

Oponion No. 29

**CITIES AND TOWNS; Offices and Officers; City Treasurer, salary
— OFFICES AND OFFICERS; Cities and Towns; City
Treasurer, salary—Sections 11-728, 11-807, Revised
Codes of Montana, 1947.**

- HELD: 1. Public officers can only receive such compensation for the performance of official duty, as is expressly provided by law.**
- 2. A city treasurer of a city of the first class can receive compensation from a city owned public utility for the performance of services for that utility which are not a part of his official duties.**

February 6, 1964

Mr. Albert E. Leuthold
State Examiner
Mitchell Building
Helena, Montana

Dear Mr. Leuthold:

You have asked me if section 11-728, R.C.M., 1947. prohibits

the payment of additional compensation to a city treasurer of a city of the first class for the performance of services for a public utility owned by that city.

The statute in question, section 11-728, R.C.M., 1947, provides in part:

“The annual salary and compensation of the treasurer must be fixed by ordinance, and must be for all services rendered by such treasurer in any capacity, (except, however, in cases where a city of the third class or a town owns and operates a public utility or utilities and receives revenue therefrom as hereafter in this section provided) and no treasurer must be allowed any percentages or fees in addition thereto. In cities of the first class, the annual salary of the treasurer must not exceed five thousand dollars (\$5,000.00),
* * * ”

This office, in Volume 18, Report and Official Opinions of Attorney General, Opinion No. 85, at page 91, considered this statute as it then read, and held:

“Any sum paid to a treasurer of a city of the second class in excess of \$2,000 as salary and compensation is an illegal expenditure.”

The statute establishes the maximum salary and compensation which can be paid to city treasurers of cities of the first and second class for the performance of their official duties. Compensation statutes must be strictly construed, **State ex rel. Matson v. O'Hern** (1936) 104 Mont. 126, 142-143, 65 P. 2d 619. The compensation paid to a city treasurer of a city of the first class is paid from public funds. Public funds can only be expended upon express authorization of law, **Brannin v. Sweet Grass County** (1930) 88 Mont. 412, 415, 293 Pac. 970. Public officers are deemed to have accepted their office with reference to the services which they may be called upon to render and the compensation provided therefor, **Broadwater v. Kendig** (1927) 80 Mont. 515, 521, 261 Pac. 264. Public officers can only receive such compensation as is expressly provided by law, and I so hold.

The operation of a public utility is not a governmental func-

tion nor is it operated by public funds. In the case of **Milligan v. City of Miles City** (1915) 51 Mont. 374, 384, 153 Pac. 276, our Supreme Court said:

“ * * * The theory adopted by the trial court and urged here by counsel for plaintiff is that the city has no power to expend any portion of the surplus in the light and power fund, even though the expenditure will turn to profitable use what has heretofore been a total loss, because the statute does not so expressly declare, or, in any event, because the installment of the improvement is not indispensable to the well being of the city. A brief consideration of the subject will demonstrate that this theory is not correct. When a city is engaged in operating a municipal plant under an authority granted by the general law, it acts in a proprietary or business capacity. In this behalf it stands upon the same footing as a private individual or a business corporation similarly situated.”

The operation of public utilities, whether owned by municipal corporations or individuals, is regulated by the Public Service Commission, Title 70, Chapter 1, Revised Codes of Montana, 1947. So long as the operation of a public utility complies with the law governing such operation, the utility may employ such servants as it may deem necessary and pay them such compensation as it deems justified.

The legal restrictions concerning payment of public funds to public officers as compensation for official duty does not prohibit public officers from receiving income from sources not connected with their public duty. Should the legislature desire to restrict the income of public officers only to that amount which the public pays, then such intention should be clearly indicated by restrictive statutes. A public officer is not obligated to perform services which are not a part of his official duties, *McQuillin, Municipal Corporations*, 3rd ed. Vol. 4, section 12.194, page 84; 43 Am. Jur. Public Officers, section 364; **Smathers v. Bd. of Freeholders et al.** (1934) 113 N.J.L. 281, 174 A. 336, 337; **Masseau v. Garey** (1926) 200 Cal. 201, 252 Pac. 324, 325; **Raymond v. Bartlett et al** (1946) 77 Cal. 2d 283, 175 P. 2d 288, 290. A public officer can hold more than one public position, unless such practice is specifically prohibited by law or public policy. Should a public official agree to perform duties,

which are not a part of his official duties, for additional compensation such agreement is enforceable unless it is prohibited by law, **Raymond v. Bartlett**, supra; **Tipton v. Sands** (1936) 103 Mont. 1, 15, 60 P. 2d 662; **Anderson v. Hinman** (1960) 138 Mont. 397, 412, 357 P. 2d 895. Section 11-728, R.C.M., 1947, does not prohibit the city treasurer from receiving payment for services rendered to a public utility which is owned by the city, so long as those services are not a part of the city treasurer's official duties. This section prohibits the payment of public funds as "percentages or fees in addition" to the city treasurer's "annual salary and compensation", **Settle v. Jones** (1947) 306 Ky. 9, 206 S.W. 2d 59, 60. In the *Settle* case, supra, the court noted the difference between public funds and the revenues of a city light and water plant by stating:

" * * * The answer to this contention is that the statute relates to salaries payable out of the general fund of the city and does not apply to salaries of members of the Board and of the Superintendent, which are paid out of the proceeds from the operation of the electric and water plant, a project financed from revenues received from the plant for which the credit of the city is not pledged."

The duties of the city treasurer are listed in section 11-807, R.C.M., 1947. Nowhere does the law require the city treasurer to receive or account for the revenues of a city owned public utility.

Therefore, it is my opinion that a city treasurer of a city of the first class may receive compensation from a city owned public utility for the performance of services for that utility, which are not a part of his official duties.

Very truly yours,

FORREST H. ANDERSON
Attorney General