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1. MUNICIPALITY—HAS NOT ADOPTED SPECIAL CHARTER—ARTICLE XVIII, SECTION 7, CONSTITUTION OF OHIO—MUST EXERCISE POWERS OF LOCAL SELF-GOVERNMENT BY AND THROUGH OFFICERS DESIGNATED IN GENERAL LAWS AUTHORIZED BY AND THROUGH ARTICLE XVIII, SECTION 2.

2. CITY COUNCIL WITHOUT POWER TO TRANSFER POWERS AND DUTIES OF OFFICERS TO OTHER OFFICERS OR BOARDS OF ITS OWN CREATION—MEMBERS OF COUNCIL, NON-CHARTER CITY, FORBIDDEN TO HOLD ANY OTHER PUBLIC OFFICE—MAY NOT EXERCISE APPOINTING POWER OR PERFORM ADMINISTRATIVE DUTIES—SECTIONS 4207, 4211 G. C.

3. NON-CHARTER CITY—COUNCIL CREATED ADVISORY COMMITTEE—TO ASSIST AND ADVISE MAYOR IN PERFORMANCE OF DUTIES—MAYOR HAS NO AUTHORITY TO PAY OVER TO COMMITTEE IN LUMP SUM MONEYS APPROPRIATED BY COUNCIL—MAY NOT AUTHORIZE DEPOSITS OUTSIDE OF MUNICIPAL TREASURY.

SYLLABUS:

1. A municipality which has not adopted a special charter pursuant to Section 7, of Article XVIII of the Ohio Constitution, must exercise its powers of local self-government by and through the officers provided in the general laws authorized by Section 2, of said Article XVIII, and the council of such city is without power to transfer the powers and duties of such officers to other officers or boards of its own creation.

2. Members of the council of a city which has not adopted a charter, are forbidden by Sections 4207 and 4211, of the General Code, from holding any other public office, and from exercising any appointing power or performing administrative duties.

3. Where the council of a non-charter city has created an advisory committee to advise with and assist the mayor in the performance of his duties in any matter, the mayor has no authority to pay over to such committee in a lump sum moneys appropriated by the council or to authorize such money to be deposited outside of the municipal treasury.

Columbus, Ohio, December 31, 1952

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen:

I have before me your request for my opinion, reading in part, as follows:

"Re: 'Community Relations Board'

"The current examination of the city of L. disclosed the enactment of Ordinance No. 6495, establishing a Community Relations Board' whose principal duties would be to administer the F. E. P. C. under said ordinance. A copy of Ordinance No. 6495 is enclosed herewith for your information, together with a letter from the city solicitor raising certain questions relative to the powers and authority of such board in the expenditure of public funds, and a copy of our letter in reply thereto.

"There are several points involved in the establishment of a 'Community Relations Board' under Ordinance No. 6495, other than those raised in the questions submitted by the solicitor. It seems doubtful if a city council may, by ordinance, change the organization of government in a non-charter city to provide for a delegation of certain administrative powers vested in the mayor to a board consisting of nine members in addition to the mayor.

"The inclusion of two members of council on said board would appear to be in violation of the provisions of Sections 4207 and 4211 of the General Code.

"The establishment of such board, if legal, could be for only advisory purposes in the absence of any statutory authority to provide an administrative board of the kind defined in Ordinance No. 6495.

"The cities of T. and C. have established similar boards to serve in an advisory capacity to the mayor. Each of the above named cities is operating under a Home Rule charter which authorizes a somewhat different distribution of power.

"In the case of a non-charter city, which has not adopted one of the optional plans of government, we believe it is mandatory that such city be guided in the organization of its governmental offices and structure by the general laws and statutes pertaining to cities. In support of this proposition we direct attention to Attorney General's Opinions No. 826 of 1929 and No. 1054 of 1949.

"It is well established also, that a municipality may not delegate to others fundamental and discretionary powers vested by statute in certain municipal officers. * * *

"Inasmuch as the questions submitted in the establishment of a 'Community Relations Board' similar to the one hereinbefore discussed are of general interest to all municipalities in Ohio, we submit the following questions for your consideration and request that you furnish us with your formal opinion in answer thereto:

"1. May the council of a non-charter city legally establish a 'Community Relations Board' with powers as defined in Ordinance No. 6495, Section 8, providing for administration of the Fair Employment Practices ordinance?

"2. If the answer to question one is in the affirmative, is the board, as organized under Section 3 of Ordinance No. 6495 properly constituted and qualified in view of the provisions of Sections 4207 and 4211 of the General Code prohibiting members of council from holding other public office and performing administrative duties?

"3. If said board is legally established and properly organized, may council lawfully appropriate public funds to pay for supplies, material and incidental expense including the salary of a part time secretary or director?

"4. May said board legally expend public moneys appropriated for its use to employ professional persons engaged in a similar type of work, to deliver public addresses on "fair employment practices," "community relations" and related matters, and remunerate them for expenses incurred for travel, meals and lodging?

"5. If the aforesaid speakers furnish technical advice to the board, may their services be remunerated from public funds?

"6. When the council of either a charter or non-charter municipality has appropriated a sum of money for use by the 'Mayor's Friendly Relations Committee,' or similar advisory board, is it legal for the mayor to contract with said committee and pay over the moneys thus appropriated by council, to said committee, in a lump sum, to be deposited outside the municipal treasury and disbursed by the committee?"

Prior to the adoption in 1912 of Article XVIII of the Ohio Constitution, municipalities were purely creatures of the legislature, and their official organization as well as their powers and the manner of the exercise of such powers were to be found solely in the laws passed by the General Assembly. Ravenna v. Penna. Ry. Co., 45 Ohio St., 118.

Article XVIII, commonly referred to as the Home Rule Amendment, made very radical changes in the status of municipalities and in their powers. Section 2 of that article reads as follows:

> "General laws shall be passed to provide for the incorporation and government of cities and villages; and additional laws may also be passed for the government of municipalities adopting the same; but no such additional law shall become operative in any municipality until it shall have been submitted to the electors thereof, and affirmed by a majority of those voting thereon, under regulations to be established by law."

Section 3 reads as follows:

> "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

Section 7 reads as follows:

> "Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government."

In these few lines are packed so many questions that they have given rise to a multitude of judicial decisions, without having yet exhausted the fund of problems. Attention of the courts has largely been centered on Sections 3 and 7, with very little reference being made to Section 2. It appears to me that the answer to your question involves the consideration and application of all of these sections. Since they were adopted at the same time, and relate to the same subject, they must obviously be construed together, and full effect be given to all.

It is to be noted that by Section 2, "general laws shall be passed to provide for the incorporation *and government* of cities and villages." That is what the General Assembly had done ever since the state was organized. How is this to be reconciled with the new freedom granted to municipalities by Section 3? And what becomes of the Municipal Code of 1902 and the other statutes granting and limiting municipal powers, which were in force when Article XVIII was adopted, and which, to a large extent, are still found in the General Code? If municipalities may by some act of their

own, shake off the control of the legislature and determine their own official organization, powers and procedure, to what extent may they do so, and by what process?

Section 2 supra, requires the General Assembly to enact general laws providing for the "government" of municipalities, and further authorizes the enactment of "additional laws" for the same purpose, which a municipality may adopt by a vote of its electors. Pursuant to this authority, the General Assembly has enacted Sections 3515-1 to 3515-71, inclusive, General Code, providing three optional forms of municipal government.

The Supreme Court in a case which arose soon after the adoption of Article XVIII supra, to wit, State ex rel. Toledo v. Lynch, 88 Ohio St., 71, held:

> "1. The provisions of the eighteenth article of the constitution as amended in September, 1912, continue in force the general laws for the government of cities and villages until the 15th day of November following, and thereafter until changed in one of the three modes following: (1) By the enactment of general laws for their amendment, (2) by additional laws to be ratified by the electors of the municipality to be affected thereby, (3) by the adoption of a charter by the electors of a municipality in the mode pointed out in the article."

This was, in effect, a declaration that the provisions conferring home rule upon municipalities were not self executing, and that the general or optional provisions of the general law must prevail unless and until a municipality framed and adopted a charter. Under that construction, a municipality which did not adopt a charter would enjoy no home rule powers whatsoever.

That case was followed by many others which established the right of a municipality, through its charter, not only to change its form of government and the distribution of official powers, but to establish many changes in its functions and processes which differed from the general law. However, after ten years, the Supreme Court in Perrysburg v. Ridgeway, 108 Ohio St., 245, held:

> "The grant of power in Section 3, Article XVIII, is equally to municipalities that do adopt a charter as well as those that do not adopt a charter, the charter being only the mode provided by the Constitution for a new delegation or distribution of the powers already granted in the Constitution. (State, ex rel. City of Toledo,

v. Lynch, Auditor, 88 Ohio St., 71, disapproved upon the proposition that a charter is a prerequisite to the exercise of home-rule powers under Section 3, Article XVIII.)"

I call particular attention to the language of that syllabus, "* * * the charter being only the mode provided by the Constitution for a new delegation or distribution of the powers already granted in the Constitution."

