436

1. VACATIONS—EMPLOYES OF MUNICIPAL FIRE DEPARTMENT—SECTION 17-1a G. C. DOES NOT DEFINE WORD "ANNUALLY"—CITY OF PAINESVILLE ORDINANCE, SECTION 2-47 PROVIDES NINE MONTHS' SERVICE IN CALENDAR YEAR SHALL BE CONSIDERED YEAR'S SERVICE TO ENTITLE EVERY EMPLOYE TO TWO WEEKS' VACATION.

2. ORDINANCE NOT IN CONFLICT WITH SECTION 17-1a G. C.

3. DEPARTMENT OF INDUSTRIAL RELATIONS—HAS AUTHORITY TO INSTITUTE ACTION TO COMPEL CHIEF OF FIRE DEPARTMENT OF CITY WHICH HAS NOT ADOPTED EIGHT HOUR REGULATION FOR FIRE DEPARTMENT TO DIVIDE UNIFORM FORCE—NOT LESS THAN TWO PLATOONS—SECTION 17-1a G. C.—INDUSTRIAL RELATIONS HAS NO RESPONSIBILITY TO ENFORCE OTHER PROVISIONS OF SECTIONS.

4. INDUSTRIAL RELATIONS NOT CHARGED WITH ENFORCEMENT OF SECTION 17-1 G. C.—EIGHT HOUR DAY FOR WORKMEN ENGAGED IN PUBLIC WORK.

5. INDUSTRIAL RELATIONS HAS NO DUTIES UNDER PROVISIONS OF SECTIONS 17-3 TO 17-6 G. C.—EXCEPTION—TO FURNISH PUBLIC AUTHORITIES WHEN REQUESTED, PREVAILING RATES OF WAGES FOR MECHANICS AND LABORERS—CLASS OF WORK—PROPOSED PUBLIC IMPROVEMENT—NO DUTY TO ENFORCE PROVISIONS OF SECTIONS 17-3 THROUGH 17-6 G. C.

SYLLABUS:

1. There is nothing in the language of Section 17-1a, General Code, as relating to vacations for employes of a municipal fire department which defines the word "annually" used therein, but the provisions of said section are supplemented and clarified by Ordinance Section 2-47 of the city of Painesville which provides that nine months' service in a calendar year shall be considered a year's service for the purpose of entitling every employe of said city to a two weeks' vacation.

2. Said ordinance is not in conflict with Section 17-1a of the General Code.

3. The department of industrial relations has the authority to institute action to compel the chief of the fire department of a city which has not adopted the eight-hour regulation for its fire department, to divide the uniform force into not less than two platoons as provided in Section 17-1a, General Code. But said department of industrial relations has no responsibility for the enforcement of the other provisions of said Section 17-1a.

4. The department of industrial relations is not charged with the enforcement of Section 17-1 of the General Code relating to the eight-hour day for workmen engaged in public work.

5. The department of industrial relations has no duties under the provisions of Sections 17-3 to 17-6, inclusive, of the General Code, except to furnish to public authorities when requested, the prevailing rates of wages for the mechanics and laborers for the class of work called for by a proposed public improvement, and the said department of industrial relations has no duty or responsibility in the enforcement of said Sections 17-3 to 17-6, General Code.

Columbus, Ohio, June 28, 1951

Hon. Albert A. Woldman, Director, Department of Industrial Relations
Columbus, Ohio

Dear Sir:

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

"The Department of Industrial Relations requests your legal opinion relative to the interpretation of that part of Section 17-1a of the Ohio General Code which deals with the subject of leaves of absence for firemen, or what are more commonly known as vacations.

"Section 17-1a of the Ohio General Code, in part, and which is pertinent to the issue herein involved, reads as follows:

> '* * * In each city all employes of the fire department shall be given not less than two weeks' leave of absence annually, with full pay. * * *'

"You will please note that the above statute does not prescribe qualifications for length of service before a fireman may be granted annual leave of absence.

"The question pertaining to such leave has arisen in a case involving one R. W., a fireman in the employ of the Painesville, Ohio, Fire Department, who was hired on August 16, 1949. Upon request, Mr. W. was duly granted vacation leave by his superior, the Captain of the Fire Department, from May 3, 1950, through and including May 16, 1950. Upon W.'s return to duty, the Painesville City Auditor deducted one week's pay for the pay period ending May 31, 1950.

