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1. DIRECTOR OF PUBLIC SERVICE—POWERS AND DUTIES IN OPERATION AND MAINTENANCE OF ALL MUNICIPALLY OWNED UTILITIES—SECTIONS 4323 THROUGH 4334 G. C. MUST BE FOLLOWED WHERE CITY DOES NOT HAVE OPTIONAL PLANS OF GOVERNMENT UNDER ARTICLE XVIII, SECTION 7, CONSTITUTION OF OHIO.
2. MUNICIPAL COUNCIL—NO AUTHORITY TO APPOINT EMPLOYEE WITHIN DEPARTMENT OF PUBLIC SERVICE AND PRESCRIBE DUTIES.
3. CHIEF UTILITIES ENGINEER—RULES, REGULATIONS AND BYLAWS MADE BY HIM IN REGARD TO DUTIES WHICH ARE IMPOSED BY STATUTE ON DIRECTOR OF PUBLIC SERVICE—NULL AND VOID—OF NO LEGAL EFFECT.
4. ANY CONTRACT AUTHORIZED BY LAW TO BE ENTERED INTO BY DIRECTOR OF PUBLIC SERVICE, IF EXECUTED BY ANY OTHER PERSON IS INVALID.

SYLLABUS :

1. If a city has not adopted one of the optional plans of government and framed a charter or exercised its powers of local self government pursuant to the provisions of Article XVIII, Section 7, of the Constitution of Ohio, the provisions of Sections 4323 to 4334, inclusive, of the General Code, as they pertain to the powers and duties of the director of public service in the operation and maintenance of all municipally owned utilities, must be followed.

2. A municipal council is without authority to appoint an employe within the department of public service and prescribe his duties.

3. The rules, regulations and bylaws made by a chief utilities engineer in regard to duties imposed, by statute, upon the director of public service are null and void and of no legal effect.

4. Any contract authorized by law to be entered into by the director of public service, if executed by anyone other than the director of public service, is invalid.

Columbus, Ohio, October 3, 1949

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen :

This will acknowledge receipt of your request for my opinion, which reads as follows :

"The current examination of the records of the city of Bellefontaine disclosed that a civil service employe of the Department of Public Service, with the title of Chief Utilities Engineer, has been designated by Council as the managing and operating head of all municipally owned utilities.

"The authority to make rules, regulations, and by-laws for the safe, economical and efficient management of the several utilities owned and operated by the city has been delegated to the Chief Utilities Engineer by ordinances duly passed by Council.

"The Council has also attempted to vest said Chief Utilities Engineer with the authority to execute contracts and perform other duties and functions which are vested by statute in the Director of Public Service under sections 4323, 4326, 4328, 4329, 4331 and 4334 of the General Code.

"The city of Bellefontaine is not a charter city, and has not adopted one of the optional plans of government as provided under Section 3515-1, Chapter IA of the General Code of Ohio.

"The audit further disclosed that the city of Bellefontaine is selling electric power to the Logan County Co-operative Power and Light Association, and that the aforesaid Chief Utilities Engineer was for a period of time also employed by that association as a consulting engineer.

"We are enclosing a copy of the letter received from our State Examiner in charge of the current examination of the City of Bellefontaine. Copies of certain Ordinances passed by Council pertaining to the matters hereinbefore discussed are on file in the Bureau office and will be available for your reference in considering this request.

"We are unable to find any provisions of law authorizing the council of a city to delegate the authority vested by statute in the Director of Public Service, with reference to the management and operation of municipally owned utilities and the execution of contracts, to any other city officer or employe.

"Inasmuch as the answer to the foregoing is of state-wide interest, may we request that you examine the enclosed correspondence, including the copies of legislation enacted by the city Council and now on file in the Bureau office, and give us your formal opinion in answer to the following questions:

"1. Where a city has not adopted one of the Optional Plans of Government, as provided in Section 3515-1, G. C. (Art. 1, Sec. 1 of Chapter IA), and such city has not framed and adopted a charter pursuant to the provisions of Article XVIII, Section 7 of the State Constitution, are the provisions of Sections 4323 to

4326, G. C., and 4327 to 4334, G. C., mandatory as they pertain to the powers and duties of the Director of Public Service in the operation and management of all municipally owned utilities?

"2. Where the Council of such city has enacted ordinances designating the Chief Utilities Engineer of the Department of Public Utilities as managing and operating head of the municipal utilities, with power to award and execute contracts, is the person duly appointed to and holding the position of Chief Utilities Engineer properly authorized and legally qualified to perform the duties fixed by statute for the Director of Public Service, with reference to such municipally owned utilities?"

"3. If the answer to question two is in the negative, what is the legal status of the rules, regulations and by-laws made by such Chief Utilities Engineer, and the contracts executed by him?"

It is noted in the copies of legislation attached that a reference in same is made to the Department of Public Utilities, however, in subsequent communications I was advised that there is no legislation on record, or other evidence on file, indicating that council has created such department of public utilities.

Section 2, 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."

Section 3, Article XVIII, of the Constitution 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."

Section 7, Article XVIII, of the Constitution provides:

"Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government."

In the case of *City of Cincinnati v. Gamble, et al.*, 138 O. S. 220, in the first branch of the syllabus the court held:

“By virtue of Sections 3 and 7 of Article XVIII of the Constitution, a municipality, irrespective of whether it has adopted a charter, has powers of local self-government and may adopt and enforce within its limits such local police, sanitary and other similar regulations as are not in conflict with general law.”

In O. Jur., Vol. 28, p. 100, it reads:

“In the acquisition, maintenance, and operation of public utilities, such as lighting, power, and heating plants, and water-works, municipalities act in their private or proprietary capacity.”

In the absence of local legislation by which a city may exercise its power of local self government, I have no alternative other than to render this opinion on the basis of general law applicable to the questions propounded.

In O. Jur. Vol. 28, at page 233, it reads:

“The provisions of the Municipal Code as to the manner in which and the authorities by whom the powers of municipal corporations are to be exercised and administered, * * * and which are operative until superseded by the adoption of some other form of government by the electors of a municipality, may be termed the general plan or form of municipal government. This plan * * * calls for a council constituting the legislative authority, and a mayor and certain other officers and departments, constituting the executive authority, of the municipality.”

The crux of the problem presented appears to be whether or not council, by legislative enactment, has the power to delegate the duties and powers of the director of public service to a chief utilities engineer whose office has been duly created within the department of public service.

Section 4211 of the General Code provides:

“The powers of council shall be legislative only, and it shall perform no administrative duties whatever and it shall neither appoint or confirm any officer or employe in the city government except those of its own body, except as is otherwise provided in this title. All contracts requiring the authority of council for their execution shall be entered into and conducted to performance by the board or officers having charge of the matters to which they relate, and after authority to make such contract has been given and the necessary appropriation made, council shall take no further action thereon.”

Section 4240 of the General Code provides that :

“The council shall have the management and control of the finances and property of the corporation, except as may be otherwise provided, and have such other powers and perform such other duties as may be conferred by law.”

It is to be noted that the functions of a municipal council are primarily to exercise the legislative powers of a municipality and to exercise general powers relating to finances and property. It should be further noted that council is prohibited from appointing or confirming any officer or employe in the city government except those of its own body, and is also prohibited from exercising those general powers not otherwise provided by law.

Section 4246 of the General Code provides for the executive officers of a municipal corporation ; Section 4247 provides their powers as to appointment and removal.

Pursuant to said sections, the director of public service is an executive officer with exclusive right to appoint all officers, clerks and employes within his department.

What are the duties of the director of public service? Sections 4323 to Section 4334, inclusive, of the General Code in substance provide for a department of public service administered by a director, with authority to make rules and regulations for the administration of affairs under his supervision, the pertinent statutes being Sections 4326, 4327, 4333 and 4334, which read :

Section 4326 :

“The director of public service shall manage municipal water, lighting, heating, power, garbage and other undertakings of the city, parks, baths, play grounds, market houses, cemeteries, crematories, sewage disposal plants and farms, and shall make and preserve surveys, maps, plans, drawings and estimates. He shall supervise the construction and have charge of the maintenance of public buildings and other property of the corporation not otherwise provided for in this title. He shall have the management of all other matters provided by the council in connection with the public service of the city.”

Section 4327 :

“The director of public service may establish such sub-department as may be necessary and determine the number of superintendents, deputies, inspectors, engineers, harbor masters, clerks, laborers and other persons, necessary for the execution of the work and the performance of the duties of this department.”

Section 4333 :

“In a municipality in which a water works, an electric light plant, artificial or natural gas plant, or other similar public utility is owned by the municipality, the director of public service, with the consent of the council may enter into and contract with the owners of any power plant or of any hydraulic or other natural or artificial watercourse to furnish power for the propelling of machinery in the water works, electric light plant, artificial or natural gas plant or other similar public utility of such municipal corporation, or acquire by purchase or transfer from others owning such rights, such power privileges. For the purpose of carrying into effect such contracts or leases, he may enter into such contracts for any term of years, and the provisions of the preceding five sections, and of this title, requiring the auditor to first certify that the money therefor is in the treasury to the credit of the proper funds and not appropriated for any other purpose shall not apply.”

Section 4334 :

“All contracts made by the director of public service shall be executed by him in the name of the city, and a duplicate copy shall be filed in his office, and a copy with the auditor of the city. No liability shall be created against the city as to any matters under the supervision of such director except by his express authority. No director of public service or officer or employe of his department shall be interested in any contract under his supervision.”

In regard to certain contracts, the director may be subject to Section 4403 of the General Code, which provides :

“No contract in the department of public service or the department of public safety in excess of five hundred dollars shall be awarded except on the approval of the board of control, which shall direct the director of the appropriate department to enter into the contract. The members of the board shall prepare estimates of the revenue and expenditures of their respective departments to be submitted to the council by the mayor, as provided by law.”

In the case of *Thomas E. Knauss, Taxpayer, etc., v. Columbus, et al.*, 13 O. D. (N. P.) 200, at page 205 the court said :

“It is fundamental that where a particular public agent or official is charged with the performance of certain duties that

these duties cannot be voluntarily assumed by any other person or delegated to any other person by him who is charged with the performance of the duty."

