intended to prevent conscientious citizens from serving the public without pay.

That the General Assembly interprets the statute in this manner is indicated by Ind. Acts of 1957, ch. 115, § 2, Burns IND. STAT. ANN., § 49-2811, which reads as follows:

"Each of the several counties of the state of Indiana shall furnish uniforms for the sheriff and his full time paid deputies." (Emphasis added.)

Unless the appointment and service of full time or part time unpaid deputies was contemplated by the General Assembly, the word "paid" in the statute is meaningless.

In my opinion, the answer to your question is an unequivocal "No." The first statute quoted herein does not prohibit a county sheriff from appointing deputies to serve without compensation from public funds where the individual's who are to be appointed are otherwise qualified according to law.

OFFICIAL OPINION NO. 45
October 13, 1965

Hon. Joseph Bruggenschmidt
Indiana State Representative
Rural Route #1
Tell City, Indiana

Dear Representative Bruggenschmidt:

I am in receipt of your letter of July 27, 1965, in which you inquire about compensation in addition to regular salary being paid to city attorneys.

Your specific questions were:

"1. Since the passage of Chapter 107, Acts of 1959 Indiana General Assembly (Burns 48-1233b), may the City Attorney of cities of the 4th and 5th classes, receive additional compensations, in addition to regular salary as city attorney, for the performance of service rendered in connection with the creation or operation of a municipally owned utility or function, provided
such additional compensation is fixed and approved by
the mayor and common council?

"2. If the answer to question number 1 is in the
affirmative and in the event such additional compen-
sation is paid to the city attorney, but inadvertently
is paid from a fund other than revenues derived from
the operation of the utility or function, what, if any-
thing, should the Clerk-Treasurer do to adjust the
inadvertence?"

1. There are two distinct factors to be considered in reach-
ing an answer to your first question: A. Are city attorneys
included in the class of officers eligible to receive additional
compensation? B. Is service rendered in connection with the
creation or operation of a municipally owned utility or func-
tion the type of service for which additional compensation
may be given? (The other factor contained in your question,
the class of cities, may be ignored since the pertinent statute,
as set out below, applies to all cities independent of class.)
These factors must be separately considered and answered.

A. Acts of 1959, ch. 107, § 8, the same being Burns IND.
STAT. ANN. (1963), § 48-1233b, 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 com-
mon council, receive additional compensation for the
performance of such services: Provided, That the
amount of such additional compensation shall be de-
termined 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 com-
pensation so authorized shall be paid from the rev-
enue derived from the operation of such utility or
function."

The original version of this provision for the payment of
additional compensation to city officials for service connected
with a municipally owned utility appeared in § 21 of ch. 233 of the Acts of 1933:

"Sec. 21. The common council of each and every city shall, by ordinance duly enacted on or before the first Monday in September, 1933, and thereafter on or before the first day of April of the year in which elections for election of city officers are held, fix the annual salaries of all officers provided for in this act at not to exceed the amounts herein specified, and such salaries when so fixed for such officers shall not be changed during their respective terms of office. The salaries as herein authorized shall be in full for all services performed for the city including services for any public utility or utilities owned and operated by such city; except that the common council of any city which owns and operates a public utility or utilities shall, by ordinance duly enacted on or before the first Monday in September, 1933, and thereafter on or before the first day of April in the years in which elections for election of city officers are held, provide that the mayor, city attorney, city civil engineer, and city controller of such city may receive, from the funds of such utility or utilities, a salary in addition to the annual salary herein otherwise authorized, which additional salary shall not exceed the sum total of six hundred dollars per year."

This section was amended several times prior to the 1959 revision, and each amendment tended to enlarge the class of officers eligible to receive additional compensation:

Acts of 1941, ch. 19, § 1—added the city clerk-treasurer to the list of officials eligible to receive additional compensation;

Acts of 1943, ch. 131, § 1—added a proviso that the city engineer could be employed in a supervisory or managerial capacity by a utility and receive compensation therefor above that provided in the Act;

Acts of 1945, ch. 271, § 1—added the city clerk to the list of officers eligible to receive additional compensation; increased the maximum amount of additional compensation allowed;
Acts of 1947, ch. 324, § 1—added the chairman of the board of public works to the list of officers eligible to receive additional compensation;

Acts of 1953, ch. 271, § 1—added "a city treasurer who is not a county treasurer" to the list of officers eligible to receive additional compensation.

In view of this legislative history there can be no doubt that a city attorney falls within the class of officials eligible to receive additional compensation.

