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1. EMPLOYEES—AKRON CITIZENS' POST WAR PLANNING COMMITTEE—PUBLIC EMPLOYEES WITHIN MEANING OF CHARTER OF CITY OF AKRON.
2. UNDER CHARTER PROVISIONS COUNCIL MAY LEGALLY DELEGATE TO COMMITTEE POWER TO APPOINT AND EMPLOY PERSONS REQUIRED FOR PERFORMANCE OF DUTIES—COMPENSATION MUST BE FIXED BY COUNCIL.
3. WORK OF COMMITTEE—EXPENDITURE OF FUNDS APPROPRIATED BY COUNCIL SUBJECT TO GENERAL LAW GOVERNING MUNICIPAL CONTRACTS.

SYLLABUS:

1. The employes of the Akron Citizens' Post War Planning Committee are public employes within the meaning of the charter of the City of Akron.

2. Under the provisions of the charter of the City of Akron, the council may legally delegate to such committee the power to appoint and employ such persons as the committee may require for the performance of its duties, but the compensation of all such employes must be fixed by the council.

3. The expenditure of funds appropriated by the council for the work of such committee is subject to the general law relative to municipal contracts.

Columbus, Ohio, August 14, 1945

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen :

You have submitted to me copy of an Ordinance of the City of Akron providing for the creation of the "Akron Citizens' Post War Planning Committee", to make a study of, and make recommendations relative to present and future planning of city problems. An examination of this ordinance discloses that it provides, among other things :

1. For the appointment by the mayor of a "Committee" consisting of such number of citizens as he shall determine; that said Committee shall consist of an Executive Committee of not more than five members, an Executive Secretary employed by the Executive Committee, and an Advisory Committee to be appointed by the mayor, subject to the approval of the Executive Committee.

2. That "the Executive Secretary shall be paid such salary or wages as the Executive Committee may determine."

3. The Executive Committee is given "full authority to do all things necessary to carry out the purposes and program of the Committee".

4. There is appropriated from the General Fund the sum of \$12,500.00 for the expense of the operation of the Committee, and no additional funds of the City are to be expended by the Committee unless appropriated by the Council.

Relative to this action by the city council, you have raised the following questions :

"Are the employes of the Akron Citizens' Post war Planning Committee public employes within the meaning of the law in this instance?

May the council legally delegate its powers of creating offices of employment and fixing salaries and compensation, to the Akron Citizens' Post War Committee?

Must the use of the public funds appropriated for said Committee be governed strictly by city charter and statutory provisions relating to contracts and operations, the same as normal city operations?"

The questions which you raise may be considered first from the standpoint of the municipal law as laid down by the General Assembly, and then as possibly affected by the provisions of home rule charter and particularly the charter of the city of Akron.

Considering then the status of employes of the Committee and the power of the Committee to fix their salaries or wages, I note that under the provisions of the ordinance the only employe mentioned is the Executive Secretary who is to be employed and whose salary or wages are to be fixed by the Executive Committee. It is probable, however, that in carrying out the entire program contemplated the Executive Committee would find it necessary to employ other persons.

Section 2 of Article XVIII of the Constitution provides:

“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.”

Accordingly, unless a municipality sees fit to avail itself of the right to adopt one of the optional forms of government set up by the General Assembly, or to frame its own charter distributing its powers among officers and departments of its own choosing, it will remain under the form of official organization set up by the Municipal Code. Turning then to that code we find in Section 4246, General Code, the following provision:

“The executive power and authority of cities shall be vested in a mayor, president of council, auditor, treasurer, solicitor, director of public service, director of public safety, and such other officers and departments as are provided by this title.”

Section 4247, General Code, provides in part:

“Subject to the limitations prescribed in this subdivision such executive officers shall have exclusive right to appoint all officers, clerks and employes in their respective departments or offices, * * *.”

As to salaries, Section 4214, General Code, 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, * * *.”

I do not find in the statutes any authority given to a city council to establish other administrative offices or departments not provided for by the statutes, or to delegate to any other officer, or board the power and duty devolved upon the council relative to fixing salaries of officers and employes, and it would appear to follow therefore that the council, if dependent entirely upon the powers conferred by the legislature, could not give to a committee such as is provided for in the ordinance in question, the power to employ or appoint an Executive Secretary and to fix his salary.

However in the adoption by the people of the state, of Article XVIII of the Constitution, broad powers were conferred upon municipalities and they are no longer required to look to the legislature for authority, at least as to matters relating only to their local government. Section 3 of that Article provides:

“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.”

The first case that arose after the adoption of Article XVIII in 1912 was *State, ex rel. v. Lynch*, 88 O. S. 71, wherein it was held:

“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.”

In the course of the opinion (p. 92) Judge Shauck said:

“By the first and second sections municipalities are classified as cities and villages, and the legislature is preemptorily required

to pass general laws for their organization and government. On the 15th of November, when the article took effect, such laws were already in force, and they continued to be in force, operating upon every municipality in the state until a change should be effected in some mode authorized by the amendment."

Again, at page 93:

"But the amended article authorizes the electors of a municipality to secure some immunity from the *uniform government* which it perpetuates as the *primary status* of all municipalities, and to entitle their municipality 'to exercise all powers of local self-government.'" (Emphasis added.)

That portion of the court's ruling that required a municipality to "secure immunity" by adopting a charter, was later expressly overruled in *Perrysburg v. Ridgway*, 108 O. S. 245, where it was 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."

