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1. WATER—NO MANDATORY DUTY FOR MUNICIPALITIES TO FURNISH FREE WATER OR ELECTRICITY TO PUBLIC SCHOOL BUILDINGS—SECTION 3963 G. C.

2. FREE WATER AND ELECTRICITY — MUNICIPALITY WHICH OWNS SYSTEM OF WATERWORKS AND AN ELECTRIC LIGHT PLANT MAY FURNISH UTILITIES TO PUBLIC SCHOOL DISTRICT LOCATED WHOLLY OR PARTLY WITHIN MUNICIPALITY.

SYLLABUS:

1. Notwithstanding the provisions of Section 3963, General Code, there is no mandatory duty resting upon municipalities to furnish free water or electricity to public school buildings.

2. A municipality owning a system of waterworks and an electric light plant may furnish free water and electricity to a public school district located wholly or partly within the municipal limits.

Columbus, Ohio, August 14, 1946

Hon. Raymond O. Morgan, Acting Prosecuting Attorney
Wooster, Ohio

Dear Sir:

I have before me your request for my opinion, reading as follows:

"The village of Orrville owns and operates a municipal light plant supplying electric current to the village of Orrville and some of the surrounding territory outside the village. The village of Orrville also owns and operates a water plant and supplies water to the village of Orrville. The Orrville Exempted Village School District consists of the territory in the village of Orrville, and contains territory outside the village of Orrville, but the territory of the school district is not identical with the territory served by the Orrville Municipal Light Plant. Both the light plant and water plant are operated by the Board of Public Affairs of the village of Orrville in accordance with the ordinances passed by the council. The questions are:

1. May the Council or the Board of Public Affairs of the village of Orrville furnish free electricity and/or water to the Orrville Exempted Village School District?

2. If your answer to question No. 1 is negative, then may the Council or the Board of Public Affairs of the village of Orrville furnish free electricity and/or water to the Orrville Exempted Village School District in the ratio which the tax valuation of the property in the village bears to the total tax valuation of the school district or in any other proportionate charge?

I believe Section 3963, Ohio General Code, answers the question pertaining to water, and Section 3982-1, Ohio General Code, would control as to electricity; however, I have been requested to have your formal opinion on these questions. I would also like your opinion as to whether or not it is mandatory to furnish free electricity and/or water in this case."

I note that you propound two specific questions relative to the *right* of the municipality to furnish free electricity and water to a school district, and then you ask a final question whether it is the mandatory *duty* of the municipality to furnish free electricity or water to such school district. I will dispose of your last question first.

1. Section 3963, General Code, reads as follows:

> "No charge shall be made by a city or village, or by the waterworks department thereof, for supplying water for extinguishing fire, cleaning fire apparatus, or for furnishing or supplying connections with fire hydrants, and keeping them in repair for fire department purposes, the cleaning of market houses, the use of any public building belonging to the corporation, or any hospital, asylum, or other charitable institutions, devoted to the relief of the poor, aged, infirm, or destitute persons, or orphan or delinquent children, or for the use of public school buildings in such city or village.
>
> But in any case where the school district, or districts, include territory not within the boundaries of the city or village, a proportionate charge for water services shall be made in the ratio which such tax valuation of the property outside the city or village bears to the tax valuation of all the property within such school district, subject to the rules and regulations of the waterworks department of the municipality governing, controlling, and regulating the use of water consumed."

This section, so far as it undertakes to compel a municipality to furnish water to the public school buildings in the municipality, was the subject of litigation in a case which reached the supreme court, entitled East Cleveland v. Board of Education, 112 O. S. 607. In an action commenced in the common pleas court that court, as well as the court of appeals, held that Section 3963, in forbidding a municipality to charge for water furnished to the public schools, was constitutional. In the supreme court two of the judges sustained the judgment of the court of appeals and five judges dissented. However, the two judges prevailed by reason of that provision of the constitution of Ohio, found in Article IV, Section 2, which provides:

> "No law shall be held unconstitutional and void by the supreme court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the court of appeals declaring a law unconstitutional and void."

The two judges voting for affirmance argued that since the school system was specially favored and its maintenance commanded by the constitution, and since it was well settled that the maintenance of the school system was distinctly a function of the state over which the municipality had no control and with which it had no right to interfere,

the legislature had a right to impose upon the municipality the duty to furnish schools with free water, and that the powers of home rule given it by Article XVIII of the Constitution did not give the municipality the power to withhold from the schools this measure of support which the general assembly had commanded. The five dissenting judges on the other hand, while conceding that the operation of the school system was a function of the state and that a municipality, even under home rule, had no right to interfere with it, argued with great force that the provisions of Article XVIII, particularly Section 4, gave a municipality the full and absolute right to acquire and operate its water works and other public utilities free from any interference on the part of the general assembly.

