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MUNICIPAL CORPORATION: CHARTER

ELECTIONS—ROTATION OF NAMES ON BALLOT—USE OF VOTING MACHINES—CHARTER PROVISIONS CONTAINED GENERAL ELECTION LAWS OF STATE—GENERAL ELECTION LAWS CONTROL AS TO MUNICIPAL ELECTIONS—USE OF VOTING MACHINES PERMITTED.

SYLLABUS:

Where the municipal charter of the City of Sandusky, adopted in 1914, makes provision for the rotation of the names of candidates on ballots in municipal elections, makes no provision whatever with respect to elections involving the use of voting machines, and provides that "except as otherwise provided by this charter or by ordinance or resolution of the city commission hereafter enacted, the general laws of the state relative in all * * * elections," the general laws of the state relative to the use of voting machines in municipal elections are applicable to the municipal elections in such municipality and voting machines may be used in elections for the office of City Commissioner of such city.

Columbus, Ohio, August 30, 1957

Hon. William E. Didelius, Prosecuting Attorney
Erie County, Sandusky, Ohio

Dear Sir:

Your request for my opinion reads in part as follows:

"Under the provisions of the charter of the City of Sandusky, all the powers of the city, with certain exceptions, are vested in a City Commission consisting of five electors of the city elected at large. The provisions relating to the election of members of the City Commission appear in Sections 44 and 49, both inclusive, of the city charter.

Your attention is directed in particular to Section 45 of the charter, which reads as follows:

'The ballots used in all elections provided for in this Charter shall be without party marks or designations. The whole number of ballots to be printed for the election of candidates for the office of City Commissioner shall be divided by the number of such candidates, and the quotient so obtained shall be the number of ballots in each series of ballots to be printed. The names of the candidates shall be arranged in alphabetical order and the first series of ballots printed. The first name shall then be placed last and the next series of ballots printed, and the process shall be repeated until each name shall have been first. The ballots shall then be combined into tablets with no two of the same order of names together. The ballots shall in all other respects conform as nearly as may be to the ballots prescribed by the general election laws of the state.'

"Your attention also is directed to Section 49 of the charter, which reads as follows:

'All elections shall be conducted, and the results canvassed and certified, by the election authorities prescribed by the general

election laws of Ohio, and except as otherwise provided by this Charter or by ordinances or resolutions of the City Commission hereafter, enacted, the general election laws shall control in all such elections.'

"During the year 1949, the Board of County Commissioners of Erie County, Ohio, adopted voting machines for use in the elections thereafter to be had in Erie County. Voting machines were used for the first time in this county at the election held on November 8, 1949, and they have been used at each election since then, including all municipal elections held in the City of Sandusky.

"There are a total of thirty-four voting precincts in the City of Sandusky at the present time. Each precinct presently is provided with two voting machines, except that one of the precincts has only one machine. In printing voting machine ballot labels for use at an election of members of the City Commission, the names of the candidates, are rotated on successive labels; however, since the ballot label on any particular voting machine cannot be changed during the course of an election, it follows that the rotation of the names of candidates on the ballot in each precinct is limited by the number of voting machines used in the precinct. In view of the fact that the number of candidates for election to the City Commission always exceeds the number of voting machines used in any one precinct, it follows that the rotation of names on successive ballots provided for in Section 45 of the city charter cannot be accomplished with the use of voting machines.

"The question has arisen whether, in view of the aforesaid provisions of the city charter of the City of Sandusky, the Board of Elections of Erie County lawfully may use voting machines in conducting an election of members of the City Commission of the City of Sandusky or whether such election should be conducted with the use of paper ballots on which the names of candidates are rotated in strict compliance with the provisions of Section 45 of the city charter. * * *"

Under Sections 3 and 7 of Article XVIII of the Constitution, municipalities are granted broad powers of local self government, resulting from time to time in decisions of the courts of Ohio interpreting these sections as including powers with regard to local elections, *Fitzgerald, et al., v. The City of Cleveland*, 88 Ohio St., 338. The Supreme Court has consistently held these sections of the Constitution, the home rule provisions, to grant to municipalities authority by charter to legislate with regard to elections of a purely local character. Within certain limitations, the City

of Sandusky, a charter city, has authority under the Constitution to govern itself in local matters and to establish provisions that pertain to local elections, and has established by charter, its form of government and the basic law controlling its government in local affairs. It follows that Sections 45 and 49 of the Charter of Sandusky are proper exercises of local sovereignty as conferred by the home rule sections of Article XVIII and that Section 45 would prevail as to local elections over any conflicting provisions, if any, found among the statutes of the state. Section 3507.07, Revised Code.

