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POLICEMAN, SPECIAL — VILLAGE MAYOR MAY APPOINT — DETAILED, SPECIAL DUTIES, MANUFACTURING PLANTS — TERMS, PAYMENT BY PLANT — COUNCIL MAY REPEAL ORDINANCE FOR EMPLOYMENT WHEN NO NECESSITY FOR SUCH EMPLOYMENT EXISTENT — SECTIONS 4384-1, 4384-2 G.C.

SYLLABUS:

A village mayor may appoint special policemen who may be detailed to special duties in a manufacturing plant in such village, and who, by the terms of their employment, are to receive no salary from the village, but are to be paid by such manufacturing plant. Such special policemen should be appointed pursuant to and in the manner prescribed in Sections 4384-1 and 4384-2 of the General Code. When the necessity for their employment no longer exists in the judgment of the village council, such council may repeal the ordinance providing for their appointment.

Columbus, Ohio, August 21, 1942.

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

Gentlemen:

I have your letter requesting an opinion relative to the appointment by a village of special policemen. Your communication reads as follows:

“We are inclosing herewith a letter received in this office from the Solicitor of the Village of ‘H’, together with a brief or summary of the law and interpretation of the law by court decisions, which the Solicitor considers pertinent to the question he submits in his letter.

Inasmuch as a search through our files fails to disclose any ruling directly applicable to the Solicitor’s question, although the answer to said question would be of general interest, and applicable to all the villages of this State, may we request that you examine the inclosures and give us your answer to the following:

Question: May a village mayor appoint, as special policemen, to serve for the duration of the present war, private policemen who are employed by and paid by a private company manufacturing exclusively, goods for the use of the United States Government in its conduct of the war, without complying

with the provisions contained in Sections 4384, 4384-1 and 4384-2 of the General Code of Ohio, effective September 5, 1941?"

Attached thereto is a letter from the solicitor of the village concerned setting forth the fact that the special policemen proposed to be appointed are, and will be, paid entirely by the company for which they are now working without any further compensation by the village.

The sections of the General Code directly involved are as follows:

"Section 4384. In each village there shall be a marshal, who shall be designated chief of police, who shall be an elector thereof, appointed by the mayor with the advice and consent of council, and who shall continue in office until removed therefrom for the causes, and under the powers and procedure provided for the removal of officers by sections 4263 to 4267, inclusive, of the General Code. Provided, however, that in the case of the removal of a marshal or chief of police of a village, an appeal may be had from the decision of the village council to the court of common pleas of the county in which such village is situated, to determine the sufficiency of the cause of removal. Such appeal shall be taken within ten days from the finding of the village council.

Section 4384-1. When provided for by the council, and subject to its confirmation, the mayor shall appoint all deputy marshals, policemen, night watchmen, and special policemen. All such officers shall continue in office until removed therefrom for the same cause, and in the same manner as provided in section 4384 of the General Code for the removal of the marshal.

Section 4384-2. All appointments made after the effective date of this act, except those officers holding office on the effective date hereof, shall be for a probationary period of six months (,) continuous service, and no appointments shall be deemed finally made until the appointee has satisfactorily served his probationary period. At the end of the probationary period the mayor shall transmit to the council a record of such employe's service with his recommendations thereon, and with the concurrence of the council the mayor may remove or finally appoint the employes, as the case may be."

Sections 4384-1 and 4384-2 are new enactments by the last legislature, and the present form of Section 4384 is an amendment of that section. It formerly provided that the marshal should be elected for a term of two years. The section prior to its amendment read as follows:

“The marshal shall be elected for a term of two years, commencing on the first day of January next after his election, and shall serve until his successor is elected and qualified. He shall be an elector of the corporation. When provided for by council, and subject to its confirmation, the mayor shall appoint all deputy marshals, policemen, night watchmen and special policemen, and may remove them for cause which shall be stated in writing to council.”

