

OPINION 13

OFFICIAL OPINION NO. 13

March 15, 1960

Hon. Robert B. Schuttler
State Representative
18 North West 4th Street
Evansville, Indiana

Dear Representative Schuttler:

This will acknowledge receipt of your letter wherein you request an Official Opinion on the following question:

“Notwithstanding the provisions of Section 53, Chapter 129, of the Acts of the Indiana General Assembly, 1905 (Burns Indiana Statutes, Section 48-1407), is it lawful for the Common Council of a second class city to employ its own attorney or investigator, pursuant to the implied authority contained in Section 3, Chapter 188, of the Acts of the Indiana General Assembly, 1909 (Burns Indiana Statutes, Section 48-1409)?”

In order to gain a better understanding of the particular application and reason for your question, the following additional paragraphs of your letter are set forth as follows:

“Burns Indiana Statutes, Section 48-1409, clearly enjoins the Common Council of every city with the responsibility and duty of investigating and supervising the functions of the various departments of the city, and the Council is given power to make any investigation and to compel the attendance of witnesses, and to do practically any other thing necessary to carry out its responsibilities as set out in Section 48-1409.

“Due to the fact that the City Attorney is appointed by the Mayor, and is not responsible to the Council, it would be almost impossible for the Council to carry out the duties enjoined upon it by the law, unless it could be construed that the Council has implied authority to appropriate funds and hire its own attorney to advise it during the course of its investigation, especially if the City Attorney chose not to be co-operative.”

Your letter also states that you are aware of the Official Opinion No. 73 of the Attorney General, found in 1944 O. A.

G., page 310, which considered certain questions relative to the right of the common council of the city of Gary to appoint and employ its own special counsel to carry on or effect settlements in certain pending litigation involving Barrett Law bonds and funds. The conclusion in that Opinion was as follows:

"It is therefore my opinion that the common council of the City of Gary cannot appoint its own attorney and pay him out of any fund of the city. The litigation in question is by statute under the 'management, charge and control' of the city attorney and his assistants."
(Our emphasis)

In the instant case, it appears to be your theory that the authority for the common council to employ its own attorneys, in a case such as this, "should be implied due to the nature of the responsibilities contained in Burns, 48-1409." This statutory reference is to the Acts of 1905, Ch. 129, Sec. 54, as amended by the Acts of 1909, Ch. 188, Sec. 3, as found in Burns' (1950 Repl.), Section 48-1409, which reads, in part, as follows:

"The common council of every city shall have the power to supervise and investigate all departments, officers and employees of the government of such city and to examine into any charge preferred against them or any of them and into the affairs of any corporation, firm or person in which the city may be interested or with which it may have entered into a contract or may be about to do so."

The remainder of the above section contains various details of procedure in connection with such investigation. There is no reference in this section pertaining to the employment or use of the city attorney, his assistants or in fact to the use of any attorneys for the implementation of the purposes set forth in the section.

It is stated in the Indiana Law Encyclopedia, Vol. 20, § 33, p. 360, in part, as follows:

"The legislative authority of every city is vested in a common council which is given various statutory powers. * * *

OPINION 13

“Such governing bodies possess and can exercise only such powers as the law has conferred on them, either directly or by necessary implication. * * *”

See also: Cooper v. Town of Middletown (1914), 56 Ind. App. 374, 379, 105 N. E. 393.

In Indiana Law Encyclopedia, Vol. 20, § 34, p. 361, we find the following:

“Where a statute prescribes the manner in which a power conferred on a municipal corporation or its governing body is to be exercised, the statutory mode must be followed *especially where the statute contains negative words which in effect prohibit the doing of the thing in question unless it is done in the manner prescribed*. If the statutory mode is not followed, the action taken may be void.” (Our emphasis)

See also: City of Indianapolis v. College Park Land Co. (1918), 187 Ind. 541, 547, 118 N. E. 356;

First Presbyterian Church of Ft. Wayne v. The City of Ft. Wayne *et al.* (1871), 36 Ind. 338, 343.

Your question involves a matter of statutory construction. The objective of all rules of statutory construction is the ascertainment of the legislative intent. In this regard an examination should be made of the whole as well as the separate parts of the act.

City of Indianapolis v. Evans (1940), 216 Ind. 555, 567, 24 N. E. (2d) 776.

The Acts of 1905, Ch. 129, which is entitled “An Act Concerning Municipal Corporations” contains a total of 272 sections applicable to the government of cities and towns. There are three sections of said act which are in point in answering your question. These sections are:

Acts of 1905, Ch. 129, Sec. 90, as amended and found in Burns' (1950 Repl.), Section 48-1801, which reads, in part, as follows:

“The head of the department of law in every city shall be the attorney and counsel of such city. He shall be appointed by the mayor, shall hold office as hereinbefore provided, and give bond with surety in the sum of five thousand dollars [\$5,000], to be approved by the mayor, except in the cities of the fifth class, the city attorney shall be appointed by the common council. *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. * * * *The salary hereby provided for the city attorney shall be in full for all his services.* * * * And in all cities, the city attorney shall employ such other assistants as he may be authorized to do by ordinance, and no other. The city attorney of every city shall promptly commence all proceedings necessary or advisable for the protection or enforcement of the rights of such city or of the public.” (Our emphasis)

Only one amendment has ever been made to this section, namely, a minor amendment, by Acts of 1909, Ch. 122, Sec. 1.

