

1675.

DAYTON CHARTER—DIRECTOR OF DEPARTMENT OF FINANCE RESPONSIBLE FOR CONDUCT OF ITS OFFICERS AND EMPLOYEES AND CUSTODY OF PROPERTY UNDER ITS CONTROL.

Under section 53 of the charter of the city of Dayton, the director of the department of finance is responsible for the conduct of the officers and employes of that department and is responsible for the custody and preservation of property under its control.

COLUMBUS, OHIO, December 3, 1920.

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

GENTLEMEN:—Acknowledgment is made of the receipt of your request for the opinion of this department as follows:

“Our examiner making examination of the city of D., Ohio, submits the following communication:

“While I was here making the last audit, but after the date of closing same, a clerk in the accounting department, C. E. H., was entrusted with the welfare payroll money for delivery to said department and payment to employes. He embezzled said money and disappeared. Later he was apprehended and all of the money was returned except \$217.65. This amount was carried as a treasury shortage until the trial when H. was given a suspended sentence conditioned that he return the balance. The auditing department then eliminated the treasury shortage by journal entry Dr. Acct. Rec. and Cr. cash. Later H. paid \$30.00 and the remaining balance of \$187.65, is now considered uncollectible.

“The regular city paymaster, Martin, was under bond of \$5,000.00, but H. gave no bond. H. E. W., director, at least once, authorized H. to deliver the payroll to said department.

“It is my conclusion therefore that finding for recovery should be made jointly against Director W. and Paymaster M. for the balance of \$187.65, as the city should not lose.”

Question: Can the paymaster or director of finance be legally held for amount of money lost by the city?”

It is noted that your question is ultimately resolved into this, viz.: whether the director of finance is legally responsible for the defalcation of one of the employes in the division of disbursements, in the department of finance of the city of D. It is also noted that the paymaster in that division was bonded for \$5,000 and had no authority from the director of finance to allow the defaulting employe to have charge and control of the payroll money that was taken. The facts in connection with this defalcation are such as to incline me to sympathize with the director in this situation. It is also noted that it is your conclusion that a finding for recovery be made against the director and paymaster jointly.

We must look to the Dayton charter for the answer to your question. The charter adopted August 12, 1913, and appearing in Volume I of the Supplement to Page and Adams Code, beginning at page 1062, has been examined.

Section 51 provides for the establishment of five administrative departments, including the department of finance. Section 52 provides that the commission of the city may “determine, combine and distribute the functions and duties of the departments and subdivisions thereof.” The subject of section 53 is “directors

of departments." Of such a director this section in part provides that he "shall be responsible for the conduct of the officers and employes of his department, for the performance of its business and for the custody and preservation of the books, records, papers and property under its control."

By this section it would appear that the director of the department of finance is legally responsible for the conduct of the employes in the divisions of his department and for the custody and preservation of the city property under the control of his department.

This department has not been advised of any amendment to the charter and the conclusion reached in this department is based on the charter as published in the Supplement, referred to.

The effect of section 53, above quoted, cannot be overlooked, although even without this very clear statement of responsibility it is believed that the common law liability of an officer entrusted with the public money would hold the head of the department responsible for the acts of his assistants unless the law, either by statute or charter provision, vested in the assistant or deputy certain powers and responsibilities independent of and free from the control of the superior officer.

In *State ex rel. vs. Harper*, 6 O. S., 607, it was held where public funds in the custody of the county treasurer were feloniously taken away without any fault or negligence on his part, that the sureties on the treasurer's bond were liable for the loss. No other provisions are found in the charter of the city of Dayton clothing or investing the head of the division of disbursements with independent responsibility, and in view of the plain provisions of section 53, it is believed that the finding for recovery, as suggested in your letter, should be jointly against the director and paymaster.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1676.

OPTOMETRY—WHEN USE AND EMPLOYMENT OF MECHANICAL DEVICE CONSTITUTES PRACTICE OF OPTOMETRY.

The use and employment of a mechanical device operated on optical principles in the examination of human eyes for the purpose of ascertaining departures from the normal, measuring their functional powers and adapting optical accessories for the aid thereof, in connection with the sale and fitting of eye glasses, constitutes the practice of optometry as defined in section 1295-21, subject to the exceptions found in section 1295-34 G. C.

COLUMBUS, OHIO, December 3, 1920.

The State Board of Optometry, Columbus, Ohio.

GENTLEMEN:—The second question of your request for the opinion of this department, dated September 23, 1920, which was reserved for further consideration, involves the interpretation of section 1295-21 G. C. of the optometry law, found in 108 O. L., p. 73.

By reference to the letter of your correspondent, enclosed with your request, you inquire if the use of a mechanical device, which you describe as a "cabinet * * * with eye cup and a disk of revolving lenses, behind which is a simplified skioptometer," constitutes the practice of optometry.

From the facts stated, it appears that the measurement of vision is obtained