A consideration of the question raised appears to involve a discussion of the rights of municipalities, with or without a charter, under the powers of home rule given them by the constitution, to control the organization and operation of the police department. For the purpose of our discussion we may assume that that proposition was settled in the case of *Cincinnati v. Gamble*, 138 O.S., 220, a portion of the syllabus of which is as follows:

“In matters of state-wide concern the state is supreme over its municipalities and may in the exercise of its sovereignty impose duties and responsibilities upon them as arms or agencies of the state.

In general, matters relating to police and fire protection are of state-wide concern and under the control of state sovereignty.”

That case related to the right of a charter city which had prior to the adoption of its charter given its approval to the establishment of a police and firemen’s pension fund under the provisions of the statutes of Ohio, to substitute a retirement system of its own making. The court in its opinion used the following language at page 231:

“The state, considered in relation to its subdivisions, is the *imperium* and as such by its very nature has state control in state affairs. Since the municipality is *imperium in imperio* only in the exercise of powers conferred upon it by the state Constitution, it must in all other respects be subordinate to state authority. If fire, police and health departments be deemed purely matters of local self-government, they could be abolished and the state would be unable to step in. Obviously the abolishment of any or all of them would affect state interests. So would even impairment.”

It would appear, therefore, that in case a village desires to appoint special policemen it must proceed under the provisions of Sections 4384-1 and 4384-2.

As to the actual control and supervision of the police of a village, it may be well to note the provision of Section 4385, which reads as follows:

“The marshal shall be the peace officer of the village and the executive head under the mayor of the police force. The marshal, the deputy marshals, policemen or night watchmen under him shall have the powers conferred by law upon police officers in all villages of the state, and such other powers not inconsistent with the nature of their offices as are conferred by ordinance.”

On the matter of compensation of special policemen who may be appointed under the authority of and in the manner provided in the sections above noted, the case of *Youngstown v. National Bank*, 106 O.S., 563, while not directly controlling, yet seems to shed some light. In that case the mayor of Youngstown, confronted by a serious emergency in the way of a strike, accompanied by great violence, appointed special policemen when there was no money in the city treasury available to pay them, and made an arrangement with the National Bank to advance their salaries, with a promise to see to it that the bank would be reimbursed by the city when funds were available. The court called attention to Section 4250, General Code, which relates only to the mayor of a *city*, and which provides:

“The mayor shall be the chief conservator of the peace within the corporation.”

The court uses the following language at page 568:

“Whatever power would be proper and pertinent to the discharge of that duty under that statute would be available to the mayor as the servant or agent of the corporation, and would likewise be obligatory upon him as such agent, and upon his principal, the city, so far as the reasonable performance of his duty required. This would be the undoubted rule of law in the absence of any special provisions.”

The court, however, found in Section 4373 a special provision covering the case, and under which the mayor was justified in acting, to wit:

“In case of riot or other like emergency, the mayor may appoint additional patrolmen and officers for temporary service, who need not be in the classified list of such department.”

It should be noted that Section 4255, relating to the duties of the mayor of a village, contains identical language:

“He shall be the chief conservator of the peace within the corporation.”

But the legislature has not left in the hands of villages the same freedom in the appointment and discharge of special policemen as is conferred upon cities, as they may only be appointed by the authorization, and subject to the confirmation of the council, and the process of their removal is much more complicated.

In the case of *Youngstown v. National Bank*, supra, Judge Wanamaker, referring to the matter of compensation, uses this language at page 570 of the opinion:

“Ordinarily the employer and employe fix the compensation in advance. Where they fail so to do, the law fixes it, after the work and service are rendered, at the fair and reasonable worth of such work or service. In short, the word ‘employ’, as ordinarily used among men in the private and public affairs of life, carries with it the primary idea of compensation. A man’s time or work is his property, and when the public takes it and uses it, there is at least an implied obligation to pay its fair and reasonable value; else you have the taking of property without due process of law. *This presumption of course is rebuttable, and it may be shown that there was to be no compensation.*” (Emphasis mine.)

