

does not constitute a portion of the school corporation's indebtedness within the meaning of the Indiana Constitution, Art. 13, Sec. 1.

OFFICIAL OPINION NO. 23

May 31, 1956

Mr. R. R. Wickersham
State Examiner
State Board of Accounts
304 State House
Indianapolis, Indiana

Dear Mr. Wickersham:

I have your request for an Official Opinion which reads as follows:

"Statutes as found in Section 48-1233 of Burns' Indiana Statutes, 1950 Repl., 1955 Supp., provide that certain city officers may receive additional compensation not exceeding the sum total of \$1,200 per year (\$1,500 per year in certain fifth class cities) from funds of a sewage disposal plant or other utility or utilities owned or operated by the city, if such additional compensation is authorized by ordinance of the common council.

"We respectfully request your official opinion on the following questions:

"1. Can any part of this additional compensation be paid to any of the officers named in such Section from the fund to which the proceeds of sewage disposal revenue bonds are receipted, during the period of construction of the sewage disposal works?

"2. Can payments of any part of this additional compensation be made from the sewage disposal plant operation and maintenance fund during the period of time after construction of the works has commenced and prior to the completion of the works if rates or charges are being collected during such period pursuant to the provisions of statute as found in Section 48-4337 of Burns' Indiana Statutes, 1950 Repl.?

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“3. In the fixing of the salary of the city attorney of a city of the fourth or fifth class pursuant to the provisions of statute as found in Section 48-1222 of Burns' Indiana Statutes, 1950 Repl., can part of such salary be made payable from the fund to which the proceeds of sewage disposal revenue bonds are received, during the period of construction of the sewage disposal works on account of duties required of the city attorney in connection therewith?”

The Acts of 1933, Ch. 233, Sec. 21, as last amended by the Acts of 1953, Ch. 271, Sec. 1, as found in Burns' Indiana Statutes (1950 Repl., 1955 Supp.), Section 48-1233, provides that the common council of each city may provide an additional compensation in addition to the salaries of certain city officers, as follows:

“* * * Provided, however, That in any city which owns or operates a sewage disposal plant or any other utility or utilities, the common council may, by ordinance duly enacted, provide that the mayor, city attorney, city engineer, city controller, city clerk or city clerk-treasurer, city treasurer who is not a county treasurer, and chairman of the board of public works of such city may receive, from the funds of such sewage disposal plant or other utility or utilities, a compensation in addition to the annual salary herein otherwise authorized, which additional compensation shall not exceed the sum total of one thousand two hundred dollars [\$1,200] per year * * *.”

The acquisition and construction of a sewage disposal plant by a city or town is authorized in the Acts of 1932 (Spec. Sess.), Ch. 61, as amended, as found in Burns' Indiana Statutes (1950 Repl.), Sections 48-4301 to 48-4324. Section 1, as last amended by the Acts of 1949, Ch. 210, Sec. 1, as found in Burns' Indiana Statutes (1950 Repl.), Section 48-4301 provides that every city and town has the following power:

“* * * to issue revenue bonds to pay the cost of acquiring, constructing, equipping, improving, enlarging, and extending such works and property. The term 'works' where hereinafter used in this act shall be con-

strued to mean and include the structures and property hereinabove described and any improvements, enlargements, and extensions.”

Your first question concerns whether the additional compensation provided for in Burns' Indiana Statutes, Section 48-1233, *supra*, may be paid to the named officers during the period of construction of the sewage works from the proceeds of the sewage disposal revenue bonds.

You will note that Burns' Indiana Statutes, Section 48-1233, *supra*, provides that “in any city or town which owns or operates a sewage disposal plant or any other utility” the additional compensation may be paid. My research does not disclose any authority in this State as to whether the words “own or operate” would, by implication, include the “construction” of such works. However, in a similar situation, the Supreme Court of Missouri held the term “construct” to be significantly different from the word “operate.” The Constitution of that State empowered cities to incur indebtedness by the issuance of revenue bonds for the purpose of “purchasing or constructing” waterworks, electric or other light plants. The city, by ordinance, issued bonds for the purpose of “erecting, constructing, maintaining and operating a waterworks and electric light plant.” The Court held:

“We do not think it can be reasonably maintained that the power to maintain and operate waterworks is necessarily incident to or implied in the power to purchase or construct waterworks or electric light plants, on the contrary, we think it was the purpose of the people in conferring this power upon cities of the population named to acquire waterworks and electric light plants which should be self-sustaining. The word ‘maintain’ does not mean ‘to provide or construct,’ but to keep up and preserve, and the word ‘operate’ means to put into or continue in operation or activity. These expressions have a distinct signification from the words ‘purchase or construct.’ * * *”

State *ex rel.* City of Chillicothe v. Wilder, State Auditor (1906), 200 Mo. 97, 98 S. W. 467.

The distinction between the construction and the operation

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of the sewage disposal works is further evidenced by language in the statute. The Acts of 1932 (Spec. Sess.), Ch. 61, Sec. 3, as found in Burns' Indiana Statutes (1950 Repl.), Section 48-4303, provides, in part, as follows:

“* * * After the construction, installation, and completion of the works or the acquisition thereof, the board shall operate, manage and control the same and may order and complete any extensions, betterments and improvements of and to the works that the board may deem expedient, if funds therefor be available or are made available as provided in this act, and shall establish rules and regulations for the use and operation of the works, and of other sewers and drains connected therewith so far as they may effect the operation of such works, and do all things necessary or expedient for the successful operation thereof. * * *” (Our emphasis)

The Acts of 1932 (Spec. Sess.), *supra*, specifically provides for the uses to which the moneys derived from the issuance of the revenue bonds are to be applied. Section 4, as found in Burns' Indiana Statutes (1950 Repl.), Section 48-4304, provides that preliminary expenses shall be paid as a first charge from the revenue of the bonds. Section 8, as found in Burns' Indiana Statutes (1950 Repl.), Section 48-4308, provides:

“* * * Funds for the payment of the costs of the work or any improvement, enlargement or extension of the works, shall be provided by the issuance of revenue bonds of the city or town, the principal and interest of which bonds shall be payable solely from the revenues of the works, and said bonds shall not in any respect be a corporate indebtedness of such city or town * * *.”