"The City of Painesville by ordinance makes provisions for vacations for its city employes, which we quote as follows:

"Section 2-47. Vacations.

"'(A) That Each City Employe shall, After one year's service, be entitled to fourteen (14) consecutive days' vacation per year, inclusive of Sundays, Holidays and other non-work days, at full pay for the usual working days during said period. Fractions of more than one-half day shall be computed as a full day, and less than one-half day shall be disregarded. No vacation shall be divided except where the Department head shall determine that same is necessary or desirable in order to facilitate the conduct of city business. The time of taking vacations shall be fixed by the head of the department and approved by the city Manager. A vacation shall be taken during the calendar year following which same was earned.

"'(B) Vacation allowance shall not be cumulative and no more than fourteen (14) days' vacation shall be granted during any calendar year.

"'(C) No vacation shall be considered as earned until same shall have been fully earned. An employe, who upon leaving the city's service, has not been privileged to take his vacation earned the previous year may do so at the time of his separation.

"'(D) Nine months' service during any year, including the year 1947, shall be deemed to be a full year's service. Less than nine months' service but not less than three full months' service in any year shall entitle an employe to one-half of the full vacation allowance to be taken during the following year. Less than three months' service during any year shall be entirely disregarded.'

"You will please note that by the above ordinance, vacations are provided for city employes after one year of service and that said vacations must be taken in a calendar year following the period during which it was earned.

"From the above facts it is apparent that W. did not quite complete nine (9) months of service before taking his vacation, which was a prerequisite for compliance with the Painesville City Ordinance and which would have been deemed to be a full year's service as prescribed by said ordinance.

"W. claims that the Painesville City Auditor has no authority to deduct one week's pay because Section 2-47 of the Painesville City Ordinance is in conflict with Section 17-1a of the Ohio General Code; that the term 'annually' as used in Section 17-1a means 'once each year' and that he is entitled to a full vacation each year during which he is employed, irrespective of the City Ordinance, which prescribes a condition precedent be-

fore a right to take a vacation may be granted; that Section 17-1a of the Ohio General Code does not stipulate any length of service as a condition before his vacation is considered to have been earned.

"Your legal opinion will be appreciated on the meaning of the term 'annually' as used in Section 17-1a of the Ohio General Code and also on the question as to whether or not Section 2-47 of the Ordinance of the City of Painesville is in conflict with Section 17-1a of the Ohio General Code.

"Will you further advise whether the Department of Industrial Relations is charged with the responsibility of enforcing Section 17-1a of the Ohio General Code.

"In connection with the subject matter as herein above set forth, we should like to call to your attention Section 17-1 and Sections 17-3 to 17-6 inclusive of the General Code.

"Section 17-1 defines the number of hours constituting a day's work and a week's work for workmen engaged on any public work. Is the Department of Industrial Relations charged with the enforcement of said section?

"With regard to Sections 17-3 to 17-6, inclusive, we particularly refer you to Section 17-4. You will please note that Section 17-4 states that the Department of Industrial Relations is charged with the duty of ascertaining the prevailing rate of wages to be paid workmen engaged in public work.

"Please give us your opinion whether the Department of Industrial Relations is charged with the duty and responsibility of enforcing Sections 17-3 to 17-6 inclusive."

Section 17-1a, General Code, reads as follows:

"It shall be the duty of the chief of the fire department of each city, unless said city is exempt from this provision as hereinafter stated, to divide the uniform force into not less than two platoons, and where the uniform force is so divided into two platoons the said chief shall keep a platoon of the uniform force on duty twenty-four consecutive hours, after which the platoon serving twenty-four hours shall be allowed to remain off duty for at least twenty-four consecutive hours, except in cases of extraordinary emergency. Each individual member of the platoons in addition to receiving a minimum of twenty-four hours off duty in each period of forty-eight hours shall receive an additional period of twenty-four consecutive hours off duty in each period of fourteen days so that no individual member shall be on duty more than a total of one hundred and forty-four hours in any period of fourteen days. The chief of the fire department shall arrange the schedule of working hours to comply with the provisions of this section. In each city all employes of the fire

department shall be given not less than two weeks' leave of absence annually, with full pay. The provisions of this section relating to the off duty periods shall not apply to any city that may have adopted or may hereafter adopt the eight hour regulation for its fire department, but the provisions relating to the two weeks' leave of absence shall apply thereto."

