

OPINION 29

Therefore, in answer to your question, it is my opinion that a County Health Officer automatically vacates his office when he accepts an appointment or reappointment to a Metropolitan School Board whose members receive compensation. It is my further opinion that subsequent to his appointment or reappointment to the School Board he is not entitled to receive compensation as a County Health Officer and the Auditor of his county has the authority to refuse to issue warrants for such salary.

OFFICIAL OPINION NO. 30

August 30, 1967

OFFICERS—MUNICIPAL CORPORATIONS—City of Third Class Operating Public Utility—Setting Amount of Salaries—Function of Common Council.

Opinion Requested by Hon. Robert E. Mahowald, State Senator.

I am in receipt of your recent request for an opinion on the following questions:

“1. If a city of the third class operates a municipally owned electric utility, what city officer or board establishes the salary of those utility officers and employees who receive an annual salary?

“2. If a city of the third class operates a municipally owned electric utility, what city officer or board establishes the wage scale of those utility employees who are paid an hourly wage?

“3. If a city of the third class operates a municipally owned electric utility, what city officer or board

1967 O. A. G.

decides whether major projects or expansions should be undertaken?"

In 1959 O.A.G., p. 328, the Attorney General concluded that Acts 1913, ch. 76, § 109, as amended, the same being Burns § 54-613, provided for the compensation of employees of municipally owned utilities in cities of the third, fourth and fifth classes. That opinion was recently affirmed by 1967 O.A.G., p. 180.

Acts 1913, ch. 76, § 109, as last amended by Acts 1967, ch. 196, § 1, the same being § 54-613, provides in part:

"In the operation of any utility now owned by any municipality in this state, except cities of the first class, and cities of the second class of not less than 150,000 population and not more than 175,000 population, or any utility that may hereafter be constructed or acquired by any municipality in this state, except cities of the first class, and cities of the second class of not less than 150,000 population and not more than 175,000 population, the common council of any such municipality may operate such utility, or it may provide for the operation thereof by a committee of its own members, or it may provide for the operation thereof by a utility service board created in the manner as hereinafter provided: *Provided, That if such municipality has a board of public works, or a board of public works and safety, such board may operate and manage such utility with the same powers and authority as provided herein for a utility service board unless and until such utility service board shall be created as hereinafter provided.* ". . . Such board, when organized, shall select a manager who shall have executive charge of any such utility owned by the municipality. Such manager may be removed by such board for cause, at any time, after notice and a hearing. If more than one [1] utility is owned by the municipality then a manager may be selected for each such separate utility as the board may determine. In the appointment of a manager the board shall make the selection on the basis of fitness to

OPINION 30

manage the particular utility to which he is to be assigned, taking into account his executive ability and his knowledge of the utility industry. The board shall fix the number and the compensation of all employees, including the manager, such compensation to be submitted to the municipal council for approval; the council shall have authority to lower such compensation but not to raise it. Each year, at a time to be fixed by the municipal council, the board shall submit a budget of its financial needs for the ensuing year to be set out in such detail as the municipal council may direct, the council having the power to lower any item or items in such budget but not to raise any such item or items. The utility service board shall have general supervision over the utility or utilities owned by a municipality, fixing the policy of control including the establishment of rates and other regulations, with the approval of the municipal council, but in no way to interfere with the detailed supervision of the utility by the manager, who is to be held responsible to such board for the business and technical operation of the utility. The utility service board shall adopt rules and regulations governing the appointment of all employees, making proper classifications, such rules to determine the eligibility of applicants; to determine by competitive examination the relative fitness of applicants for positions; to establish eligible lists arranged according to the ratings secured, and to provide for the appointment of those having the highest ratings, in compliance with such rules as such board may establish for that purpose, appointments to be made from such eligible lists by the manager, such manager having the right to discharge at will but shall be required to state the cause: Provided, That unskilled labor may be employed by the manager in such manner as he may direct without competitive examination. Such rules shall also provide methods of promotion of employees: Provided, however, *That any municipality in this state that now operates such a utility by a committee of its municipal council, such committee may*

1967 O. A. G.

operate and manage such utility in the same manner, and with the same power, and subject to the same limitations, as provided in the case of a municipally owned utility governed by a utility service board. . . .
(Emphasis added.)

(The omitted portions of the statute deal with the method of establishing or abolishing a utility service board, the membership and organization of such board, and the power of the public service commission to set rates, all subjects not germane to your questions.)

Thus a municipally owned utility in a city of the third class may be operated by either the common council of the city, the board of public works and safety (established by Acts 1933, ch. 233, § 6, as amended, Burns § 48-1216), or a utility service board. Your questions do not specify which of the three boards operate the utility with which you are concerned, but as the emphasized portions of the statute indicate (and as 1967 O.A.G., p. 180 holds in relation to the board of public works), that information is not necessary as the powers and duties are the same for each board. In this opinion, as in the statute, the operating board will be referred to as the board.

