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1. WATERWORKS OF MUNICIPALITY—SURPLUS FUNDS FROM ITS OPERATION—MAY BE APPLIED ONLY TO REPAIRS AND ENLARGEMENT OR EXTENSION, PAYMENT OF INTEREST ON ANY LOAN MADE FOR CONSTRUCTION OR FOR CREATION OF SINKING FUND FOR LIQUIDATION OF DEBT—SECTION 3959 G. C.

2. CITY WITHOUT AUTHORITY TO CHARGE WATERWORKS RENTAL FOR USE OF WATERWORKS PROPERTY—PURPOSE, REVENUE INTO GENERAL FUND, AN OFFSET AGAINST MONEYS IMPROPERLY DIVERTED FROM WATERWORKS SURPLUS INTO GENERAL FUND OF CITY.

SYLLABUS:

1. Under the provisions of Section 3959, General Code, any surplus arising from the operation of the water works of a municipality after paying the expenses of conducting and managing same may be applied only to the repairs and enlargement or extention of such works or the reservoirs connected therewith, the payment of the interest of any loan made for their construction or for the creation of a sinking fund for the liquidation of the debt.

2. A city is without authority to charge the waterworks of said city with a rental for the use of the property belonging to the waterworks for the purpose either of bringing revenue into the general fund or as an offset against moneys theretofore improperly diverted from the waterworks surplus into the general fund of the city.

Columbus, Ohio, June 25, 1946

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen:

Your request for my opinion reads:

> "We are inclosing herewith a letter from our City of Steubenville Examiner, together with copies of two ordinances adopted by the council of said city, under which waterworks funds have apparently been diverted to uses of the general fund of said city.
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> Will you kindly examine the inclosure and advise us in answer to the following question:
>
> May a city which has heretofore diverted waterworks funds to general fund uses through the expedient of overdrawing the general fund balances, legally adjust such fund balance by declaration of the council, by ordinances, that land occupied by waterworks plants, (acquired by expenditure of general bond funds, which bonds may have been serviced from water revenues), should pay rents to the general city funds for past as well as future occupancy of said land?"

Attached to your communication is a letter of your examiner which contains certain statements of fact which I consider have a bearing on the question submitted. It reads as follows:

> "Enclosed you will find Ordinances No. 7348 and 7349 adopted by the Council of the City of Steubenville, Ohio. These Ordinances are of such vicious nature that I shall appreciate you considering them and advising me on their respective legality.
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> The Officials here inform me that both you and Mr. Ferguson are familiar with the critical financial condition existing here during 1943, 1944 and the first half of 1945; such condition prompting the above numbered ordinances. * * *
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> Old examiners reports and bond records indicate that General Taxation Bonds have been issued in every instance for the acquisition, enlargement or improvement of the Water Department or its pumping or filtration appurtenances. The records indicate that in some years the requirements for principal and interest were levied for within the millage allowed. To counter this, the old examiners reports show that the Water Department transferred regularly each year up to 1941 to the Bond Retirement Fund to meet debt requirements incurred for Water Dep't.

benefits. I cannot locate all the records, thus I cannot make definite statements, but it is not beyond reason to believe that the Water Dep't. has paid its own debt requirements. Considering this is it not a bit unreasonable for a City to charge a rental to its Water Dep't. for the privilege of inhabiting premises which are a product of its (Water Dept's.) own income or revenue?

As for No. 7349, I believe it to be illegal because it is retroactive in nature, therefore contrary to the Constitution; and is in reality an attempt to legalize the illegal overdrawing of various city funds made possible by using Water Works cash to support the checks drawn against overdrawn funds."

There are also attached copies of the ordinances referred to in the examiner's letter. Ordinance No. 7348, passed June 12, 1945, is an emergency ordinance, vetoed by the mayor on June 19, 1945, and repassed by the council over the veto on July 5, 1945. It provides in Section 1 that "the water works department shall occupy and use the premises now known as the water works pumping station * * * on a rental basis of $1,250.00 per month, beginning July 1, 1945. * * *"

Section 2 of the ordinance provides that "the water works department shall use and occupy the premises known as the filtration plant * * * and shall pay therefor a rental value of $1,250.00 per month commencing the 1st day of July, 1945."