Section 45, as you point out in your request, provides for rotation in detail of ballots used in all elections of City Commissioners. You have also advised me that this section of the Charter was adopted as a part of the whole Charter of the city on July 28, 1914 at a time presumably when voting machines were not contemplated. The fact that Section 45 did not, in express language, provide for voting machines does not, of itself, preclude their use. However, it is your suggestion that perhaps the provisions for rotation make such use not proper where admittedly the rotation possible in the case of voting machines is not, and cannot be, as complete as that outlined by Section 45.

It is necessary, I think, to examine Section 2a, Article V, of the Constitution which reads as follows :

“The names of all candidates for an office at any general election shall be arranged in a group under the title of that office, and shall be so alternated that each name shall appear (in so far as may be reasonably possible) substantially an equal number of times at the beginning, at the end, and in each intermediate place, if any, of the group in which such name belongs. Except at a Party Primary or in a non-partisan election, the name or designation of each candidate’s party, if any, shall be printed under or after each candidate’s name in lighter and smaller type face than that in which the candidate’s name is printed. An elector may vote for candidates (other than candidates for electors of President and Vice-President of the United States) only and in no other way than by indicating his vote for each candidate separately from the indication of his vote for any other candidate.”
(Emphasis added.)

The above section of the Constitution provides specifically for rotation of candidates for public office and is sufficiently detailed to suggest immediately the probability that it is self-executing and that in establishing a procedure for rotation, it supersedes any like provision in the statutes

of the state or in charters of municipalities. Such a view was adopted, with regard to state law, by the Supreme Court of Ohio, in *State, ex rel., Russell v. Bliss*, 156 Ohio St., 147. The matter before the court for determination was whether the rotation of names of candidates in a general election in Summit County should be in accordance with Section 2a, Article V of the Constitution or according to the more detailed method provided in the then Section 4785-80, General Code. The court stated the rule of constitutional construction as follows:

“Another way of stating this general, governing principle is that a constitutional provision is self-executing if there is nothing to be done by the legislature to put it in operation. In other words, it must be regarded as self-executing if the nature and extent of the right conferred and the liability imposed are fixed by the constitution itself, so that they can be determined by an examination and construction of its terms, and there is no language indicating that the subject is referred to the legislature for action. * * *”

The court then proceeded to the actual determination of the case before it:

“It appears to this court that the constitutional provisions set out how the names of candidates shall be rotated on the ballots with such clarity that the form of the ballot is clearly prescribed, making unnecessary any repetitive or enabling legislation.”

This then, I think, is clear: that the provisions of Section 2a, Article V, spelling out rotation of the names of candidates “in so far as may be reasonably possible” is self-executing; that the provisions of the city charter of Sandusky carry no greater sanctity than state statute; that the home rule provisions of the Constitution give to such a charter no such greater sanctity in the face of a further and later constitutional provision on the very matter under consideration; and that therefore, following the rule of the *Russell* case, Section 2a, Article V must necessarily apply instead of Section 45 of the Sandusky charter.

I have stated the foregoing, mindful however, of the rule set forth in *State ex rel., Taylor v. French*, 96 O.S., 172. In that case the Supreme Court of Ohio found that the home rule provisions of the Constitution over-rode the then Section 1, Article V, of the Constitution limiting electors to “every white male citizen * * *” and held that a charter provision of the City of East Cleveland, granting the right of franchise to women as well

as men, prevailed. The effect of the rule of the Taylor case was that the home rule provisions struck down another express provision of the Constitution dealing with the right of elective franchise. In a long and exhaustive dissenting opinion, Judge Jones took the position that whereas a municipal charter may in certain respects ignore state law it should not and, in his opinion, cannot nullify specific provisions of the Constitution dealing with specific matters in which the obvious intent of such provisions is that they apply equally to statewide and local matters. He pointed out that there are any number of provisions in the Constitution dealing with the matter of elections, as an example, that no idiot or insane person shall be entitled to the privileges of an elector and he doubted that a municipal charter provision could abrogate such a prohibition.