B. The history of the 1933 Act up to and including the 1953 amendment, as set out above, reveals a trend toward permitting a greater number of city officials to receive a greater proportion of their total compensation from revenue collecting municipally owned utilities. If we assume that both the total amount of work done by these officials and the total compensation received by these officials remained constant, then the various amendments would permit a lower proportion of salaries to be paid from the city's general fund and a larger proportion to be paid from revenues collected by the public utility. (Of course, this change in the allocation of total compensation is not a necessary result. If an official did no work for the utility or if the additional compensation was not authorized as provided by the statute the total compensation would still derive from the general fund. See *City of Lebanon v. Dale*, 113 Ind. App. 173, 46 N.E.2d 269 (1943).)

The intent, which is clear and consistent through the several legislatures involved, is to enable a city that operates a revenue collecting and, theoretically, self-supporting utility to pay officials for work performed in connection with that utility with monies collected from the beneficiaries of the services of the utility rather than from the public at large.

However, though the intent might have been clear, the statute failed to effectuate the intent and this office determined that it did not permit a city attorney to receive additional compensation for service performed in connection with the construction of a utility to be owned and operated by the city. 1956 O. A. G., page 99, No. 23.

Section 21 of ch. 233 of the Acts of 1933, was amended by Acts of 1959, ch. 107, § 8, being Burns IND. STAT. ANN., 246
1965 O. A. G.

(1963), § 48-1233b, as set out above. (The omitted provisions relating to the fixing of salaries were placed in two newly created sections, 20a and 20b, the same being Burns IND. STAT. ANN., (1963), §§ 48-1233 and 48-1233a.) Two obvious changes illustrate the continuation of the earlier trend: first, additional compensation may be paid to all officials and employees as opposed to the specific listing in the earlier statute; second, the limit on the amount of compensation has been removed.

More important, the intent has been clearly expressed by the specific provision that such compensation is to be for service “other than governmental” coupled with the provision that the compensation is to “be paid from the revenue derived from the operation of such utility or function.”

The difference between “governmental” and “other than governmental” functions on the part of a municipality was clearly expressed in Department of Treasury v. City of Evansville, 223 Ind. 435, 60 N.E.2d 952 (1945), wherein the Court said, on page 440:

“The rule is universally recognized that municipal corporations exist and act in a dual capacity—one public or governmental and the other private or proprietary. In its public or governmental capacity, it acts as the agent of the state for the benefit and welfare of the state as a whole but when acting for the peculiar and special advantage of its inhabitants, rather than for the good of the state at large, the city is spoken of as acting in a private or proprietary capacity.”

The Court in its opinion quotes numerous cases and fully discusses how the duties and liabilities of the city depend upon which capacity is involved.

That a city should be able to divide its payroll between the two capacities is eminently reasonable. The Act enables the city to pay a flat annual salary for all governmental service, and all non-governmental service that is not connected with the operation of a revenue collecting utility or function, from the general fund, and to provide additional remuneration for non-governmental service on a piecework basis if desired. In connection with this latter point it is important to note that
the statute contains no restrictions as to when the additional compensation is to be paid or as to the period of time involved.

In Gallagher v. City of Clinton, — Ind. App. —, 207 N.E.2d 647 (1965), the "other than governmental" factor was controlling. The complaint in that case alleged that a city attorney had performed services, other than governmental, in connection with the city's arranging for a proposed revenue bond issue to finance proposed extensions and additions to the city's waterworks; that the services were performed at the request, and with the approval, of the Mayor, the Common Council, and the Board of Public Works and Safety; and that a resolution of the Board of Public Works and Safety authorizing payment for the legal services was approved by the Mayor and the Common Council. The lower court sustained a demurrer to the complaint. In reversing the lower court the Appellate Court said, on page 649:

"It is our view that if, in fact, appellant was engaged to perform services other than governmental, he is entitled to receive remuneration therefor in accordance with such evidence as may be admitted to sustain the allegations of the said complaint."

Therefore, it is my Official Opinion that the City Attorney of cities of the 4th and 5th classes may receive additional compensation, in addition to regular salary as city attorney, for the performance of service rendered in connection with either the creation or the operation of a municipally owned utility or function, provided such additional compensation is fixed by the proper administrative authority and approved by the mayor and common council, provided further that such service is other than governmental and that such municipally owned utility or function is a revenue collecting, self-supporting enterprise.

