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RECREATION BOARD:

1. MUNICIPAL COUNCIL MEMBER — PROHIBITED FROM SERVING AS MEMBER OF RECREATION BOARD—SECTIONS 4065-3, 4207 G. C.

2. BOARD MAY APPOINT OFFICERS AND EMPLOYES NAMED IN SECTION 4065-2 G. C.—WITHOUT POWER TO FIX COMPENSATION OF SUCH OFFICERS AND EMPLOYES—COMPENSATION MUST BE FIXED BY MUNICIPAL COUNCIL.

3. MUNICIPALITY MAY INCUR LIABILITY TO ONE WHO SUFFERS INJURY WHILE USING PARKS OR PLAYGROUNDS—NUISANCE—SECTION 3714 G. C.

4. MUNICIPALITY—AUTHORITY TO PURCHASE INSURANCE AGAINST LIABILITY—MAY PAY PREMIUMS OUT OF PUBLIC RECREATION FUNDS

5. EMERGENCY, MEDICAL CARE—FIRST AID.

6. MUNICIPAL COUNCIL—MAY APPROPRIATE MONEY RAISED BY TAXATION FOR PRIZES AND TROPHIES—ATHLETIC CONTESTS.

SYLLABUS:

1. By virtue of the provisions of Section 4207, General Code, a member of a municipal council is prohibited from serving as a member of a recreation board appointed pursuant to Section 4065-3, of the General Code.

2. A recreation board appointed pursuant to Section 4065-3 of the General Code, may appoint the officers and employes named in Section 4065-2, General Code, but is without power to fix the compensation of such officers and employes; such compensation must be fixed by the municipal council.

3. By virtue of the provisions of Section 3714 of the General Code, a municipality may incur liability to one who suffers injury while using its parks or playgrounds, where such injury is caused by a nuisance created or permitted to exist by the municipality or its employes.

4. A municipality has authority to purchase insurance to protect itself against such liability, and may pay for the same out of public recreation funds.

5. A municipality in operating its parks or playgrounds, may lawfully provide out of public recreation funds, emergency medical care by way of first aid, for persons injured while using such parks or playgrounds.

6. The council of a municipality may lawfully appropriate money raised by taxation for the purchase of prizes or trophies for successful contestants in athletic contests conducted by a recreation board or other authority charged with the maintenance, operation and supervision of its recreational facilities.

Columbus, Ohio, October 5, 1951

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen:

I have before me your request for my opinion, reading as follows:

"The current examination of the City of W——, disclosed the following conditions in connection with the administration of recreation activities, which appear to be unauthorized by the laws governing recreation matters in municipalities:

"Council passed an ordinance providing for the establishment of a Recreation Commission, containing two provisions of questionable legality. First, said ordinance provides that one member of city council shall be appointed to the commission. Second, the ordinance provides that the Recreation Commission shall fix the compensation of its employes.

"In the first instance the provisions of Section 4207, General Code, prohibit a member of council from holding any other public office or employment except notary public or member of the state militia.

"In the second instance, Section 4214, General Code, vests the authority to fix the compensation of all officers and employes in the municipal council unless otherwise specifically provided. We do not consider the provisions of Section 4065-3, General Code, and related statutes, to constitute specific authority for the Recreation Commission to fix salaries.

"Another question has been raised by our Examiner in connection with the operation of a municipal recreation program, which involves the hazards incident to athletic and other public recreation activities, and the liability, if any, on the part of the city as a result of sponsoring a recreation program on lands, grounds, and property owned by the city.

"The purchase of prizes and trophies out of the funds raised by taxation for recreation purposes was also noted.

"In view of the facts and conditions set forth in the preceding paragraphs, we submit the following questions for your consideration:

"1. When a city has established a Recreation Commission pursuant to the authority of Sections 4065-3 to 4065-7, General Code, is it legal for a member of council to serve as a member of said Recreation Commission?

"2. Does the Recreation Commission of a city, appointed pursuant to the provisions of Section 4065-3, General Code, possess the power to fix compensation of all its employes in the recreation department?

"3. How shall the compensation be fixed for all recreation department officers and employes, and who shall select such employes?

"4. In view of the provisions of Section 3714, General Code, is a municipality liable for damages resulting from injuries suffered by persons participating in a city-sponsored and supervised recreation program when such accident or injury occurs on *public grounds or property?*

"5. Can the municipal corporation legally expend public recreation funds to pay the cost of medical services rendered and expenses incurred for the benefit of a person injured in the city recreation program, resulting from either supervised play, competitive athletic games, or other activities connected with the city sponsored recreation program?

"6. If it is determined that a municipality is liable for damages as a result of injuries suffered by the participants in a municipal recreation program, is it legal for the city to purchase liability isurance to cover such hazard and to pay the premium out of public recreation funds?

"7. Is it legal to expend public recreation funds raised by taxation for the purchase of prizes and trophies to be given as a reward to successful contestants under the Recreation Commission's supervision?

"Since the answers to the foregoing questions are necessary in order to complete the current audit report, and also are of state-wide concern, we respectfully request that you furnish us your formal opinion in answer thereto."

Your first question is as to the eligibility of a member of council to be a member of a recreation commission authorized under Section 4065-1 et seq., General Code. That Section reads as follows:

"That the council or other legislative authority of any city, village, or the county commissioners of any county, may designate and set apart for use as playgrounds, playfields, gymnasiums, public baths, swimming pools, or indoor recreation centers, any

lands or buildings owned by any such city, village or county, and not dedicated or devoted to other public use. Such city, village or county may, in such manner as may be authorized or provided by law for the acquisition of land or buildings for public purposes in such city, village or county, acquire lands or buildings therein for use as playgrounds, playfields, gymnasiums, public baths, swimming pools or indoor recreation centers."

Section 4065-2, General Code, provides as follows:

"The authority to supervise and maintain playgrounds, playfields, gymnasiums, public baths, swimming pools, or indoor recreation centers, may be vested in *any existing body or board, or in a recreation board,* as the city or village council or the county commissioners shall determine. The *local authorities* of any such city, village or county, may equip, operate and maintain, the playgrounds, playfields, gymnasiums, swimming pools, public baths or indoor recreation centers, as authorized by this act. Such local authorities may, for the purpose of carrying out the provisions of this act, employ play leaders, recreation directors, supervisors, superintendents or any other officers or employes as they may deem proper." (Emphasis added.)

Section 4065-3, General Code, provides that if the city or village council determines that the power to equip, operate, and maintain playgrounds, playfields, gymnasiums, public baths, swimming pools, or recreation centers, shall be exercised by a recreation board, they may establish in said city or village such recreation board, and if so established it is to consist of five persons, two of whom shall be members of the board of education of the city or village school district. The board is to be appointed by the mayor and is to serve for a term of five years. It is to be noted that under the provisions of the law above quoted, it is not necessary for a city or village to set up this recreational board; all the powers above mentioned may be vested in "any existing body or board, or in a recreation board, as the city or village council * * * shall determine." Section 4065-2, supra, further provides that: "The local authorities of any city, village or county, may equip, operate and maintain, the playgrounds, etc." I take this to mean that the council may leave the whole matter in the hands of the director of public service who, by law, is the "local authority" primarily charged with the supervision and maintenance of such public facilities. See Section 4326, General Code.

Section 4207, General Code, provides in part, as follows:

"Each member of council shall be an elector of the city, shall

> not hold any other public office or employment, except that of notary public or member of the state militia, and shall not be interested in any contract with the city. A member who ceases to possess any of the qualifications herein required, or removes from his ward, if elected from a ward, or from the city, if elected from the city at large, shall forthwith forfeit his office."

If the city council sees fit to establish the recreation board prescribed by the statute above quoted, it seems quite clear that it has thereby establish an *office,* to wit, the office of a member of such board and that the provisions of Section 4207, supra, would prohibit a member of the council from holding such office.