The above-quoted statute contains the specific provision that "The board shall fix the number and the compensation of all employees, including the manager, such compensation to be submitted to the municipal council for approval; the council shall have the authority to lower such compensation but not to raise it."

The statute does not speak in terms of "annual salary" or "hourly wage," but rather in terms of "compensation." In *Cowdin v. Huff*, 10 Ind. 83, 85 (1875), the Indiana Supreme Court said:

"There are now, and were, at the adoption of our constitution, at least three modes in use of compensating persons engaged in the public service, viz., fees, salaries and wages. These modes are all different, each from the other; and the difference between them has been immemorially well understood.

OPINION 30

“FEES are compensation for particular acts or services; as the fees of clerks, sheriffs, lawyers, physicians, etc.

“WAGES are the compensation paid, or to be paid, for services by the day, week, etc., as of laborers, commissioners, etc.

“SALARIES are the *per annum* compensation to men in official and some other situations. The word *salary* is derived from *salarium*, which is from the word *sal*, salt, being an article in which the *Roman* soldiers were paid. See [the dictionaries of] *Richardson Webster, Bouvier, and Wharton.*”

The language above is both quoted and approved in the later cases of *Board of School Comm'rs v. Wasson*, 74 Ind. 133, at 141 (1881), and *Seiler v. State ex rel. Board of Comm'rs.*, 160 Ind. 605, 618, 65 N.E. 922 (1903).

Thus “salary” is one form of compensation, “wages” is another form of compensation, and therefore the procedure for establishing compensation applies equally to utility employees paid by annual salary and utility employees paid by hourly wages. In either case, the board devises a compensation schedule and submits that schedule to the common council. The council may either approve the schedule as submitted or revise the schedule by reducing the compensation for one or more positions before approval.

Although your questions do not raise the issue, I feel I must point out that the approval of the common council is required only for the compensation of the position. The council has no voice in determining who should hold a particular position. Burns § 54-613, *supra*, specifically gives the board full authority to adopt the rules and regulations concerning employment, promotion and discharge.

Your question concerning new projects or expansions can also be answered by a direct quote from Burns § 54-613:

“ . . . Each year, at a time to be fixed by the municipal council, the board shall submit a budget of its financial needs for the ensuing year to be set out in such

detail as the municipal council may direct, the council having the power to lower any item or items in such budget but not to raise any such item or items. The utility service board shall have general supervision over the utility or utilities owned by a municipality, fixing the policy of control including the establishment of rates and other regulations, with the approval of the municipal council, but in no way to interfere with the detailed supervision of the utility by the manager, who is to be held responsible to such board for the business and technical operation of the utility.”

Thus the manager of the utility, appointed by the board, is responsible for the normal day to day activities and functions of the utility. The board determines the policies of the utility, and such policy questions would naturally include innovations in service such as expansion of facilities. The policy decisions of the board must be approved by the common council. The council has the power to veto any project undertaken by the board either directly by refusing to approve that project, or indirectly by eliminating items relating to that project from the budget proposed by the board.

The preceding conclusions are based on a precept announced in numerous cases such as, for example, *Tucker v. Muesing*, 219 Ind. 527, 531, 39 N.E. 2d 738 (1941), wherein the Indiana Supreme Court said:

“ . . . In case of ambiguity in statutes, there are certain rules of construction to which the court resorts in arriving at the intention of the Legislature, but such rules have no application to a statute that is free from ambiguity.”

Surely Burns § 54-613, *supra*, is free from ambiguity insofar as both the authority of the board to initiate and recommend compensation schedules and utility projects and expansions and the powers of the common council to lower the recommended compensation or veto the proposed projects are concerned.

Therefore, in specific answer to your questions, it is my opinion that:

OPINION 30

1. In a city of the third class operating a public utility, the salary of those utility officers and employees who receive an annual salary is in the first instance set by the board operating that utility (whether a committee of the common council, a utility service board, or the board of public works and safety), but such salary must be approved by the common council, which council may lower but cannot raise the salary so set.

2. In a city of the third class operating a public utility, the wages of those utility employees who receive an hourly wage is in the first instance set by the board operating that utility (whether a committee of the common council, a utility service board, or the board of public works and safety), but such wages must be approved by the common council, which council may lower but cannot raise the wages so set.

3. In a city of the third class operating a public utility, the decision whether to undertake major projects or expansions is in the first instance made by the board operating that utility (whether a committee of the common council, a utility service board, or the board of public works and safety), but the decision to undertake such an innovation must be approved by the common council.

OFFICIAL OPINION NO. 31

August 31, 1967

MOTOR VEHICLES—Registration Certificates—Apparently Useless and Unnecessary Information—Need to Follow Statute.

Opinion Requested by Mr. Ernest Bixel, Commissioner of Motor Vehicles.

I am in receipt of your recent inquiry concerning the recording of vehicle weight and horsepower on certificates of registration for passenger motor vehicles (automobiles).