

the compensation received from military or naval service while in active service in the "present war".

Second, they shall not be required to file any return or pay any tax until six (6) months after the "termination of hostilities" of the present war.

Third, they shall not be required to pay any penalty or interest with respect thereto if such return is filed on the tax due thereon is paid on or before six (6) months after "such hostilities cease".

In 1945 O. A. G. No. 104, page 407 to 413, it was held that although there was a termination of hostilities of the present war that the present war has not been terminated in the legal sense and will not so terminate until formal action is had by competent authority terminating the war and reestablishing peace. The war has not as yet by any Act of Congress been terminated.

In my opinion therefore, members of the Armed Forces are now exempt only from the payment of such tax with respect to the compensation received for military or naval service while in active service.

OFFICIAL OPINION NO. 51

June 8, 1951.

Public Employes' Retirement Fund,
707 Board of Trade Building,
Indianapolis, Indiana.

Attention: Mr. Ross Teckemeyer,
Executive Secretary.

Dear Sir:

I have your request for an official opinion as follows:

"Is a Municipal Utility owned and operated by a City or Town as provided for in Chapter 129 of the Acts of 1905 and other Acts supplemental or amendatory thereof, (BRS Vol. 9, part 2, 48-7201 to 48-7235) a proprietary function, or is the operation of a Municipal Utility a Governmental function?"

OPINION 51

I observe that you refer to Burns 48-7201—7235 which has reference to the purchase and operation of utilities by municipal corporations, and whether it is a proprietary function or a governmental function.

This question has been definitely decided by the Supreme Court of Indiana and needs but little citation of authority.

City of Logansport v. Public Service Commission of Indiana (202) Ind. 523, — N. E. (2) —.

The question involved in that case was whether or not the City of Logansport which owned and operated an electric light plant was entitled to have rates sufficient to pay only the operating expenses of said plant a fair return on the value of the utility.

I quote from a part of said decision—Page 523:

“The dual capacity or twofold character possessed by municipal corporations is: (1) governmental, public, or political; and (2) proprietary, private or *quasi-private*. In its governmental capacity a city or town acts as an agency for the state for the better government of those who reside within the corporate limits, and, in its private or *quasi-private* capacity, it exercises powers and privileges for its own benefit, *Holmes v. City of Fayetteville* (1929), 197 N. C. 740, 150 S. L. 624, P. U. R. 1930 A. 369, 373; *Scales v. City of Winston-Salem* (1925), 189 N. C. 469, 127 S. E. 543. When a municipal corporation engages in an activity of a business nature rather than one of a governmental nature, such as the supply of light or water or the operation of a railroad, which is generally engaged in by individuals or private corporations, it acts as such corporation and not in its sovereign capacity, *American Aniline Products, Inc. v. Lock Haven* (1927), 288 Pa. St. 420, 135 Atl. 726, 50 A. L. R. 121 P. U. R. 1927D 112; *New York etc., Power Co. v. City of New York* (1927), 221 App. Div. 544, 224 N. Y. Supp. 564, P. U. R. 1927E 788, and a city operates its municipally owned utility plant in its proprietary capacity as a private enterprise subject to the same liabilities, limitations and regulation as any other public utility.”

1951 O. A. G.

In conclusion, you are informed that the operation of an electric light plant is the operation of a private enterprise and is not governmental in its functions.

It will appear from the reading of the sections of the statutes referred to above, that the debts created by a municipality in the operation of its municipal utilities is in no sense a debt of the city, but is a debt of the utility while operated by the city under the proprietary function.

OFFICIAL OPINION NO. 52

June 19, 1951.

Otto K. Jensen,
State Examiner,
State Board of Accounts,
Room 304, State House,
Indianapolis, Indiana.

Dear Mr. Jensen:

Your letter of June 7, 1951, has been received and in part reads as follows:

“A school corporation in Indiana has submitted to us the following questions which we are transmitting to you for your official opinion:

“(1) Since the superintendent was not notified prior to May 1, 1951 and since his successor could not be elected because of a deadlock on the board, is his contract in force for another year?

“(2) Is the School City obligated to pay the superintendent his present salary after July 31, 1951?”

Accompanying your letter is a copy of the form of contract in the particular instance referred to under which this superintendent was employed from July 30, 1947 to July 31, 1951 at a salary of \$8,000.00 per year. There is nothing in the contract as to what notice, if any, will be given toward renewal.

Section 28-4321 Burns 1948 Replacement provides in part as follows: