

5755

PUBLIC SERVICE, DIRECTOR, IN CITY :

1. SOLELY CHARGED WITH MANAGEMENT AND CONTROL, WATER WORKS, COLLECTION OF RENTS—REQUIRED TO DEPOSIT WITH CITY TREASURER, WEEKLY, ALL MONEYS SO COLLECTED—SECTIONS 3956, 3958, 3960, GENERAL CODE.
2. DIRECTOR RESPONSIBLE FOR CONDUCT OF CLERK APPOINTED BY HIM—ANSWERABLE FOR DEFAULT IN FAILURE TO ACCOUNT FOR AND PAY OVER WATER RENTS TO CITY TREASURER—SECTION 9, GENERAL CODE.
3. DIRECTOR NOT RELIEVED OF RESPONSIBILITY WHERE ORDINANCE, CITY COUNCIL, PROVIDED CLERK SHOULD COLLECT AND ACCOUNT FOR WATER RENTS.

SYLLABUS:

1. Under the provisions of Sections 3956 and 3958 of the General Code, the director of public service in a city is solely charged with the management and control of the water works and with the collection of water rents, and is required by Section 3960, General Code, to deposit with the city treasurer, weekly, all moneys so collected.

2. Under the provisions of Section 9 of the General Code, the director of public service of a city is responsible for the conduct of a clerk appointed by him whose duties include the collection of water rents, and is answerable for the default of such clerk in failing to account for and pay over to the city treasurer the water rents collected by him.

3. In such case the director of public service is not relieved of his responsibility by the fact that the city council, in the ordinance providing for the appointment of such clerk by the director, provided that said clerk should collect the water rents and account to the city treasurer for the moneys so collected.

Columbus, Ohio, January 16, 1943.

Bureau of Inspection and Supervision of Public Offices,  
Columbus, Ohio.

Gentlemen :

I have your letter requesting my opinion, reading as follows :

“We are submitting a brief concerning the contention of the ex-director of public service of the city of C. that he should not

be joined in the finding for recovery for moneys unaccounted for by one N. P. while serving as clerk of the water works department of the city of C.

Will you kindly examine the enclosure and give us your opinion in answer to the following question:

Is the director of service of a city responsible for the acts of his deputy or clerk, for accounting for collections coming into his hands as collecting agent, notwithstanding the provisions of an ordinance of council that requires said clerk to account for such collections directly to the city treasurer?

Thanking you in advance for an early consideration of this question, and reply, as the filing of the examiner's report will be delayed awaiting your ruling."

I do not have before me the text of the ordinance of the city council providing for the clerk in question and outlining his duties, but my understanding is that it provided for such clerk to be appointed by the director of public service, and that the clerk was to collect all water rents and pay them weekly to the city treasurer; and further, that the director did appoint the clerk provided for in such ordinance.

I am assuming also that the city in question has not adopted a special charter providing for any other distribution of powers and duties than that contained in the general statutes as to the management and control of water works. Accordingly I call attention to certain provisions of the municipal code bearing upon the powers and duties of the council and the director, respectively. (In each case emphasis indicated is mine.)

Section 3616 of the General Code provides:

"All municipal corporations shall have the general powers mentioned in this chapter and council may provide by ordinance or resolution for the exercise and enforcement of them."

Among the powers which are enumerated in the sections following is that contained in Section 3619 relating to water supply, reading as follows:

"To provide for a supply of water, by the construction of wells, pumps, cisterns, aqueducts, water pipes, reservoirs, and water works, for the protection thereof, and to prevent unnecessary waste of water, and the pollution thereof. To apply moneys received as charges for water to the maintenance, construction, enlargement and extension of the works, and to the extinguishment of any indebtedness created therefor."

Section 4211 has, in my opinion, an important bearing, as it clearly

limits the functions of the council and expressly deprives it of any administrative power. It provides in part as follows:

“The powers of council shall be legislative only, and *it shall perform no administrative duties whatever* and it shall neither appoint nor confirm any officer or employe in the city government except those of its own body, except as is otherwise provided in this title.”

Section 4327 sets out the general powers of the director of public service with respect to the departments whose management is committed to his care, as follows:

“The director of public service may establish such sub-department as may be necessary and determine the number of superintendents, deputies, inspectors, engineers, harbor masters, clerks, laborers and other persons, necessary for the execution of the work and the performance of the duties of this department.”

Section 4214 provides:

“*Except as otherwise provided* in this title, council, by ordinance or resolution, shall determine the number of officers, clerks and employes in each department of the city government, and shall fix by ordinance or resolution their respective salaries and compensation, and the amount of bond to be given for each officer, clerk or employe in each department of the government, if any be required. Such bond shall be made by such officer, clerk or employe, with surety subject to the approval of the mayor.”

