

OPINION 15

OFFICIAL OPINION NO. 15

May 16, 1967

**MUNICIPAL CORPORATIONS—Right of City Officials to
Additional Compensation for Services Other Than
Governmental—Necessity That Claim Be
Brought within Purview of Statute.**

Opinion Requested by Mr. Richard L. Worley, Chief Examiner, State Board of Accounts.

I am in receipt of your recent request for an Official Opinion on the following question:

“May the officials of any city, both elected and appointed, receive additional compensation pursuant to the provisions of Burns’ 48-1233b from the proceeds of a utility revenue bond issue for the purpose of construction or reconstruction?”

Your letter also indicates that the question arises from the possibly divergent views presented in 1956 O.A.G., p. 99, 1965 O.A.G., p. 243, *Gallagher v. City of Clinton*, — Ind. App. —, 207 N.E. 2d 647, 5 Ind. Dec. 562 (1965), and *Gallagher v. City of Clinton*, — Ind. —, 221 N.E. 2d 350, 9 Ind. Dec. 374 (1966).

The statute cited in your question is Acts 1933, ch. 233, § 21, as last amended by Acts 1959, ch. 107, § 8, the same being Burns § 48-1233b, which provides:

“The officials of any city, both elected and appointed, and the employees of any city, who perform services for the city, other than governmental, which services are connected with the operation of any municipally owned utility or function, may, within the discretion of the mayor and subject to the approval of the common

council, receive additional compensation for the performance of such services: Provided, That the amount of such additional compensation shall be determined and fixed by the administrative authority in control of the operation of such utility or function, subject to the approval of the mayor and the common council: Provided further, That any additional compensation so authorized shall be paid from the revenue derived from the operation of such utility or function.”

The interpretation to be given this statute is somewhat obscured by the above cited Opinions and court decisions as all consider whether a city attorney can receive compensation in addition to his salary as established by the common council for work performed in the establishment of a municipally owned utility, such additional salary to be derived from funds obtained by the sale of revenue bonds, and appear to reach different conclusions. However, when carefully examined in chronological order, the several decisions are not in conflict.

In the earliest of the cited Opinions, 1956 O.A.G., p. 99, the Attorney General stated specifically that a city attorney could not receive additional compensation from the funds derived from the sale of revenue bonds issued for the construction of a municipally owned sewage disposal works. (The Opinion did indicate that such funds could be used to employ other attorneys to assist the city attorney in performing the necessary legal work connected with the construction of such utility.)

That Opinion was basically an interpretation and application of the provisions of Acts 1933, ch. 233, § 21, as it had been last amended by Acts 1953, ch. 271, § 1. As was noted in the 1965 O.A.G., that section was entirely amended and divided into three separate sections by Acts 1959, ch. 107, §§ 6, 7 and 8.

The Appellate Court rendered its decision in the case of *Gallagher v. City of Clinton*, — Ind. App. —, 207 N.E. 2d 647, 5 Ind. Dec. 562 (1965) on June 9, 1965, and so that decision must be considered next. In that case a former city attorney had sued the City of Clinton for fees allegedly due

OPINION 15

him for services performed "in connection with the said city arranging for a proposed revenue bond issue to finance proposed extensions and additions to the City Municipal Water Works." The fees were to be derived from the funds obtained from the bond issue, and the complaint alleged that the additional compensation had been approved in the statutory manner (that is, in accord with the 1959 amendment). The trial court had sustained a demurrer to the complaint, thereby holding that the facts stated in the complaint, if true, would not entitle the attorney to recovery of the fees. The Appellate Court reversed the trial court and remanded the case to that court for the hearing of evidence, thereby in effect holding that dependent upon the facts in a given situation a city attorney could receive additional compensation from the proceeds of a utility revenue bond issue for the purpose of construction and reconstruction.

That decision of the Appellate Court was the basis for the views expressed in 1965 O.A.G., p. 243, issued October 13, 1965. In that opinion I cited *Ross v. Review Bd. of the Indiana Employment Security Div.*, 243 Ind. 61, 182 N.E. 2d 585 (1962), for the proposition that a court of appeal will search the entire record to sustain the lower court's action, and deduced from that proposition the conclusion that if a city attorney could never receive additional compensation from the sale of utility revenue bonds the Appellate Court would have sustained the lower court's action on that ground.

The *Gallagher* case was later transferred to the Supreme Court, and that Court, in a decision rendered November 18, 1966, reversed the Appellate Court and sustained the action of the trial court. *Gallagher v. City of Clinton*, — Ind. —, 221 N.E. 2d 350, 9 Ind. Dec. 374 (1966). While at first blush this might indicate that a city attorney could not receive such additional compensation, a close reading of the decision reveals that the Supreme Court held only that Gallagher in his complaint did not allege facts sufficient to indicate compliance with the statutory prerequisites for payment of additional compensation. The Court, on page 356, at 382 of 9 Ind. Dec., specifically stated:

"We find that appellant's fourth amended complaint does not state facts sufficient to constitute a cause of

action in that he has failed to bring himself within the spirit and letter of the statute relied upon by any express provision in the resolution passed by the Board of Public Works and Safety; in that the resolution does not provide for any additional services to be performed by appellant, by agreement or otherwise; is silent as to the nature and purpose of the attorney fees set forth therein and names no recipient for those fees; in that the allegations of services performed by appellant do not fall within those services which would be 'other than governmental.' ”

The necessary corollary to the decision of the Supreme Court is that if the city attorney had alleged facts which would have placed him within the operation of the statute he would be able to receive additional compensation from funds derived from the sale of utility revenue bonds.

While the foregoing discussion concerns city attorneys specifically, the principle is the same for all city officers as defined in the applicable statute. Thus there can be no doubt that your question must be answered in the affirmative. City officers, both elected and appointed, can receive additional compensation from the proceeds of a utility revenue bond issue for the purpose of construction or reconstruction. This by necessity is the only conclusion I can reach. Acts 1933, ch. 233, § 20a, as last amended by Acts 1965, ch. 437, § 1, the same being Burns § 48-1233, requires the salary of city officers to be set by an ordinance enacted before April 2nd of the year in which city elections are held, and prohibits the increase of such salaries until the next election year. This means that the salaries so established will be calculated on the basis of the time and energy such officers will expend in the normal or average year. The salaries so established do not contemplate the hundreds of additional hours of work involve in those rare years in which a municipally owned utility issues bonds to finance either the original construction or the expansion of its facilities. Such additional work must be compensated. Increasing the annual salary would not be effective since the project often is not contemplated when the salaries are established, since the officer who does the actual work

OPINION 15

might not hold the office for the entire term for which the higher salary is established, and since, as was pointed out in my 1965 opinion, equity demands that such compensation be derived from revenue obtained from users of the utility rather than from the city's general fund which represents taxes levied on both users and non-users of the utility. Therefore, the most practical method is by an award of additional compensation made for the particular work involved and paid by the utility occasioning such work. To avoid confusion concerning the services and compensation involved, and to prevent possible denial of the compensation, officials seeking compensation should take the steps necessary to bring that compensation clearly within the purview of Burns § 48-1233b. That is, the award of compensation should plainly specify both the amount and the recipient, should establish that the services performed are other than governmental, should be awarded by the administrative authority in charge of the utility, and should be approved by both the common council and the mayor.

This answer, however, is to be construed only as a general statement of the law. Whether a particular officer can receive additional compensation from a given bond issue is dependent upon facts peculiar to that situation, and therefore this opinion cannot be interpreted as approving any individual transaction.