I note the provisions of the ordinance of the City of Painesville, which you quote, whereby it is provided that each city employe shall be entitled to fourteen consecutive days vacation in a year, after one year's service. It is further provided that such vacation allowance shall not be cumulative and that not more than fourteen day's vacation shall be granted in any calendar year. There is a further provision that nine month's service during any year, including the year 1947, shall be deemed to be a full year's service, and that less than nine months but not less than three month's service in any year shall entitle an employe to one-half the vacation allowance to be taken during the following year; also that less than three month's service during any year shall be entirely disregarded.

The first question you raise is as to the meaning of the word "annual" as used in the statute quoted; and your second question is whether the provisions of said ordinance are in conflict with said Section 17-1a. These two questions will be discussed together. It is said in 28 Ohio Jurisprudence, page 443:

> "In determining whether an ordinance is in conflict with general laws, the general test is whether the ordinance permits or licenses that which the statute forbids and prohibits, or vice versa."

Citing Struthers v. Sokol, 108 Ohio St., 263; Greenburg v. Cleveland, 98 Ohio St., 292; Walter v. Bowling Green, 5 O. C. C. (N.S.), 516.

In the case of Struthers v. Sokol, supra, it was held:

> "In determining whether an ordinance is in 'conflict' with general laws, the test is whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa."

It is true that this case and the many cases cited by the court in its opinion in support of that proposition, deal with police regulations and their possible conflict with state laws on the same subject. It appears to me, however, that the same principle may be applied to an ordinance such as we are considering here, which undertakes to regulate a depart-

ment of the city government, in which, under the decisions of our Supreme Court, the public at large is interested, and which is therefore subject to state regulation as well as municipal control. See State, ex rel. Strain v. Houston, 138 Ohio St., 203; Cincinnati v. Gamble, 138 Ohio St., 221.

Section 17-1a, General Code, in providing that all employes of the fire department shall be given not less than two week's absence annually, leaves in complete doubt what is meant by "annual." Generally speaking, in so far as this word has been defined by legal adjudication, it may be said to mean "yearly" or "once a year." These definitions throw no light on the specific question you present. Looking at the statute alone, the chief of a fire department charged with the responsibility of granting these vacations, would have nothing to guide him in determining whether a man must serve fifty weeks of a year before he is allowed to take his two week's vacation, or whether he might be granted such vacation in the first month of his service, relying upon his returning to work and finishing out the year. The chief would have nothing to guide him as to whether the year referred to is the calendar year or the year from the time of the appointment of the fireman.

The ordinance undertakes to make these matters definite so that the statute would be workable. I can see no inconsistency between the provisions of the ordinance and the provisions of the statute. I can see no provision of the ordinance that denies to a fireman what the statute says he shall have, or imposes conditions from which the statute relieves him, particularly since the ordinance gives the fireman the right to a full year's service credit after nine months of service during any calendar year, and gives him a right to one-half of the prescribed yearly vacation after three months of service.

It should also be remembered that a fire department is after all, under the statutes of the state, a department of the city government; that the city has the power under Section 4377, General Code, to determine the number of firemen and other officers and employes; under Section 4378, to prescribe the duties of the department; and under Section 4214, to fix the salaries of such firemen and other employes.

In the case you present, the city council in passing the ordinance in question, was acting quite within its powers and was merely supplementing and clarifying the statutes.

It is my opinion that the Painesville ordinance which you have submitted is not in conflict with Section 17-1a of the General Code.

I come next to your question as to whether your department is charged with the responsibility of enforcing Section 17-1a, General Code. The answer to this question so far as concerns the duty of the municipality to establish the platoon system is found in State, ex rel. v. Houston, 138 Ohio St. 203. That was an action in mandamus brought on the relation of Strain, as director of the department of industrial relations, to force the chief of the fire department of the city of Cincinnati to establish a two-platoon system in its fire department, as required under the circumstances set forth in Section 17-1a, supra. The court in the opinion said that the first question presented by the record was whether it is the duty of the relator, as director of the department of industrial relations, to enforce *the provisions of Section 17-1a,* General Code, and if so, may he invoke the remedy of mandamus against the respondent for that purpose. Answering that question, the court, after referring briefly to the duties of the Department of Industrial Relations as set forth in Section 154-45, General Code, said:

> "It reasonably appears from the law that the duty of enforcing the provisions of Section 17-1a, General Code, relating to hours of labor and the comfort, health, safety and general welfare of city firemen, is vested in the Director of the Department of Industrial Relations."