Ordinance No. 7349 also passed, vetoed by the mayor and repassed on the same dates as the other ordinance, recites that the waterworks department has for a great number of years been using and occupying premises owned by the city and known as the pumping station; that there has been no rental paid by said waterworks department for the use of said premises; and that the use of said premises by the water department is reasonably worth $1,250.00 a month; furthermore that the filtration plant of the waterworks department has for a number of years been using and occupying premises owned by the city and known as the filtration plant; that no rental has been paid by said waterworks department for use of said premises; that the use thereof is reasonably worth $1,250.00 per month.

The ordinance further recites that the City of Steubenville has become indebted to the waterworks department in the sum of $176,334.58

for moneys loaned by said waterworks department to the various funds of the city. The ordinance then provides as follows:

> "Section 3. NOW THEREFORE, BE IT ORDAINED by the council of the city of Steubenville, Ohio, that the debt due to the city of Steubenville, Ohio, by the department of Water Works for the last six years up to and including the month of June 1945, for the use of the Pumping Station Premises shall be $90,000.00; and the debt due to the city of Steubenville by the Water Works Department for the last six years up to and including the month of June 1945, for the use of the Filtration Plant premises shall be $90,000.00.
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> "Section 4. The Auditor of the city of Steubenville, Ohio, is hereby authorized and ordered to credit his accounts with the amounts above mentioned and make proper adjustment to the various funds of the said city of Steubenville."

Section 3959 General Code, in effect when the ordinances above referred to were passed, provides in part as follows:

> "After paying the expenses of conducting and managing the water works, any surplus therefrom may be applied to the repairs, enlargement or extension of the works or of the reservoirs, the payment of the interest of any loan made for their construction or for the creation of a sinking fund for the liquidation of the debt. * * *
>
> The amount authorized to be levied and assessed for water works purposes shall be applied by the council to the creation of the sinking fund for the payment of the indebtedness incurred for the construction and extension of water works and for no other purpose whatever."

The case of Cincinnati v. Boettinger, 105 O. S. 145, was one in which it was sought to enjoin the transfer of funds from the waterworks department of the City of Cincinnati to the general fund of the city and to enjoin the alleged misapplication of the surplus funds derived from the operation of the waterworks toward the payment of fixed charges and current expenses of the city. The holding of the court as shown by the first paragraph of the syllabus was as follows:

> "Section 3959, General Code, is constitutional and operates as a valid limitation upon the uses and purposes for which revenues derived from municipally owned waterworks may be applied. By virtue of the provisions of that section, surplus reve-

> nues derived from water rents may be applied only to repairs, enlargement or extension of the works, or of the reservoirs, and to the payment of the interest of any loan made for their construction, or for the creation of a sinking fund for the liquidation of the debt."

By subsequent decisions the court has reaffirmed its holding in the above case. See Hartwig Realty Company v. Cleveland, 128 O. S. 583; City of Lakewood v. Reese, 132 O. S. 399. The limitations imposed by this statute appear to be so well confirmed by judicial decisions that it is unnecessary to go at length into a discussion of the cases.

It will be noted however that this Section 3959 limits the disposition of the surplus "after paying *the expenses of conducting and managing* the water works." The question therefore arises: What may be included in the expense of conducting and managing? That question has been considered in several opinions of former attorneys general. In 1939 Opinions of Attorney General, page 2248, it was held:

> "A city which operates a municipal waterworks, may not use the funds derived from the operation thereof in payment of a portion of the salaries of the mayor, director of law, director of finance of such city, and may not use such funds in payment of the operating expense of such municipal departments."

An opinion to like effect appears in 1937 Opinions of Attorney General, page 835.

In the 1939 opinion it was said:

> "* * * the salaries of the salaried officers of the city, such as mayor, law director and director of finance, and the expense of the operation of their departments, are a part of the *general operation expense* of the city rather than of the municipal waterworks, even though some portion of their efforts may be expended in promoting the welfare of such utility, and are payable only from the general fund of the city."