The soundness of the majority view in the Taylor case, decided April 3, 1917, should not now be judged by this office but rather I think should and can be distinguished from the situation confronting us in the charter of the City of Sandusky. The then Section 1, Article V, of the Constitution above referred to was effective prior in point of time to the home rule provisions, the latter having been adopted in 1912. It is to be noted that Section 2a, Article V, became effective in 1949 so that whereas the rule of the Taylor case may be applicable to provisions of the Constitution prior to the effective date of the home rule amendment, I find it impossible to believe that it applies with regard to amendments of the Constitution adopted thereafter. What the people of the State of Ohio grant by constitutional provision they may clearly repeal, modify, limit or liberalize, and I think it clear that in Section 2a, Article V, of the Constitution, we have a provision which must be held to limit the home rule provision. It clearly applies throughout the state and provides for a method of rotation "at any general election" which obviously covers elections of municipal officials held on the first Tuesday after the first Monday in November in odd-numbered years. See Section 3501.01, Revised Code. We have in the final analysis a detailed method of rotation established by charter inconsistent with a broader and more liberal self-executing provision of the Constitution. In such an event, there can be, in my opinion, no doubt that the latter must necessarily apply.

Your request makes no mention of the use of the term "ballot" in Section 45, but I deem it perhaps advisable to consider its meaning briefly. The use of the word "ballot" I think should not be interpreted as giving

added significance to the charter section. In State, *ex rel.*, Automatic Registering Machine Company v. Green, 121 Ohio St., 301, the following rule was enunciated as set forth in the first paragraph of the syllabus:

“A constitutional requirement that all elections be by ballot does not invalidate an otherwise legal enactment providing for the use of voting machines in elections. *The term “ballot” designates a method of conducting elections which will insure secrecy, as distinguished from open or viva-voce voting.*”

(Emphasis added.)

What the court had before it was the use of the word “ballot” as found in Section 2, Article V of the Constitution and it held that such term does not preclude the use of voting machines.

As a result of the foregoing I find no prohibition or limitation in the charter of the City of Sandusky or to be drawn from the Constitution that prevents the use of voting machines. Finally, it is to be noted that Section 49 of the Sandusky charter provides in substance that, except as otherwise provided therein, the general election laws shall control in all elections. You state that voting machines were adopted in the year 1949 by the Board of County Commissioners of Erie County for county-wide use. The then Section 4785-161, General Code, pertaining to voting machines read in pertinent part as follows:

“Voting machines may be adopted for use in elections in any county or municipality in the following manner:

1. *By the board of county commissioners of such county or the legislative authority of such municipality on the recommendation of the board of elections; or*

2. *By the affirmative vote of a majority of the electors of such county or municipality voting upon the question of the adoption of voting machines in such county or municipality.*

* * * ”

(Emphasis added.)

It might be added that the provision quoted above has been carried into the Revised Code in like manner and remains without substantive change as a part of the general laws of the State of Ohio. See Section 3507.01, Revised Code.

Assuming, then, that the Board of Elections made the recommendation to the Board of County Commissioners as contemplated by such section and ruling out the rotation requirement of Section 45 of the Charter of

Sandusky, it appears clear that the adoption of voting machines county-wide in Erie County is, in fact, in harmony with the provisions of the charter of the City of Sandusky. I conclude, therefore, in view of all of the foregoing, that voting machines may be used for the election of commissioners of the City of Sandusky.

In response to your question this is to advise you that where the municipal charter of the City of Sandusky, adopted in 1914, makes provision for the rotation of the names of candidates on ballots in municipal elections, makes no provision whatever with respect to elections involving the use of voting machines, and provides that "except as otherwise provided by this charter or by ordinances or resolutions of the city commission hereafter enacted, the general laws shall control in all * * * elections," the general laws of the state relative to the use of voting machines in municipal elections are applicable to the municipal elections in such municipality and voting machines may be used in elections for the office of City Commissioner of such city.

Respectfully,
WILLIAM SAXBE
Attorney General