

OPINION 34

OFFICIAL OPINION NO. 34

May 13, 1954

Mr. R. R. Wickersham  
State Examiner  
State Board of Accounts  
304 State House  
Indianapolis 4, Indiana

Dear Mr. Wickersham:

This is in reply to your letter in which you requested an Official Opinion, which reads as follows:

"We respectfully request your official opinion upon the following:

"Is that part of Burns 48-1233 which says: '\*' \* \* the salaries as herein authorized shall be in full for all services performed for the city '\*' \* \*,' prohibitive of additional compensation as to prevent employment of the City Attorney as legal counsel for Boards or Commissions of the city, who are authorized by law to employ attorneys?

"For your convenience we are attaching a copy of an opinion of a City Attorney."

Your enclosure indicates that the city attorney for a particular city of the second class has an opportunity to be employed as attorney for the city Board of Sanitary Commissioners, as attorney for the city Board of Aviation Commissioners, and as attorney for the city Redevelopment Commission. The question is whether such attorney may act in all four capacities and receive compensation in each and all capacities.

The controlling principle of law applicable to your question has, I think, been stated by the Supreme Court of Indiana. In *City of Rochester v. Campbell* (1915), 184 Ind. 421, 429, 111 N. E. 420, the court in speaking of a city attorney, said:

"It is well settled that a public officer is bound to perform the duties of the office for the salary fixed or the compensation provided by law and that any contract or agreement by which he is to receive any additional compensation for any services pertaining to the duties

of his office is without consideration and void as against public policy."

Therefore, a city attorney cannot receive additional compensation under separate employment contracts for performing legal services for municipal boards or commissions if it is his duty, under the law, to perform said services for said boards and commissions in his official capacity as city attorney.

The duties of the city attorney are enumerated in the Acts of 1905, Ch. 129, Sec. 90, as amended, Burns' Indiana Statutes (1950 Repl.), Section 48-1801. This section provides in part as follows:

"The head of the department of law in every city shall be the attorney and counsel of such city. He shall be appointed by the mayor, shall hold office as hereinbefore provided, and give bond with surety in the sum of five thousand dollars (\$5,000), to be approved by the mayor, except in the cities of the fifth class, the city attorney shall be appointed by the common council. *He shall have the management, charge and control of the law business of such city and for each branch of its government, shall prosecute all violators of city ordinances, shall be the legal adviser of all its departments and officers, shall draw up ordinances, leases, deeds, contracts or other legal papers for such city and its various departments*, when requested to do so by the proper officer, shall be the custodian of the papers properly appertaining to his office, and shall turn the same over to his successor in office. He shall conduct all legal proceedings authorized by this act, and all appeals of every nature whatsoever in which such city or the public shall have an interest, shall make all searches and examine all abstracts of title required in opening, widening or changing any street, alley or public place, or required in any public work of any kind. \* \* \* *The salary hereby provided for the city attorney shall be in full for all his services.* \* \* \* And in all cities, the city attorney shall employ such other assistants as he may be authorized to do by ordinance, and no other. The city attorney of every city shall promptly commence all proceedings necessary or

OPINION 34

advisable for the protection or enforcement of the rights of such city or of the public." (Our emphasis)

As you suggest, the Acts of 1933, Ch. 233, Sec. 21, as amended, Burns' Indiana Statutes (1950 Repl., 1953 Supp.), Section 48-1233, provides in part, as follows:

"The common council of each and every city shall, by ordinance duly enacted on or before the first day of April of the year in which elections for the election of city officers are held, fix the annual salaries of all officers provided for in this act [§§ 48-1201—48-1204, 48-1215—48-1240], and such salaries when so fixed shall not be changed by the common council during their respective terms of office. *The salaries as herein authorized shall be in full for all services performed for the city: 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: Provided further, That in cities of the fifth class having three utilities not including a sewage disposal plant said additional compensation shall not exceed the sum total of one thousand five hundred dollars [\$1,500] \* \* \*.*" (Our emphasis)

This proviso does not apply to cities of the second class owning and operating two (2) or more municipal utilities other than sewage disposal plants, see the Acts of 1933, Ch. 233, Sec. 12, as amended, Burns' Indiana Statutes (1950 Repl.), Section 48-1224. It is also true that certain municipal boards and commissions are considered as entities distinct from the municipality for the purpose of special taxing districts and for the purpose of issuing revenue bonds and so forth. In this connection, see 1953 O. A. G., page 376, No. 75. Some of these

boards and commissions, including the Board of Aviation Commissioners, the Department of Public Sanitation and the Redevelopment Commission are also authorized to hire attorneys but it is also clear that these departments are to be considered as executive departments of the various municipalities in which they exist; see the Acts of 1945, Ch. 190, Sec. 2, as amended, Burns' Indiana Statutes (1950 Repl.), Section 14-413 (Aviation Board); the Acts of 1917, Ch. 167, Sec. 1, Burns' Indiana Statutes (1950 Repl.), Section 48-4201 (Sanitary Board), and the Acts of 1953, Ch. 176, Sec. 4, Burns' Indiana Statutes (1950 Repl., 1953 Supp.), Section 48-8544 (Redevelopment Commission). It would, therefore, appear that the city attorney under Burns' Indiana Statutes (1950 Repl.), Section 48-1801, *supra*, should have "the management, charge and control of the law business" of these commissions and boards since they are included within the executive department of said city. If the volume of legal business in the particular city involved is so great as to prevent the city attorney from personally handling all of the legal business of these boards and commissions it would be proper for said boards and commissions to employ additional attorneys to assist the city attorney. In my opinion any attorney so employed should work under the supervision of the city attorney since it is his duty, as city attorney, to conduct the law business of said Commissions.

In view of the foregoing I do not believe a city attorney may legally enter into a separate contract of employment in addition to his employment as city attorney to perform legal services for the various boards and commissions of the city hereinabove referred to. It would, however, appear proper, under Burns' Indiana Statutes (1950 Repl., 1953 Supp.), Section 48-1233, *supra*, for the city attorney to receive certain additional compensation from the funds of a sewage disposal plant or other utilities but this compensation results from his employment as city attorney and not from a separate contract of employment.