Since the director is to determine the number of assistants he will require to operate and manage the enterprises committed to his care and is to have, as I will later show, the entire management of the water works, it seems clear that the only function left to the council under Section 4214, so far as the water works is concerned, is to fix the salaries or compensation of the assistants whom the director has determined that he requires, and, if bonds are required, to fix the amount thereof.

Sections 3955 to 3981, inclusive, relate particularly to water works and their operation, and in Section 3955 the general powers of council relative to water works are stated as follows:

“The council of a municipality may take possession of any land obtained for the construction or extension of water works, reservoirs, or the laying down of pipe, and also any water rights or easements connected with the use of water.”

Section 3956 prescribes the duties of the director of public service as follows:

“The director of public service shall manage, conduct and control the water works, furnish supplies of water, *collect water rents*, and appoint necessary officers and agents.”

Section 3957 provides:

“Such director may make such by-laws and regulations as he deems necessary for the safe, economical and efficient management and protection of the water works. Such by-laws and regulations shall have the same validity as ordinances when not repugnant thereto or to the Constitution or laws of the State.”

Section 3958 provides in part as follows:

“For the purpose of paying the expenses of conducting and managing the water works, *such director may assess and collect from time to time a water rent of sufficient amount in such manner as he deems most equitable* upon all tenements and premises supplied with water.”

Here it will be noted is another reference to the collection of water rents; this statute as well as Section 3956 imposes this duty upon the director and upon him solely. Whether he does it in person or through a deputy or clerk appointed by him, it is he who is responsible for collecting the water rents and for depositing them weekly with the city treasurer, as explicitly provided by Section 3960, which reads as follows:

“Money collected for water works purposes shall be deposited weekly with the treasurer of the corporation. Money so deposited shall be kept as a separate and distinct fund. When appropriated by council, it shall be subject to the order of the director of public service. Such director shall sign all orders drawn on the treasurer of the corporation against such fund.”

In the case of *Hutchins v. Cleveland*, 9 C. C. (N. S.), 226, it appears that the council by ordinance provided that water furnished to certain buildings should be metered, but that water furnished to residences should be metered only on the request of the consumer. It further appeared that notwithstanding this ordinance, the director of public service was about to place meters in residences, and this action was brought to enjoin him from doing so because in violation of the ordinance. The court held:

“The power to assess and collect water rents in cities is vested in the director of public service, and the manner in which they exercise this power is not subject to the control of the city council.”

The court in the opinion, after discussing the various statutes relating to the powers of council and the director respectively, relative to the water works, said that in so far as the ordinance required the installation of meters in certain buildings, its validity could be conceded because it was within the concurrent powers of council and the director to prevent waste of water, but that in so far as it undertook to regulate the manner of assessing water rents or to prevent the director from requiring meters, it was beyond the powers of council. This case was affirmed in 79 O. S., 478.

Plainly the management of the water works of a city is a purely administrative function. The statute denies to the council any administrative powers whatsoever. The management of the water works and the collection, accounting for and disposition of its revenues are committed exclusively to the director. It is for the director to determine the number of employes he requires and to appoint such employes, and prescribe their respective duties. It is his responsibility, too, to see to it that they perform their duties with fidelity. It is for council merely to fix their salaries and compensation.

In so far as the ordinance in question undertook to define the duties of the clerk in question, council was plainly exceeding its authority.

It is a well settled principle of law that the acts of a deputy are the acts of his principal. Consequently the principal is answerable for the acts of his deputy. The responsibility of the principal for the neglect or misconduct of his deputy or clerk is set forth in Section 9 of the General Code, which reads as follows:

“A deputy, when duly qualified, may perform all and singular the duties of his principal. A deputy or clerk, appointed in pursuance of law, shall hold the appointment only during the pleasure of the officer appointing him. The principal may take from his deputy or clerk a bond, with sureties, conditioned for the faithful performance of the duties of the appointment. In all cases the principal shall be answerable for the neglect or misconduct in office of his deputy or clerk.”

It will be noted that this section provides that *in all cases* the principal is to be answerable for the neglect and misconduct in office of his deputy or clerk. The section also provides, evidently for the protection of the principal, that he may take a bond from his deputy or clerk conditioned for the faithful performance of the duties of the appointment.

The director must be presumed to know the law and to know that being charged with the management of the water works, authorized to assess and collect water rents and having authority to appoint one or more clerks or deputies to assist him in the performance of these duties, he

should exercise such supervision as is necessary to see to it that the duties delegated to his subordinates are carried out with fidelity, and that moneys collected are duly deposited with the city treasurer. He cannot claim in this case that the clerk in question was not his clerk, because he himself made the appointment.

I am clearly of the opinion that the director of public service in the case under consideration is responsible for the acts of his clerk, and if it is found that the clerk has collected moneys from water rents for which he has failed to account, the director would be personally responsible for the deficiency; and that the provisions of the ordinance requiring the clerk to account to the city treasurer for the collections made by him would not relieve the director from his responsibility.

Respectfully,

THOMAS J. HERBERT,  
Attorney General.