The “cost of the works” is defined in Section 7, as found in Burns' Indiana Statutes (1950 Repl.), Section 48-4307, and is as follows:

“The cost of the works shall be deemed to include the cost of acquisition or construction thereof, the cost of all property, rights, easements, and franchises deemed necessary or convenient therefor and for the improve-

ments determined upon as provided in section six of this act; interest upon bonds prior to and during construction or acquisition and for six [6] months after completion of construction or of acquisition of the improvements last mentioned; engineering and legal expenses; expense for estimates of cost and of revenues; expense for plans, specifications and surveys; other expenses necessary or incident to determining the feasibility or practicability of the enterprise, administrative expense, and such other expenses as may be necessary or incident to the financing herein authorized and the construction or acquisition of the works and the placing of the works in operation and the performance of the things herein required or permitted in connection with any thereof."

Section 9, as found in Burns' Indiana Statutes (1950 Repl.), Section 48-4309 provides that the surplus of bond proceeds over and above the cost of the works shall be paid into the sinking fund. The sinking fund is created in Section 13 of the Act, as found in Burns' Indiana Statutes (1950 Repl.), Section 48-4313, which section provides that the sinking fund is to be used for the payment of the bonds and the interest and the payment of the charges of banks or trust companies for making payment of such bonds or interest. The statute further provides that the common council or board of trustees shall set aside a sufficient amount of the net revenues of the works (the revenues of the works remaining after the payment of the reasonable expenses of operation, repair and maintenance) for payment into the said sinking fund. Said payments from the net revenues are a first charge upon all the net revenues of the works. The sinking fund or any part thereof may also be used for the purchase of any of the outstanding bonds.

A close examination of the statute creating the sinking fund reveals that the fund is exclusively for the payment of the bonds and interest and further that this fund is separate and distinct from the revenues of the works.

In an action by the mayor of a fifth class city for additional compensation for services rendered by him in the operation of a waterworks and sewage disposal plant, our Appellate Court held that the Acts of 1933, *supra*, were not mandatory and the

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mayor was not entitled to additional compensation unless such compensation was authorized by the board of works and public safety. The Court said:

“* * * To make such additional salary available to the mayor, and as a condition precedent thereto, action by the board of works and public safety, in which exclusive control of the operation of such utilities vested, was necessary. Certainly the Legislature did not intend to burden the operation of public utilities with an additional salary to the mayor if the financial affairs of such utilities, in the discretion of their governing boards, were not in position to warrant it * * *.

“Public interests do not necessarily demand that the mayor of a fifth class city be paid an additional salary from the funds of its public utilities. In fact, the interests of the public, for many reasons, may require the contrary. * * *”

City of Lebanon v. Dale (1943), 113 Ind. App. 173,
46 N. E. (2d) 269.

In view of the language of the above case and from the language of the statute, it is my opinion that the Legislature did not intend that an additional compensation be paid to the named officers from the funds derived from the issuance of revenue bonds. The revenue from the bonds should be applied to the construction of the works and the additional compensation should be paid from the revenues derived from the operation of the sewage disposal plant. Therefore, my answer to your first question is in the negative.

Your second question is whether the additional compensation may be made from the rates and charges collected under the Acts of 1949, Ch. 179, Sec. 1, as found in Burns' Indiana Statutes (1950 Repl.), Section 48-4337. This section provides that rates and charges for the services to be rendered by the sewage system prior to the completion of said system may be collected “in an amount sufficient to meet the interest on the bonds and other expenses payable prior to the completion of the works.”

This statute provides that the rates and charges are to be

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used to meet the interest on the bonds and other expenses payable *prior to the completion* of the works. Based upon my reasoning in answer to your first question, these funds cannot be used for the payment of additional compensation, and therefore my answer to your second question is in the negative.

Your third question concerns the payment of additional compensation to the city attorney from the proceeds of the revenue bonds during the construction of the sewage works. For the same reasons given in my answer to question one, it is my opinion that the answer is again in the negative. However, the Acts of 1932, *supra*, Sec. 3, as found in Burns' Indiana Statutes (1950 Repl.), Section 48-4303 provides:

"* * * The board [board of public works of the city, or the committee or body authorized to perform the duties of the board of public works in cities where there is no such board, or the board of trustees of the town, as the case may be] may employ engineers, architects, inspectors, superintendent, manager, collectors, *attorneys*, and such other employees as in its judgment may be necessary in the execution of its powers and duties, and may fix their compensation, all of whom shall do such work as the board shall direct. * * *" (Our emphasis and insertion)

Thus, the board has specific authority to employ attorneys to assist the regular city attorney when necessary to perform additional legal work.

OFFICIAL OPINION NO. 24

June 1, 1956

Mr. Wilbur Young
State Superintendent of Public Instruction
227 State House
Indianapolis, Indiana

Dear Mr. Young:

Your letter of May 17, 1956, has been received and reads as follows:

"In 1948, your office issued Official Opinion No. 41,