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MUNICIPALITY—NO AUTHORITY TO PROVIDE BY ORDINANCE THAT A CERTAIN PERCENTAGE OF ANNUAL GROSS RECEIPTS OF WATERWORKS BE USED FOR GENERAL OPERATING EXPENSES.

SYLLABUS:

A municipality may not, by ordinance, provide that a certain percentage of the annual gross receipts of the waterworks shall be paid into the general fund of a municipality to be used for general operating expenses.

COLUMBUS, OHIO, June 22, 1925.

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

GENTLEMEN:—I am in receipt of your communication as follows:

"The first two paragraphs of the syllabus in the case of Cincinnati vs. Roettinger, 105 O. S. 145, read:

"1. Sectioon 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 ot the provisions of that section, surplus revenues 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.

"2. Section 3799, General Code, is in the nature of a limitation upon taxation, and as applied to cities and villages under charter governments does not violate any of the sections of article XVIII of the 'Ohio constitution and operates to prevent the transfer of revenues from the waterworks fund to the general fund.

"The synopsis of attorney general's opinion No. 3866, dated January 4th, 1923, reads:

" 'Under the provisions of sections 3958 and 3713, G. C., the waterworks department of a municipality may enter into an agreement with the city, to pay rental for office space occupied by said department in a public building under the control of the city.'

"The synopsis of attorney general's opinion No. 2109, dated December 13th, 1916, reads:

" 'Council of a city is authorized to pass ordinances fixing the salary of the director of public service and making same payable part from the public service fund and part from the waterworks fund.

" 'The division between the two funds is within the sound discretion of council and should be according to amount of time spent for each activity.'

"The commission of the city of Dayton on March 7th, 1923, adopted ordinance No. 11779, providing that ten per cent of the annual gross receipts of the waterworks shall be paid to the general fund of the city as a proper proportion of expenses of general government. A copy of such ordinance is enclosed herewith.

"On December 31, 1923, $47,850.00 was paid from the waterworks to the general fund and on November 24th, 1924, $49,000.00 was paid in like manner.

"Question: In view of the decision of the supreme court above referred to, were such payments legal?"

Section 3959 G. C. provides 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 waterworks and for no other purpose whatever."

This section provides for the disposition of a surplus derived from water rents and limits the expenditure of said surplus to repairs, enlarging or extension of the works or reservoirs and payment of interest of any loan made for construction or for the creation of a sinking fund for the liquidation of a debt. It further provides that the tax levied for waterworks purposes shall be applied to the payment of indebtedness incurred for construction and expenses of the waterworks and for any other purposes whatever.

Section 3799 G. C. provides as follows:

> "By the votes of three-fourths of all the members elected thereto, and the approval of the mayor, the council may at any time transfer all or a portion of one fund, or a balance remaining therein, except the proceeds of a special levy, bond issue or loan, to the credit of one or more funds, but there shall be no such transfer except among funds raised by taxation upon all the real and personal property in the corporation, not until the object of the fund from which the transfer is to be effected has been accomplished or abandoned."

This section provides a method of transferring the balance remaining of any fund except the proceeds of a special levy or bond issue to some other fund that limits such transfer to funds raised by taxation upon all real and personal property of a corporation.

These two sections were considered by the supreme court of the state of Ohio in the case of Cincinnati vs. Roettinger, 105 O. S., page 145. The supreme court, in the above case, held as follows:

> "1. 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 revenues 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.
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> "2. Section 3799, General Code, is in the nature of a limitation upon taxation, and as applied to cities and villages under charter governments does not violate any of the sections of article XVIII of the Ohio constitution and operates to prevent the transfer of revenues from the waterworks fund to the general fund."

In the above case the attempt was made by ordinance to appropriate the surplus in the waterworks fund to the general fund of the city. This was a slightly different proceeding from the one being attempted in this instance. The ordinance under consideration attempts to appropriate a certain percentage of the general revenues regardless of whether there is any surplus or not.

It is believed, however, that the same reasons which are applicable to the Roettinger case are applicable to this ordinance.