The law remained in this condition until the case of Board of Education v. Columbus, 118 O. S. 295, was decided. That case came up from the common pleas court on a judgment by that court, sustained by the court of appeals, holding that Section 3963, in so far as it undertook to require municipalities to furnish free water to schools within their limits, was unconstitutional. The supreme court having still the same personnel, divided as before, but since the majority was not called upon to declare the law unconstitutional, their judgment of affirmance became the law and since that time it has been well settled that the statute in question cannot be applied so as to require a municipality to furnish free water to public schools located either in part or wholly within the limits of a municipality. The first branch of the syllabus reads as follows:

> "That portion of Section 3963, General Code, which prohibits a city or village or the waterworks department thereof from making a charge for supplying water for the use of the public school buildings or other public buildings in such city or village, is a violation of the rights conferred upon municipalities by Section 4 of Article XVIII of the Ohio Constitution, and is unconstitutional and void. (East Cleveland v. Board of Education, 112 Ohio St., 607, 148 N. E. 350, overruled.)"

This opinion was affirmed later in the case of Board of Education v. Village of Willard, 130 O. S. 311, six of the judges concurring.

It therefore follows, in specific answer to your question, that it is not the mandatory duty of a municipality under any circumstances to furnish free water to a school district, whether located entirely within the municipal limits or partly within and partly without.

As to electric current, the statute to which you refer, Section 3982-1 of the General Code, reads as follows:

> "The council of any municipality owning and operating municipal water, gas, or electric light plants, may provide by ordinance to furnish free of charge the products of such plants when used for municipal or public purposes."

This statute does not purport to impose any duty but merely to authorize a municipality by ordinance to provide for furnishing either water, gas or electricity free of charge when used for municipal or public purposes. Inasmuch as there is no command feature to this provision, it seems unnecessary to discuss it in connection with the question which we are here considering.

2. Coming to your question as to whether the council or the board of public affairs of a village *may* furnish free electricity or water to a school district which embraces the territory of the village and also certain territory outside of its limits, I would again direct attention to the provisions of Section 3982-1, supra, in which the General Assembly has in very clear terms undertaken to authorize a municipality to furnish without charge water, gas or electricity "when used for municipal or public purposes." The use of the words "municipal or public purposes" seems to contemplate that it was intended to authorize such free service not only to public institutions belonging to the municipality but also to those institutions which serve the local public but do not belong to the municipality.

The policy of the legislative branch of the state is clearly shown in Section 3963, supra, in which the General Assembly not only authorized but attempted to require cities to furnish free water not only for municipal uses but for a number of institutions having a manifest relation to the welfare of the municipality and the community in which it is located, including specifically public school buildings in such city or village. The reference to "any hospital, asylum or other charitable institution" is not qualified by any provision that these institutions must be within the corporation or under public control. One of my predecessors in an opinion found in 1928 Opinions of the Attorney General, page 886, held that under the authority of said Section 3982-1 the council of a municipal corporation could provide free water for the use of a county children's home located outside of the city limits.

Wholly independent of this statutory authority, we find in Article XVIII, Sections 4, 5 and 6, abundant authority not only to acquire public utility plants but also to manage and operate them in such manner as the municipality deems proper. This power has in many decisions been held by our courts to be plenary and wholly beyond the power of the legislature to modify or limit.

In the third syllabus of the case of Board of Education v. Columbus, supra, it was held:

> "Municipalities derive the right to acquire, construct, own, lease and operate utilities the product of which is to be supplied to the municipality or its inhabitants, from Section 4 of Article XVIII of the Constitution and the legislature is without power to impose restrictions or limitations upon that right."

To the same effect see Dravo-Doyle Company v. Orrville, 93 O. S. 236 and Power Company v. Steubenville, 99 O. S. 421.

In deciding the case of Board of Education v. Columbus, supra, the prevailing majority of the court referred to and adopted its dissenting opinion in the former case of East Cleveland v. Board of Education. From that opinion, found in 112 O. S. 620, I quote as follows:

> "We have read Sections 4, 5 and 6 of Article XVIII of the Ohio Constitution in vain to find any provision of the Constitution which prevents the taxing authorities of the city from raising part or even all of the revenues to pay for water by direct taxation. The entire matter of a supply of water for the inhabitants and institutions of East Cleveland, including the public schools, being within the control of the city, that control must rest, under the charter of the city of East Cleveland, in its city commission. It having seen fit to adopt an ordinance clearly covering the situation, the judicial branch of the government may not stay its hand."

It appears to me that a considerable discretion is vested in the city in the matter of furnishing free water for institutions which it considers are conducive to the welfare of the inhabitants of the municipality or community of which it is a part. While the school district is independent of the municipality and the limits not precisely co-extensive, yet there is a substantial identity and a close community interest and I do not consider that it would be an abuse of discretion if the municipality sees

fit to furnish free water to the school district of which it is a part even though not precisely co-extensive. The general policy of the law in this respect is illustrated by the statutes dealing with the powers of municipalities. Municipalities are given power whenever they deem it necessary, to acquire by condemnation land located *outside* their limits, and these powers include the acquisition of parks, boulevards and playgrounds. (Sections 3677, 3678, General Code.)

Section 3711, General Code, undertakes to authorize a municipal corporation to transfer to or permit the use of by the trustees of a public school library of a district within which a municipal corporation is situated, lands which the municipality has acquired or which are suitable for library purposes. Section 4065-5 authorizes a municipality and school district to cooperate and join in equipping, operating and maintaining playgrounds, swimming pools, etc.

It is accordingly my opinion that a municipality owning a system of waterworks and an electric light plant may furnish free water and electricity to a public school district located wholly or partly within the municipal limits.

Respectfully,

HUGH S. JENKINS,
Attorney General.