I see no reason, therefore, why the council of the village involved, in passing an ordinance authorizing the appointment of the emergency policemen in question, should not therein stipulate that they are to serve without compensation so far as the village is concerned, their compensation being provided by the company over whose plant they are specially detailed to watch. They would, however, by the terms of Section 4385 above quoted, be under the general control and direction of the village marshal.

The question may further arise as to how the employment of these special policemen might be discontinued when the village council desires to terminate their service, in view of the provisions of Sections 4384-1 and 4384-2, which provide that they shall, when their appointments become final after the probationary period of six months,

“continue in office until removed therefrom for the same cause and in the same manner as provided in Section 4384 for the removal of the marshal.” Section 4384, as amended, refers to causes for removal, as contained in Sections 4263 to 4267, General Code, and those causes are limited by Section 4263 as follows:

“When the mayor has reason to believe that the head of a department or other officer has been guilty in the performance of his official duty, of bribery, misfeasance, malfeasance, non-feasance or misconduct in office, gross neglect of duty, gross immorality or habitual drunkenness.”

The procedure prescribed is the filing with council of written charges, service of the same upon the officer, and trial by council. It will be further noted that Section 4384 provides for an appeal from the decision of the council to the Court of Common Pleas.

We need not be concerned with these legislative provisions however as the village council may repeal the ordinance establishing these positions, or provide in the original ordinance authorizing their appointment, that such appointments are only for the duration of the war.

It is true that the court in the case of *Cincinnati v. Gamble*, supra, virtually held that the city could not, by its charter provision, work the repeal of its ordinance whereby it had established police and firemen's pension systems, and in so holding, the court relied largely on its own opinion in the previous case of *Thompson v. City of Marion*, 134 O.S., 122, where it was held, in effect, that the city, having once given its consent to the establishment of such pension systems, was without power to repeal its action. The court said at page 126 of the opinion:

“The general rule that the power to enact ordinances implies a power of repeal is inapplicable where the ordinance in question is enacted under a limited authority to do a certain thing in the manner and within the time fixed by Legislature. *Simpson, Treas., v. State, ex rel. Eisler*, 179 Ind., 196, 99 N.E., 980; *State, ex rel. Wheeler, Treas., v. Bentley, Mayor*, 99 Kan., 344, 150 P., 218; *Brown v. Arkansas City*, 135 Kan., 453, 11 P. (2d), 607. Nor is such right of repeal impliedly conferred upon a municipality by a subsequently amended statute which ‘mandatorily required the levy of an increased tax, with nothing conditioning the increase upon the consent of the city council.’ *State, ex rel. Minneapolis Police Relief Assn., v. City Council of Minneapolis*, 188 Minn., 447, 247 N.W., 514. This case likewise involved ‘a statute granting power in respect

to police relief associations and pension funds conditioned * * * upon consent of the city council, which was given.'”

On an examination of the cases cited by the court in support of that proposition I find that each of them arose in a jurisdiction where there was nothing corresponding to our Ohio constitutional grant of home rule. But assuming that the court was justified in applying that principle to an Ohio city, in reference to the maintenance of a police pension system, we do not need to carry its application beyond the case there presented, or to an absurd extreme, and I am firmly of the opinion that it does not go far enough to prevent a village, acting under the authority of the statutes which we have been considering, from putting an end to the employment of special policemen who may have been appointed to meet an emergency and who, by reason of the passing of the emergency, are no longer needed. To hold otherwise would be to ascribe to the legislature a very absurd intention.

Specifically answering your question, it is my opinion that a village mayor may appoint special policemen who may be detailed to special duties in a manufacturing plant in such village, and who, by the terms of their employment, are to receive no salary from the village, but are to be paid by such manufacturing plant; that such special policemen should be appointed pursuant to and in the manner prescribed in Sections 4384-1 and 4384-2 of the General Code; and that when the necessity for their employment no longer exists in the judgment of the village council, such council may repeal the ordinance providing for their appointment.

Respectfully,

THOMAS J. HERBERT
Attorney General.