While no reference is made in the syllabus of this case to that conclusion, yet it appears to me that the fact that the court proceeded to consider and decide the case thus instituted, granting the writ as prayed for, is conclusive of the proposition that the director of industrial relations had the right to enforce that provision of said Section 17-1a which imposed upon a municipality the mandatory obligation to establish the two platoon system in its fire department. But the statement by the court quoted above seems to be broader than was justified by the case before it, since the action had nothing to do with any provision of Section 17-1a except that relating to the establishment of the two platoon system. Being a specific duty enjoined by law relative to the organization of a municipal department, the establishment of such a system was the proper subject of a writ of mandamus; and the director of industrial relations, acting in a representative capacity, was, according to the statement of the court, a proper officer to invoke the aid of the court.

As to the two weeks' vacation for each fireman, the law itself gives him that right in explicit terms, and I am unable to see any place for intervention by the director of industrial relations. In the case you present, a fireman takes his two weeks' vacation and is refused one week's pay. His right to that week's pay is purely a personal right which he may enforce by appropriate action. What possible action could the director of industrial relations institute to enforce his claim? I can see none.

I am therefore of the opinion that aside from the right to enforce by mandamus proceedings the duty of the city to establish the two platoon system, the director of industrial relations has no further right or duty with reference to the enforcement of Section 17-1a, General Code.

I come now to the provisions of Sections 17-1, General Code, and your question as to the relation of your department to the enforcement of its provisions. That section reads as follows:

> "Except in case of extraordinary emergency, not to exceed eight hours shall constitute a day's work and not to exceed forty-eight hours a week's work, for workmen engaged on any public work carried on or aided by the state, or any political subdivision thereof, whether done by contract or otherwise; and it shall be unlawful for any person, corporation or association, whose duty it shall be to employ or to direct and control the services of such workmen, to require or permit any of them to labor more than eight hours in any calendar day or more than forty-eight hours in any week, except in cases of extraordinary emergency. This section shall be construed not to include firemen in cities and villages, and policemen in villages."

This law as originally enacted in 103 Ohio Laws, 854, carried a section providing for a penalty of fine and imprisonment for its violation. That penal provision, which was codified as Section 17-2, was repealed in 121 Ohio Laws, 18. There is no reference in this section to the department of industrial relations and no duty imposed on that department for its enforcement.

The whole effect of that section appears to be merely a declaration of public policy. It undertakes to establish a rule or condition which public agencies are required to observe in entering into a contract for public work, or employing labor therefor, the provision being that it is unlawful for any such public agency to require or permit any workman engaged on such work to labor more than forty-eight hours per week, except in case of extraordinary emergency.

This section stands alone, so far as other sections of the code are concerned, except that it was amended in 108 Ohio Laws, Pt. II, p. 1286, by an act which also enacted Section 17-1a, General Code. Only slight verbal changes were made by this amendment of Section 17-1, General Code, which did not in any way affect its substance or meaning. I am unable to see any respect in which the department of industrial relations should or could take any action looking to the enforcement of this section.

Considering your question as to Sections 17-3 to 17-6, General Code, these sections were originally embraced in an act found in 114 Ohio Laws, p. 116. They have since been amended and supplemented. They constitute what is known as the "prevailing rate of wage law." Section 17-3 defines certain terms used in the act, including the definition of "public authority" which is to mean any officer, board or commission of the State of Ohio, or any political subdivision thereof authorized by law to enter into a contract for the construction of a public improvement or to construct the same by direct employment of labor.

Section 17-4 provides in part, as follows:

> "It shall be the duty of every public authority authorized to contract for or construct with its own forces for a public improvement, before advertising for bids or undertaking such construction with its own forces, to have the department of industrial relations ascertain and determine the prevailing rates of wages of mechanics and laborers for the class of work called for by the public improvement, in the locality where the work is to be performed; and such schedule of wages shall be attached to and made part of the specifications for the work, and shall be printed on the bidding blanks where the work is done by contract. * * *"

Section 17-4a defines what is meant by "prevailing rate of wages." There would be no purpose in setting forth these provisions which are quite lengthy.