In view of the foregoing, it becomes apparent that any city which has not adopted one of the optional plans of government and such city has not framed and adopted a charter nor has it exercised the powers of local self government pursuant to the provisions of Article XVIII, Section 7, of the Constitution of Ohio, the provisions of Sections 4323 to 4334, inclusive, of the General Code, as they pertain to the powers and duties of the director of public service in the operation and maintenance of all municipally owned utilities, must be followed; that a municipal council is without authority to appoint an employe within the department of public service and prescribe his duties.

As to question 3, which involves contracts executed by the chief utilities engineer, it becomes necessary at this time to qualify my answer regarding the same. That is, such answer must be confined to those contracts which are solely within the power and duty of the director of public service to execute. Keeping that thought in mind, it must be observed that when council created the position of chief utilities engineer, which is solely within its powers, said position was established within the department of public service. Therefore, any appointment to be made must be made by the director of public service and, upon the appointment of a chief utilities engineer, he becomes subject to the supervision and direction of the appointing authority. However, in the Knauss case, *supra*, it has already been said that powers conferred upon a particular municipal officer cannot be by him delegated to or exercised by another.

In O. Jur. Vol. 28, at page 899, it is said:

"that the power to contract is inherent in every municipal corporation with respect to any subject-matter within its corporate powers."

In O. Jur. Vol. 28, at page 919, it is stated:

"It is well established in Ohio that, under the doctrine of *ultra vires* as applied to the acts of corporations generally, any attempted exercise of power to contract by a municipality which transcends the limits expressed or necessarily implied from the language of the instrument by which its powers are conferred is null and void. And the same rule is applicable to contracts entered into * * * in disregard of statutory provisions."

There can be no question as to the right of a city to enter into contracts relative to its public utilities, however, it is readily seen that such contracts are invalid if improperly executed.

The question now is, may the terms and conditions of an invalid contract be enforced against the municipality? It further reads in Vol. 28, O. Jur., at page 924, that :

“It seems to be well established in Ohio that no recovery can be had against a municipal corporation, even on a quantum meruit basis, for benefits accepted and enjoyed by it under a contract which is invalid by reason of * * * the disregard of statutory requirements in the formation or execution thereof.”

In O. Jur. Vol. 28, at page 923, it reads :

“It is held, however, under the doctrine that the title to property does not pass under an illegal contract, that where a municipality has come into possession of property by virtue of an illegal contract which is not malum in se, but merely malum prohibitum, the law will compel the restitution thereof to the owner. * * * It has been held, however, that where a municipality is in the possession and enjoyment of property received under a contract which is invalid merely by reason of the failure to comply with statutory requirements, and the situation is such that restitution is impossible, the municipality will be required to pay the contract price, if fair and reasonable, although this holding seems to go somewhat beyond what may be regarded as the established Ohio doctrine.”

In the case of *Sweeny v. Stapleton*, 38 O. L. Abs. p. 213, the second branch of the syllabus reads :

“When a municipality in the exercise of its proprietary functions goes into business by way of engaging in the operation of a public utility and acquires the same by a purchase contract, it should be held to the performance of its terms by every moral and equitable rule and by the same rules which control a private corporation under similar circumstances.”

As to whether or not a city may enforce the terms and conditions of an invalid contract against one with whom the city has contracted, the general rule as stated in O. Jur. Vol. 28, at page 926, is :

“that estoppel cannot be invoked against a municipal corporation in the case of contracts which are invalid by reason of the disregard of mandatory provisions of statutes prescribing the mode or manner of their formation or execution.”

May a city ratify its invalid contracts? At page 925, Vol. 28, O. Jur., it reads:

“It is said that it is competent also for a municipal corporation to ratify a contract and thereby to make it a binding obligation, acting through its authorized agencies and in the manner prescribed by law for making contracts of such a character, if the contract was within its general corporate powers but was invalid because defectively or irregularly executed, or because of a lack of proper authority on the part of the person assuming to act on behalf of the municipality.”

From the foregoing statements of the law applicable to the execution of contracts by a municipality, it appears reasonably clear that unless such contracts are executed by the proper municipal officer authorized to execute such instruments, they are invalid. In the absence of a ratification of such invalid contracts by the proper municipal authority, they would be unenforceable by either contracting party.

In view of the foregoing, it is therefore my opinion that:

1. If a city has not adopted one of the optional plans of government and framed a charter or exercised its powers of local self government pursuant to the provisions of Article XVIII, Section 7, of the Constitution of Ohio, the provisions of Sections 4323 to 4334, inclusive, of the General Code, as they pertain to the powers and duties of the director of public service in the operation and maintenance of all municipally owned utilities, must be followed.
2. A municipal council is without authority to appoint an employe within the department of public service and prescribe his duties.
3. The rules, regulations and by-laws made by a chief utilities engineer in regard to duties imposed, by statute, upon the director of public service are null and void of no legal effect.
4. Any contract authorized by law to be entered into by the director of public service, if executed by anyone other than the director of public service, is invalid.

Respectfully,

HERBERT S. DUFFY,
Attorney General.