I do not deem it necessary for the purpose of this opinion to discuss the question as to how far a municipal council may go, in the absence of a charter, in establishing new officers and departments and committing to them powers inconsistent with the provisions of the general law. It is very clear, at least, that by the adoption of a charter, it may create or authorize the creation of such offices and departments as it chooses. In the early case of *Fitzgerald v. Cleveland*, 88 O. S. 338, it was held:

"Under Sections 3 and 7, Article XVIII, as so amended, municipalities are authorized to determine what officers shall administer their government, which shall be appointed and which elected, that the nomination of elective officers shall be made by petition by a method prescribed, and elections shall be conducted by the election authorities prescribed by general laws."

Referring to the matter of electing officers, which was the subject involved in that case, Judge Johnson said at page 348 of the opinion:

"* * * The very idea of local self-government, the generating spirit which caused the adoption of what was called the home-rule amendment to the constitution, was the desire of the

people to confer upon the cities of the state the authority to exercise this *and kindred powers without any outside interference.*"

(Emphasis added.)

Accordingly, it is my opinion that a municipality may, by provision in its charter, authorize its council to establish such offices and departments as it deems proper, and to confer upon them such powers of appointment and other powers as it sees fit. This brings me to an examination of the charter of the City of Akron.

Section 31 of the charter provides:

"Except as otherwise provided in this charter, the Council shall have authority, by two-thirds vote of its entire membership, to create new departments, offices and employments, and continue or abolish existing departments, offices and employments, or establish temporary departments for special work; to appoint or provide for the appointment of all officers and employees of the municipality whose appointment is not otherwise provided for; to remove any such officer or employee by a majority of all members when such removal is not otherwise provided for, *and by ordinance or resolution to prescribe, limit or change the compensation of all officers and employees.*" (Emphasis added.)

Here, it will be observed, the charter expressly confers upon the council the power, and as I conceive it, the duty to fix the compensation of all officers and employes of the municipality. And there can be no doubt that officers and employes of the Committee set up by the ordinance in question are employes of the city. The so-called "committee" and its "executive committee" are quite within the purview of the section quoted. They constitute one of the "new departments", perhaps one of the "temporary departments" referred to in the charter. The council is given the power to "appoint *or provide for the appointment*" of all officers and employes whose appointment is not otherwise provided for. Hence the authority given to this Committee to appoint its own Executive Secretary is quite in accordance with the charter. But as to fixing the compensation of that employe and of such other clerks and employes as the Committee might require, that was plainly the prerogative and the duty of the council, and could not be delegated.

In your third inquiry you raise the question whether the expenditure of the fund provided by the appropriation must be made in accordance

with the provisions of the statutes and the city charter, the same as normal city operations. It is to be noted at the outset, that the constitution in granting home rule to municipalities also reserved to the General Assembly the power to pass laws "to limit the power of municipalities to levy taxes and incur debts". See Section 13, Article XVIII. A very similar provision is found in Section 6, Article XIII of the Constitution as adopted in 1851. Acting on this authority, the General Assembly has enacted laws regulating the making of contracts by directors of public service as set forth in Section 4328, General Code.

"The director of public service may make any contract or purchase supplies or material or provide labor for any work under the supervision of that department not involving more than five hundred dollars. When an expenditure within the department, other than the compensation of persons employed therein, exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of council. When so authorized and directed, the director of public service shall make a written contract with the lowest and best bidder after advertisement for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the city."

By reference, contracts by directors of public safety and of village boards of public affairs, are to be governed by the same statute. Like restrictions have been inserted in laws pertaining to contracts by certain other municipal boards created by statute, but there is no all-embracing provision of like character relating to municipal operations generally. Accordingly it might be assumed that a municipality might by charter provision create an agency which could make contracts involving municipal expenditures without being bound by restrictions such as that above quoted.

However, in the case of *Phillips v. Hume*, 122 O. S. 11, the Supreme Court held:

"The power of municipalities to incur debts may be limited or restricted by general laws. Such limitations or restrictions are warranted by Section 6, Article XIII of the Constitution adopted in 1851, and also by Section 13, Article XVIII of the amendments adopted in 1912. Such limitations or restrictions apply to all municipalities, whether operating under charter or otherwise."

The theory underlying this holding is shown in the opinion at page 15 where it is said:

“The requirement for advertising, where expenditures exceed \$500, was one of the methods of limitation expressly imposed upon the debt-incurring power of municipalities. The duty of advertising imposed upon the director of public service by Section 4328, General Code, is now exercised and discharged by the purchasing agent of Lima under the provisions of the city charter. The Code section relating to advertising applies to all cities; and we are loath to hold that a municipality can, by indirection, absolve itself from the restrictions imposed by Section 4328, General Code, by adopting the expedient of casting the duty of advertising upon one whom the charter designates a purchasing agent instead of the director of public service.”

(Emphasis added.)

Accordingly, it is my opinion that if any expenditure on the part of the Committee in question, other than the compensation of its employes, would involve more than \$500.00, it should first be authorized by council, and a contract let pursuant to advertising as provided by Section 4328, General Code.

Specifically answering your inquiries, it is my opinion:

1. The employes of the Akron Citizens' Post War Planning Committee are public employes within the meaning of the charter of the City of Akron.

2. Under the provisions of the charter of the City of Akron, the council may legally delegate to such Committee the power to appoint and employ such persons as the Committee may require for the performance of its duties, but the compensation of all such employes must be fixed by the council.

3. The expenditure of funds appropriated by the council for the work of such Committee is subject to the general law relative to municipal contracts.

Respectfully,

HUGH S. JENKINS,

Attorney General.