Section 17-4b reads as follows:

> "Whoever, being a public official authorized to contract for or construct with his own forces a public improvement, fails, before advertising for bids or undertaking such construction with his own forces, to have the department of industrial relations ascertain and determine the prevailing rates of wages of mechanics and laborers for the class of work called for by the public improvement in the locality where the work is to be performed, as provided in section 17-4 of the General Code of Ohio, shall

> be guilty of a misdemeanor and upon conviction thereof shall be fined not less than twenty-five dollars and not more than five hundred dollars."

Section 17-4c relates further to penalties against members of any public board, commission or other public authority authorized to contract for or construct a public improvement who vote for the award of any contract, unless such "public authority shall have first had the department of industrial relations ascertain the prevailing rate of wages."

Section 17-5 provides that where such work is done by contract, such contract shall contain a provision requiring a successful bidder and all subcontractors to pay wages not less than the scale so fixed.

Section 17-6 prescribes a penalty for any person or corporation who shall violate the wage provisions of such contract. This section further provides:

> "* * * Any employee upon any public improvement who is paid less than the fixed rate of wages applicable thereto may recover from such person or corporation the difference between the fixed rate of wages and the amount paid to him, and in addition thereto a penalty equal in amount to such difference. * * *"

The sections to which I have just referred, appear to impose on the department of industrial relations not in specific terms but by necessary implication, a duty to prepare and when requested, to furnish to public authorities about to contract for or construct public improvements, a schedule of the prevailing wages for various classes of work in the locality where the work is to be performed, but nothing in these statutes so far as I can discover imposes any further duty on the department. The means for the enforcement of these provisions are provided for by the act and are of two classes: first, penalties by way of fines for violation of the provisions of the law by public officers or members of boards; and second, a right of an employe on such public improvement who had been paid less than the fixed rate of wages applicable thereto, to recover the difference, together with a penalty equal in amount to such difference. This manifestly is a personal right, to be enforced by personal action. I can conceive of no action which the director of industrial relations could bring to enforce compliance. The statutes merely impose conditions precedent to the execution of a contract by these public authorities. If a contract should be made in violation thereof, it is conceivable that a taxpayer might seek relief by injunction, but even if the director of industrial relations

should take such action, his suit would be in his own person, as a taxpayer, and not as a public official.

Accordingly, it is my opinion that the department of industrial relations is not charged with the duty and responsibility of enforcing the provisions of Sections 17-3 to 17-6 of the General Code.

In none of the sections to which reference has been made, is there any express imposition on your department of any duty by way of enforcement. Nor do I find any provision to that effect in any general statute relating to the department. It might be noted, by way of contrast, that in the statutes (Sections 154-45d to 154-45t, General Code) relating to minimum fair wage standards for women and minors the director of industrial relations is given broad and specific powers and duties relative to the enforcement of the provisions of those sections.

In specific answer to your questions it is my opinion:

1. There is nothing in the language of Section 17-1a, General Code, as relating to vacations for employes of a municipal fire department which defines the word "annually" used therein, but the provisions of said section are supplemented and clarified by Ordinance Section 2-47 of the city of Painesville which provides that nine month's service in a calendar year shall be considered a year's service for the purpose of entitling every employe of said city to a two week's vacation.

2. Said ordinance is not in conflict with Section 17-1a, of the General Code.

3. The department of industrial relations has the authority to institute action to compel the chief of the fire department of a city which has not adopted the eight hour regulation for its fire department, to divide the uniform force into not less than two platoons as provided in Section 17-1a, General Code. But said department of industrial relations has no responsibility for the enforcement of the other provisions of said Section 17-1a.

4. The department of industrial relations is not charged with the enforcement of Section 17-1 of the General Code relating to the eight hour day for workmen engaged in public work.

5. The department of industrial relations has no duties under the provisions of Sections 17-3 to 17-6, inclusive, of the General Code, except to furnish to public authorities when requested, the prevailing rates of

wages for the mechanics and laborers for the class of work called for by a proposed public improvement, and the said department of industrial relations has no duty or responsibility in the enforcement of said Sections 17-3 to 17-6, General Code.

Respectfully,

C. William O'Neill
Attorney General