The question of the use of surplus funds of the waterworks was again presented to my predecessor and discussed in an opinion found in 1944 Opinions of Attorney General, page 151, where it was held:

> "Under the restrictions imposed by Section 3959, General Code, a municipality may not through ordinance or resolution of council require that the water revenue fund of such munici-

> pality be charged an annual sum of money representing the cost of general overhead service performed by the general officers, such as the law department, finance department, etc., and including the probable cost of rental of office space, heat, light, etc.
>
> A municipality may, consistent with Section 3959, General Code, and pursuant to the provisions of Section 280, General Code, out of the revenues of its waterworks pay into the municipal treasury *the reasonable value* of office space and heat and light therefor, furnished to the water department *by the city,* such expenditures being a part of the necessary expense of conducting and managing the waterworks."
>
> (Emphasis added.)

Touching on the payment by the waterworks of the cost of rental space, heat, light, etc., used by the water department, it was said in the course of that opinion:

> "Accordingly, it appears to me that while a municipality may not legally pay out of its water revenue fund a lump sum annually, as stated in your question, covering the general overhead services performed by the general officers, and including also the cost of rental space, heat, light, etc., used by the waterworks department, still, it would, in my opinion, be legal for these latter expenses which are clearly a direct and necessary part of the operating expense of the waterworks, to be paid for out of the waterworks revenue. If such items as rent, heat and light are procured from someone other than the city, their cost would certainly be a legitimate element of expense 'in conducting and managing the waterworks' and under the express provisions of Section 3959, General Code, would be payable out of this revenue."

As bearing on that proposition, Section 280 of the General Code was quoted, which reads as follows:

> "All service rendered and property transferred from one institution, department, improvement, or public service industry, to another, shall be paid for at its full value. No institution, department, improvement, or public service industry, shall receive financial benefit for the support of another. When an appropriation account is closed, an unexpended balance shall revert to the fund from which the appropriation was made."

It would seem to be a reasonable application of that section to allow a water department to pay a certain rent for space occupied by it in a

city hall built with general funds. The water department is a more or less independent institution, and may reasonably be expected to pay its own way.

It should be noted however that the syllabus of the opinion just referred to makes it clear that only the *reasonable value* of office space and heat and light therefor is to be considered as a legitimate part of the operating expense, and furthermore that the space and other service which may be paid for must be furnished to the water department *by the city*. There is certainly nothing in that opinion which would give sanction to the proposition of permitting the city to charge the water department for rental of property which has been bought and paid for by the water department, nor is there anything in the opinion which suggests the propriety or legality of a charge other than a reasonable rental, or that the water department should subsidize the city in its general operations.

Under the facts submitted by you it would appear that these two pieces of land which the waterworks department has occupied for many years for its pumping station and its filtering plant were purchased and paid for mainly if not entirely by the waterworks department out of its own revenues. If it is to be charged ground rental for the use of its own lands it would be equally appropriate to charge it for the use of the improvements which it has constructed on these lands, including the buildings, filtering beds and pumping equipment and also for the distributing lines throughout the city. The title to all of these is of course in the city, yet since the water system is a public utility and stands on its own feet and acquires by its earnings the property which it uses, it seems preposterous that the city should charge it rental for the use of property thus acquired.

I have no direct information as to the reasonableness of the rental of $2,500.00 per month which the city proposes to charge its waterworks under these ordinances and which it has used as a basis for paying its indebtedness of $180,000 to the waterworks, but it would rather appear that the rental value was fixed on the basis of equalling the overdraft of the general fund of the city rather than with any reference to a reasonable value of the lands.

On the facts presented to me and in view of the legal propositions to which I have called attention, I am compelled to hold that the attempt of the city to refund the money which it has borrowed from the waterworks department by fixing a charge covering the use by the waterworks of the premises used by that department for the preceding six years constituted a direct violation of Section 3959 of the General Code; further that the charge fixed for rental to be paid for the premises occupied by the waterworks for its pumping station and filtration plant is also a violation of the provisions of said Section 3959, General Code.

Respectfully,

HUGH S. JENKINS
Attorney General