Section 5649-2 et seq. places a limitation upon the taxes which may be levied by a municipality and thereby limits the income a municipality may receive for certain purposes. To permit a municipality to appropriate from funds which are raised by the collection of water rents to the general fund to be used for the current operating expense of a municipality would be in the nature of a tax levy. Water rents are not a tax levy when the rental charge is not in excess of the amount sufficient to pay the cost of the operation of the waterworks and to make repairs, renewals, extensions and interest and principal of debt arising out of construction.

In the opinion of the Roettinger case, supra, on page 153, may be found the following:

> "While it is universally conceded that rates and charges not in excess of the amount necessary to meet such purposes are not classed as taxes, it does not follow that such excessive amount would not be classed as taxes. While it is quite well settled that charges for services and conveniences rendered and furnished by a municipality to its inhabitants are not taxes, yet where the charge is in excess of the entire cost of the service and convenience, the reason for the rule no longer prevails. A water rate exacted for actual consumption is merely the price of the commodity, and when in an amount which fairly compensates the cost can have no proper relation to those revenues which are expended for the equal benefit of the public at large, and it should not be placed in the same classification with burdens and charges imposed by the legislative power upon persons or property for the purpose of raising money for general governmental purposes. Taxation refers to those general burdens imposed for the purpose of supporting the government, and more especially the method of providing the revenues which are expended for the equal benefit of all the people. It is apparent that any effort on the part of any municipality to deliberately impose rates and charges for a water supply, not for the purpose of covering the cost of furnishing and supplying the water, but for the purpose of making up a deficiency in the general expenses of the municipality, and which cannot be met within the limits of taxation otherwise provided, is to that extent an effort to levy taxes, and, to the same extent, an effort to evade the statutory and constitutional limitations upon that subject. It requires no argument to show that the taxing power is a legislative power."

The ordinance in question, in section 1, provides as follows:

> "That the city manager be, and he is hereby required to include each year in the estimate of revenues and expenses, which he shall submit to the commission for the ensuing year, an item equivalent in amount to ten per centum of the estimated gross revenues of the waterworks of such year which amount shall appear as an item of expenditure from or as a charge against the revenues of the division of water, being the waterworks of said city, and as a credit to or an item of income to the credit of the general fund of said city, and an appropriation of such amount from the revenues of

the waterworks to the general fund of the city shall be included in the annual appropriation ordinance which shall follow: * * *."

This ordinance would indicate that the addition of ten per cent to the charges for operation of the waterworks would be in addition to the actual expense of operating such waterworks and to such an extent would be a levying of taxes. Under the authority of Cincinnati vs. Roettinger, supra, such addition is unauthorized and illegal.

In the opinion referred to in your communication, found in opinions of attorney general for 1916, volume 2, page 1910, may be found the following:

> "Council of a city is authorized to pass ordinances fixing the salary of the director of public service and making same payable part from the public service fund and part from the waterworks fund."

This is on the theory that the director of public service is a manager of the waterworks and that under section 3959 G. C., this is an expense of conducting and managing the waterworks. In this instance it would probably be possible to ascertain the exact amount which should be charged against the waterworks department for services rendered by the director of public service.

In the opinion found in opinions of attorney general for 1922, volume 2, page 1109, is found the following:

> "Under the provisions of section 3958 and 3713 G. C., the waterworks department of a municipality may enter into an agreement with the city to pay rental for office space occupied by said department in a public building under the control of the city."

In this instance also it is possible to arrive at the exact amount which should be charged against the waterworks department.

In the ordinance submitted there is no attempt to charge any particular part of any service against the waterworks department, but a certain percentage of the income from such department is attempted to be charged as the expenses of such department, this on the theory that the director of public service, the city manager, the director of law, the civil service commission, the city accountant, and the city purchasing agent, have certain duties in connection with the operation of the waterworks department which should probably be charged as items against such operation.

It is believed that under the authority of the opinions quoted above that it would be possible by ordinance, to provide that a certain part of the salaries of officials who have duties to perform in connection with the waterworks department might be paid from the waterworks funds.

It is, therefore, my opinion that a municipality may not, by ordinance, provide that a certain percentage of the annual gross receipts of the waterworks shall be paid into the general fund of a municipality to be used for general operating expenses.

Respectfully,
C. C. CRABBE,
Attorney General.