02 to provide for "all persons sentenced to or confined in a prison or station house at the expense of the municipal corporation" clearly includes municipal prisoners in the county jail.

The ordinance provision of R.C. 753.02 merely mandates that the legislative authority of a municipal corporation pass an ordinance which will make payment of the obligations incurred by the municipality in incarcerating its prisoners properly payable. See R.C. 5705.41 (providing that public monies be properly appropriated). The use of the word "shall" indicates that the procedure set forth is mandatory. Dorrian v. Scioto Conservancy District, 27 Ohio St.2d 102, 271 N.E.2d 834 (1971); Cleveland Ry. Co. v. Brescia, 100 Ohio St. 267, 126 N.E. 51 (1919). Where, as in your situation, the legislative authority of a municipal corporation has failed to comply with a duty imposed by statute, the corporation is not thereby relieved of liability. A municipal corporation clearly has a duty imposed by R.C. 1905.35 to pay the expenses of sustaining violators of municipal ordinances confined in the county jail. In order to pay this obligation such municipal corporation must follow the procedure set forth in R.C. 753.02 and pass an ordinance pursuant to which such payment may be made.

R.C. 753.02 does not require that a municipal corporation execute a contract providing for the terms according to which municipal prisoners may be housed in the jail of the county in order for the obligation of the municipal corporation to pay the costs of housing its prisoners in the county jail to arise. I concur in the conclusion reached by one of my predecessors in 1941 Op. Att'y Gen. No. 3459, p.

78, 81 that, "Section 4126, General Code [R.C. 753.02] . . . is of limited application and only applies when the municipal corporation maintains its jail or station house in quarters leased from the county commissioners" (emphasis added). The language of R.C. 753.02 merely provides that if the legislative authority of a municipal corporation leases space from the board of county commissioners and houses its prisoners on such premises, the municipality need not actually provide the care and maintenance itself, but rather may contract for someone else to perform this service for the municipality. This section merely gives the municipal corporation the authority to make a contract, but the provision of these services, by whomever performed, remains the ultimate responsibility of the municipality.

It is clear that R.C. 753.02 does not require the legislative authority of a municipal corporation to enter into a contract with a board of county commissioners in order for the sheriff of the county to have charge of and responsibility for municipal prisoners confined in the county jail. Such prisoners come under the charge of the sheriff pursuant to R.C. 1905.35 and, as stated above, R.C. 1905.35 provides that although municipal prisoners are in the charge of the county sheriff, the municipal corporation is responsible for the expenses incurred by virtue of such confinement. Since you have stated in conversations with members of my staff that the municipality with which you are concerned does not have a lease-type arrangement with the county jail, the contract provision of R.C. has no application to your situation.

Therefore, it is my opinion, and you are advised, that, pursuant to R.C. 1905.35, a municipal corporation must pay the expenses incurred in sustaining violators of municipal ordinances who are confined in the county jail. No contract or ordinance is required to be executed by the municipal corporation in order for such obligation to arise. In order to make such payment, however, the legislative authority must comply with R.C. 753.02, which requires that a municipal corporation pass an ordinance providing for the payment of expenses incurred in sustaining all municipal prisoners wherever confined.