2. Before a complete answer to your second question can be supplied it is necessary to determine exactly what is meant by the statutory provision "That any additional compensation so authorized shall be paid from the revenue derived from the operation of such utility or function." That provision could be interpreted either as requiring the compensation to derive directly from revenue collected or as
permitting the compensation to be derived from funds obtained by the sale of revenue bonds which are to be redeemed with revenue collected. The former interpretation would not permit payment of additional compensation for service performed prior to the commencement of operation of the utility. The latter interpretation would enable the utility to be self-supported from the start.

*Gallagher v. City of Clinton, supra*, supplies a guide to the proper interpretation. The resolution of the Board of Public Works and Safety, referred to in the Opinion, a copy of which is included in appellant's brief, is to request the Common Council to authorize the issuance of revenue bonds in a sum sufficient to provide funds for expenses listed in the preamble of the resolution. One of the expenses so listed is the attorney fees being claimed as additional compensation by the city attorney. The additional compensation was to come from revenue bonds rather than directly from revenue.

If the Appellate Court had construed the statute as not permitting the compensation to be paid from funds derived from the sale of revenue bonds to be redeemed by collected revenue it would have affirmed the judgment of the lower court even if that point were not raised on appeal. The Indiana Supreme Court was explicit on this point in *Ross v. The Review Board of the Indiana Employment Security Div.*, 243 Ind. 61, 182 N.E.2d 585 (1962), wherein the Court said, on page 65:

". . . It is well settled that the burden is on appellant to show error on appeal. As long as there is any substantial ground upon which the decision of the lower tribunal may be sustained on appeal, the judgment will not be reversed. The reviewing court may examine the entire record to sustain the lower court's action. The court does not search the record to reverse, although it may do so in order to affirm."

The implication in the *Gallagher* case is not the only indication that additional compensation may come from the funds raised by the sale of revenue bonds. The statutes authorizing the issuance of such bonds imply that all expenses connected with the establishment of the utility are to be included in the proposed value of the bond issue.
One such indication is found in Acts of 1913, ch. 76, § 106, as amended by Acts of 1933, ch. 190, § 16, the same being Burns IND. STAT. ANN., (1951), § 54-610:

"(c) If the municipal council of any municipality where it is proposed to construct, build, purchase, condemn, or otherwise acquire a utility, shall be of the opinion that it is impracticable to *raise the entire funds necessary* to construct, build, purchase, condemn or otherwise acquire such utility, *solely by the issuance and sale of revenue bonds*. . . ." (Emphasis added.)

Additional compensation paid to a city attorney, or any officer or employee, would be a necessary expense in view of the earlier discussion concerning the intent of the instant statute, and so could derive from the funds obtained by the sale of revenue bonds. If the two statutes are considered *in pari materia* no other conclusion is possible.

Having determined the proper source for the additional compensation your second question becomes an accounting rather than a legal problem. Assuming that the statutory requirements as to type of service and approval of compensation are satisfied, the compensation can come from no other source than funds derived from the sale of revenue bonds or from the operation of the utility.

If the service has been performed the compensation is a debt owed by those funds until it has been satisfied by those funds; if the compensation has been paid from some other source it is a debt owed to that source. Any practical method of settling both debts would probably be in accord with law.

In summary, a city attorney may receive additional compensation for service performed in connection with the creation or the operation of a municipally owned function or utility provided that the utility is one that collects revenue from its operation, that the service performed is other than governmental, and that the additional compensation is awarded by the governing body of the utility and approved by the mayor and common council. The additional compensation must come from either revenue collected from the operation of the utility or funds raised by the sale of rev-
enue bonds to be redeemed by revenue collected from the operation of the utility. If the additional compensation is inadvertently paid from some other source, that source must be recompensed by monies drawn from the proper source.

OFFICIAL OPINION NO. 46

October 14, 1965

Hon. Robert L. Rock
Lieutenant Governor of Indiana
332 State House
Indianapolis, Indiana

Dear Governor Rock:

This is in response to your letter of recent date requesting an opinion as to whether a newspaper possessing the following qualifications would be eligible for legal advertising:

"1. The newspaper has been a weekly in general circulation in Gary and Lake County for more than five years.

"2. Though it is based in what is generally regarded the Negro section of the city, the newspaper enjoys extensive subscription and newsstand sales in all sections of the community.

"3. The office maintained by the newspaper in Gary is fully staffed with administrative, editorial, advertising and circulation personnel.

"4. While all of the functions essential for its publication are performed in Gary, the newspaper is printed in Chicago for valid reasons and because of the unavailability of adequate printing service in Lake County.

"5. The newspaper has been allowed second class mailing privileges at the Post Office in Gary.

"6. The City of Gary, through action by its Board of Works, has used and is using the columns of this newspaper for legal advertising purposes."