Acts of 1905, Ch. 129, Sec. 53, as found in Burns' (1950 Repl.), Section 48-1407, the closing sentence of which reads:

“* * * The common council of any city of the first, second, third or fourth class shall not elect or appoint any person to any office or employment whatever *except as in this act expressly provided.*” (Our emphasis)

OPINION 13

This section has never been amended.

Acts of 1905, Ch. 129, Sec. 270, as found in Burns' (1950 Repl.), Section 48-501, which reads as follows:

“Wherever there is a grant of authority or power conferred by any section or sections of this act upon any officer or board of any city or town, and no method is provided herein for the exercise of such authority or power, and a method for the exercise of such authority or power is necessary to be provided by law to make such grant of authority or power effectual, *and a method for the exercise of such or similar authority or power is provided by any other section or sections of this act, or by any other law of this state applicable to the exercise of the authority so granted, then such other section or sections, or other law, so far as the same provide a method for the exercise of such authority or power herein conferred, may be followed as fully as if incorporated in and made a part of the provisions of this act granting such authority or power.* And wherever there is a grant of authority or power conferred by this act, and no method is provided by this act or by any other general law, as herein referred to, for the exercise of such authority or power, the common council of any city or the board of trustees of any town may, by ordinance, provide such method.” (Our emphasis)

This section has never been amended.

Let us assume, merely for the purpose of argument, that the common council does require the services of an attorney in the exercise of the powers conferred upon it by the provisions of Burns' 48-1409, *supra*. I find no express statutory authority either in Burns' 48-1409, *supra*, or elsewhere, that authorizes the common council to employ and compensate attorneys for the use solely of such council. Furthermore, attorneys cannot be employed under any implied powers of the council inasmuch as the provisions of Burns' 48-1407, *supra*, expressly prohibit such action by limiting the council's right of employment to that “*expressly provided*” in the Acts of 1905, Ch. 129, *supra*.

Where no method is provided in a section of the act to make the grant of power or authority prescribed therein effective, but where some other section or sections of the act do provide a method, resort should be had to the provisions of the other section as provided in Acts of 1905, Ch. 129, Sec. 270, *supra*. The effective method for providing legal services is found in Acts of 1905, Ch. 129, Sec. 90, *supra*, through the use of the city attorney whose duties are enumerated in said Section 90, which reads, in part, as follows:

“The head of the department of law in every city shall be the attorney and counsel for such city. * * * *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 * * * when requested to do so by the proper officer.*” (Our emphasis)

In my opinion the provisions of this section are explicit as to the method intended by the Legislature for the handling of the law business of a city. There are no “negative words” or exceptions in the above language, and therefore if legal services are required by the common council the same should be obtained from the city attorney.

See also: Williams v. City of Michigan City (1934), 100 Ind. App. 136, 138, 192 N. E. 103;
1944 O. A. G., page 310, No. 73, *supra*;
1954 O. A. G., pages 122, 125, No. 34.

In my opinion, our laws contain certain deterrents against any such non-co-operative action between the common council and the city attorney, the possibility of which you have suggested in your letter. For example, the Acts of 1933, Ch. 233, as amended and found in Burns' (1959 Supp.), Section 48-1233, provides, in part, as follows:

(b) “The salaries of each and every appointive officer, employee, deputy, assistant and departmental and institutional head shall be fixed by the mayor *subject to the approval* of the common council * * * *The common council may reduce* but in no event is the

OPINION 13

common council authorized to increase any salary so fixed by the mayor * * *.” (Our emphasis)

You also ask whether the common council has authority to appoint an investigator to aid in carrying out its powers under Burns' 48-1409, *supra*. Again I refer you to Burns' 48-1407, *supra*, which prohibits the common council of every city except those of the fifth class from employing any person except as expressly provided in the 1905 Act. The common council is given broad powers with respect to its investigating authority under the statute in question. It may compel the attendance of witnesses and the production of books, papers and other evidence, and, in addition, has the power of access to all records pertaining to an investigation commenced under Burns' 48-1409, *supra*. The absence of any express authority for the appointment of an investigator is certainly significant. Therefore, since Burns' 48-1409, *supra*, does not expressly authorize the employment of an investigator and the common council's power to employ any person is restricted to persons expressly authorized by the act, it is my conclusion that the common council cannot employ an investigator. However, in investigating any matter within its powers, the common council may seek to obtain the co-operation of all local law enforcement agencies, and may make full use of its own members individually or in committees.

It is particularly noteworthy, that while it has been over 50 years since the passage of the Acts of 1905, Ch. 129, *supra*, only two minor amendments, neither of which bear on your question have been made to the sections considered herein and those amendments were made in the year 1909.

Therefore, in my opinion, it is not lawful for the common council of a second class city to employ its own attorney or investigator, and compensate such attorney or investigator, out of any funds of the city.