Your principal question, therefore, resolves itself into this: Where a municipality has not seen fit to frame and adopt a charter, may it by ordinance provide for a new delegation or distribution of the powers granted to it by the Constitution, differing from the official organization and distribution of powers established by general law?

Considering Sections 2, 3 and 7 of Article XVIII of the Constitution together, it is plain that from and after the adoption of that article the electors of a municipality had three choices as to the form of its governmental structure: (1) they may take no action, in which case the municipality remains under the regime set up by the statutes; (2) they may vote to adopt one of the three forms of organization set out in Section 3515-1 et seq., of the General Code; (3) they may by vote of the electors adopt a charter of their own making and thereby may distribute the exercise of municipal powers to such officers and boards as the charter may prescribe.

But, observe that it is the electors who may make these choices, not the council. The council has been elected pursuant to the statutes. These statutes also set forth the official organization by whom the municipality is to be governed, and the powers of the several officers, including the council. Section 3616, 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."

No where is any authority given the council to limit the authority granted to any officer or to transfer his powers to another officer or office which the council sees fit to create. While the municipality is authorized by Section 3 of Article XVIII supra, to exercise all powers of local self-government, it cannot substitute a municipal organization of its own making for that which the General Assembly has enacted pursuant to Section 2 of the same Article.

This proposition was under consideration in an opinion of one of my predecessors, to wit, in Opinion No. 826, Opinions of the Attorney General for 1929, page 1276, where it was held:

> "Council of a non-charter city is without power to create by ordinance a municipal airport board to control the operations of a municipal airport. Such airport, if established, should be managed and supervised as provided by general laws, that is by the Director of Public Service in cities, and by a board of trustees of public affairs in villages, until such time as other provision is made therefor by municipal charter."

In Opinion No. 1054, Opinions of the Attorney General for 1949, page 669, it was held:

> "1. If a city has not adopted one of the optional plans of government and framed a charter or exercised its powers of local self-government pursuant to the provisions of Article XVIII, Section 7, of the Constitution of Ohio, the provisions of Sections 4323 to 4334, inclusive, of the General Code, as they pertain to the powers and duties of the director of public service in the operation and maintenance of all municipally owned utilities, must be followed.
>
> "2. A municipal council is without authority to appoint an employe within the department of public service and prescribe his duties."

In Volume 28, page 233, Ohio Jurisprudence, it is said:

> "The provisions of the Municipal Code as to the manner in which and the authorities by whom the powers of municipal corporations are to be exercised and administered, * * * and which are operative until superseded by the adoption of some other form of government by the electors of a municipality, may be termed the general plan or form of municipal government. This plan * * * calls for a council constituting the legislative authority, and a mayor and certain other officers and departments, constituting the executive authority, of the municipality."

Sections 4250 and 4255, General Code, provide that the mayor shall be the chief conservator of the peace within the corporation. Section 4258, General Code, provides that the mayor shall see that all ordinances, by-laws and regulations of the council are faithfully obeyed and enforced. The mayor of a city is the appointing authority. Sections 4251 and 4252, General Code. Certain powers of appointment are given by these sections to the directors and boards whom the mayor is authorized by law to appoint.

The recent case of Sanzere v. Cincinnati, 157 Ohio St., 515, while not directly in point, seems to support my contentions as to the governmental differences between a charter municipality and one which has not adopted a charter. It was held:

> "1. Sections 7, 8 and 9 of Article XVIII of the Constitution of Ohio, authorizing any municipality to adopt a charter and thereunder exercise all powers of local self-government, classify the municipalities of the state into charter and noncharter cities and villages, which classification the General Assembly may recognize and apply in the enactment of laws governing municipalities."

The court, at page 523, of the opinion said:

> "It must be recognized, however, that Sections 7, 8 and 9 of Article XVIII of the Constitution of Ohio, authorizing any city or village to provide by election for the adoption of a charter, have the effect of creating within the Constitution itself two kinds of municipalities *for governmental purposes*—charter and noncharter." (Emphasis added.)

And again, at page 524:

> "The purpose of the adoption of a home rule charter is to provide for *local self-government and secure exemption from general laws*. This has been repeatedly recognized by this court and there is no basis for the suggestions now made that differentiation between charter and noncharter cities is in violation of the Constitution which expressly creates that distinction."
> (Emphasis added.)

Coming to the ordinance of the City of L., referred to in your letter, I note that it has the purposes stated in its title, to wit:

> *"An Ordinance 6495*
>
> To establish a Community Relations Board in the office of the Mayor of the City of L., Ohio, and to define its functions and duties; and to prohibit discrimination in employment because of race, color, religious creed, national origin, or ancestry, by employers, employment agencies or labor organizations."

