Mr. Otto K. Jensen,  
State Examiner,  
Department of Inspection and  
Supervision of Public Offices,  
State House,  
Indianapolis, Indiana.

Dear Mr. Jensen:

I have your request for an opinion as to the validity of a section of an ordinance passed by the common council of the City of Lebanon on the 20th of October, 1942. A copy of the ordinance accompanies your letter.

The question presented is whether or not a utility service board, properly established by a municipal council to operate and manage municipally owned utilities, has authority to employ and fix the salary of a legal counsel to represent and advise such utility service board.

It appears that the common council of the City of Lebanon, by ordinance duly enacted, created a utility service board of three members to operate and manage the sewage treatment plant, the electric utility and the water works utility, all owned by the city. Section VI of the ordinance is as follows:

"That Utility Service Board shall have all the power, authorities and duties conferred upon said Board by Section 19, Chapter 190, of the Acts of the General Assembly of 1933, and it hereby being contemplated that among the powers conferred upon said Board by Statute, there is also included the power to employ legal counsel to represent and advise the said Utility Service Board, at such compensation as shall be determined by the Utility Service Board, subject to the approval of the Common Council."
The section and chapter of the act referred to in the above ordinance is found in Section 54-613 of Burns' Indiana Statutes Annotated, 1933.

The Board is authorized to adopt rules governing the appointment of employees and to adopt “classifications” to determine the eligibility of applicants and to conduct competitive examinations to determine the fitness of applicants and to provide for the appointment of those “with the highest rating.” The employment of “unskilled labor” is also provided for. It will be noted that there is no language in the act directly empowering a service board to employ an attorney or legal counsel and the description of the duties and manner of selecting the employees does not seem to include an attorney or legal counsel.

The authority of the service board to employ legal counsel must be found within the framework of the above act, either by express language, or implied from the provisions of the act. A municipal council cannot confer such authority on its service board. A general manager is provided for “who is to be held responsible to such board for the business and technical operation of the utility.”

Whether a city decides to manage its utilities directly by its common council or through a utility service board, the responsibility for the management rests primarily on the municipality itself which has express authority to employ counsel to give any necessary legal advice to any city official or department.

The legal department of every city is headed by a city attorney as provided for by law. Chapter 129 of the Acts of 1905 as amended appears as Section 48-1801, Burns' Indiana Statutes Annotated, 1933, and defines the powers and duties of city attorneys. Part of this section reads as follows, to-wit:

“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.”

It is true that certain provisions of the foregoing section have been repealed by implication; however, I am of the opinion that the above quoted part stands and is effective. Therefore, as in this case, it may be that there is need for a special counsel for utility problems because of the fact that the city attorney is giving his full time to the other affairs of the city. I believe that in that event the common council could declare the existence of an emergency and provide for the employment of an assistant city attorney who may be assigned to any duties, including the performance of all the legal services necessary for the utility. In this connection, I direct your attention to Section 48-1222, Burns' Indiana Statutes Annotated, 1933. The specific provision to which I refer reads as follows, to-wit:

“Provided, That where an emergency exists for employment of assistants in any office, board, commission, department, institution and/or utility maintained or operated by any civil city and specific provision for such employment is not made by law or authority of law, the mayor is hereby given power and authority to provide for and appoint such assistants. The salaries of each and all of such appointive officers, employees, deputies, assistants and departmental and institutional heads, other than those fixed by the common council under the provisions of this act, shall be fixed by the mayor subject to the approval of the common council, which may reduce but in no event shall raise the salary so fixed. When the salary of such officers or employees shall have been so fixed as herein provided, it shall be the duty of the common council to appropriate moneys to pay the same; * * *”
The provisions of this act, of course, should not be employed except in cases of emergency, and the assistant employed should be paid out of moneys appropriated by the common council of the city and from funds of the city and not funds of the utility.

From all the foregoing, I am led to the conclusion that in a city of the fifth class, such as Lebanon, a utility service board has no power to employ and fix the salary of a special legal counsel to represent and advise the utility service board, as is provided for in Section VI of the ordinance which is attached to your letter. I am, however, of the opinion that if, due to an emergency, the duties of the city attorney become so numerous that it is impossible for him to adequately perform them, an assistant may be employed in the manner herein provided and that the employment of the assistant city attorney in no way would affect the duties of the city attorney or the compensation of the city attorney in regard to any other duties he is required to perform by law.

GENERAL ASSEMBLY: Whether General Assembly may legally provide an additional maintenance per diem.

January 13, 1943.

Honorable Hobart Creighton,
Speaker House of Representatives,
Indianapolis, Indiana.

Dear Sir:

I have before me your letter requesting an official opinion as to the constitutionality of a proposed bill, the provisions of which would allow members of the General Assembly a certain amount per diem for maintenance while on duty as members of the General Assembly. Apparently, however, the question is as to whether an additional allowance may be made so as to be effective in the case of the present members.

It is sometimes difficult to pass upon the constitutionality of a bill pending before the Legislature in the absence of the exact terms and provisions of such bill. I shall, however, endeavor to state the general principles which apply and so far as possible in the absence of the exact terms of such bill apply those principles to your question.