The ordinance provides for the appointment in the office of the mayor of a board known as the Community Relations Board, consisting of the mayor, two members of the council, and seven persons, to be chosen from various elements of the public, and to be appointed by the mayor. This

board is given certain duties as to assembling and disseminating information relative to discrimination, and to making plans for promoting fair employment practices.

All of these purposes and functions are highly commendable, and in so far as the board is advisory to the mayor and other officers of the municipality, and is designed to assist them in enforcing the ordinance and accomplishing the purposes stated, the appointment of such a board is certainly not unlawful. The question of possible illegality appears to be raised when we note certain of the powers that are given to the board. One of the provisions is to this effect:

> "The Community Relations Board, shall, by a majority vote of all its members elect its own officers including a chairman, and appoint as its staff, such technical and office personnel and assistants as it may deem necessary, *within the appropriation made available for such purposes*, salaries of said staff to be set by City Council." (Emphasis added.)

Since the mayor is only one of ten members, it is manifest that the board could exercise the power of appointment without regard to and in defiance of his wishes. This would clearly transfer powers of appointment from him to a board which the council has created, and would involve the expenditure of municipal funds by a body which has no proper legal authority.

The ordinance proceeds to make unlawful a series of acts of discrimination in employment of labor, both in private industry and on public works, and imposes penalties of fine and imprisonment for violation of any provisions of the ordinance. It further provides:

> "The administration of this ordinance shall be the responsibility of the Community Relations Board."

This would seem to take from the mayor the duty and authority above referred to as to the enforcement of ordinances, and transfer it to the Board, which might overrule the mayor as to the character and degree of enforcement.

Accordingly, it would be my conclusion that the ordinance in question, while quite proper in every other respect, is illegal (1) in conferring on the community Relations Board the power of appointment of municipal employes; and (2) in placing in said board the authority and responsibility for the enforcement of the provisions of the ordinance.

Your second question is as to the legality of the provision of the ordinance in providing that two members of the city council shall be members of the Community Relations Board. You direct attention to Sections 4207 and 4211, of the General Code. Section 4207 provides in part, as follows:

> "Each member of council shall be an elector of the city, shall not hold any other public office or employment, except that of notary public or member of the state militia, and shall not be interested in any contract with the city. A member who ceases to possess any of the qualifications herein required, or removes from his ward, if elected from a ward, or from the city, if elected from the city at large, shall forthwith forfeit his office."

Section 4211 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. * * *"

The ordinance in question certainly transgresses both of these sections in that it undertakes to appoint two of the members of the council to a board whose members have the character of officers.

The answers above indicated, to your first and second questions, seem to make it unnecessary to consider your third, fourth and fifth questions.

Your sixth question states that in a certain city money has been appropriated for the "Mayors Friendly Relations Committee," or similar advisory board, and you inquire whether it is legal for the mayor to contract with said committee and pay over the monies so appropriated to said committee in a lump sum to be deposited outside the municipal treasury and disbursed by the committee.

By Section 4300, General Code, the treasurer is to receive and disburse all funds of the city, and by Section 4298, General Code, he shall disburse them on the order of such person or persons as are authorized by law to issue orders therefor. There is no authority in the law whereby a mayor could by contract transfer his own authority or the prerogatives of the treasurer to any committee.

If the city in question has not adopted a charter, it seems clear, for the same reasons set out in the earlier part of this opinion that such procedure

would be wholly without legal sanction. As to a city which had adopted a charter undertaking to authorize some such procedure, I can express no opinion, in the absence of information as to such charter provisions.

Accordingly, it is my opinion and you are advised:

1. A municipality which has not adopted a charter pursuant to Section 7, of Article XVIII of the Ohio Constitution, must exercise its powers of local self-government by and through the officers provided in the general laws authorized by Section 2, of said Article XVIII, and the council of such city is without power to transfer the powers and duties of such officers to other officers or boards of its own creation.

2. Members of the council of a city which has not adopted a charter, are forbidden by Sections 4207 and 4211 of the General Code, from holding any other public office, and from exercising any appointing power or performing administrative duties.

3. Where the council of a non-charter city has created an advisory committee to advise with and assist the mayor in the performance of his duties in any matter, the mayor has no authority to pay over to such committee in a lump sum, moneys appropriated by the council, or to authorize such money to be deposited outside of the municipal treasury.

Respectfully,

C. WILLIAM O'NEILL
Attorney General