What constitutes an "office" is well summarized by Ohio Jurisprudence, Vol. 32, page 856, where it is said:

> "A public office is the right, authority and duty created and conferred by law by which, for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public. The individual so invested is a public officer."

I do not consider it worth while to cite authorities to show that the position in question is an office, since by the terms of the statute above quoted, the board is endowed with important functions and responsibilities, including the right to employ all of the personnel necessary to carry out the powers committed to it, and to equip, operate and maintain the public facilities mentioned. Accordingly, the conclusion seems to be irresistible that a member of council is ineligible to appointment as a member of the recreation board of a city or village, where such board has been created under Section 4065-1, et seq., General Code.

It will be noted, too, that the statute not only forbids a member of council to be a "public officer" but extends the prohibition to being a "public employe." Among the many offices and employments which have been held to be forbidden to a member of a council, we may note the following:

Member of the board of health—State ex rel. Attorney General v. Craig, 69 Ohio St., 236;

County school examiner—State ex rel. Shank v. Gard, 8 O. C. C. (N. S.) 599;

Director of Workhouse—Commissioners v. Cambridge, 7 O. C. C., 72;

Decennial Board of Equalization—State ex rel. v. Kearns, 47 Ohio St., 566;

Services in military forces of the United States—State ex rel. Cooper v. Roth, 140 Ohio St., 377;

Registrar in state university—State ex rel. Tilden v. Harbourt, 70 Ohio App., 417.

As to your second question relative to the authority of the recreation board to fix the compensation of officers and employes appointed by it, I direct your attention to the language of Section 4065-3, supra, reading as follows:

> "* * * such recreation board which shall possess all the powers and be subject to all the responsibilities of the respective local authorities under this act."

In view of the express provisions of the statutes which I have quoted, that the power of management and operation of these recreation facilities may be vested either in the local authorities or in any existing body or board or in a recreation board if the city chooses to provide for it, we may properly look to the authority of the local authorities or of any other existing body, to fix salaries of officers or employes engaged in supervising parks and playgrounds. We do not find in the statutes relating to the office of Director of Public Service any authority vested in him to fix the salaries of persons he may appoint for that purpose, although he is authorized by Section 4327 to determine their number, Section 4214, General Code, relating to cities, provides as follows:

> "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, and the amount of bond to be given for each officer, clerk or employe in each department of the government, if any be required. Such bond shall be made by such officer, clerk or employe, with surety subject to the approval of the mayor."

Section 4219, General Code, makes a similar provision as to the compensation of officers and employes of a village. There are certain exceptions in the statutes, authorizing certain boards to fix the compensa-

tion of their employes. But there is no such authority given to the recreation board here under consideration.

In an opinion of one of my predecessors, No. 3859, Opinions of the Attorney General for 1922, page 1082, the various sections of the act relating to the organization of the recreation board, to wit, Sections 4065-1 to 4065-7, General Code, inclusive, were under consideration. It was there held:

> "1. The power to lease lands and acquire buildings for recreation purposes under sections 4065-1 et seq., of the General Code, is vested in the council of the city or village, or in the county commissioners.
>
> "2. Under Section 4065-3 G. C., a board of recreation is unauthorized to levy taxes or appropriate money for the purpose of said act."

In that opinion attention was called to the language of section 4065-3 supra, referring to the recreation board, "which shall possess all the powers and be subject to all the responsibilities of the respective local authorities under this act * * *." The writer of that opinion said at page 1083:

> "While it is not altogether clear as to just what powers are vested in the said recreation board by the above phraseology, or as to the meaning of the term 'local authorities' as used therein; it is believed, however, that the intention of the statute is to transfer the powers and duties of the local authorities previously supervising such matters as playgrounds, etc., to the board of recreation provided by Sec. 4065-3 G. C. That is to say that relative to such matters, the board of recreation was to have the same supervisory control over said playgrounds, etc., as that exercised by the director of public service under Sec. 4325 G. C., and the board of park commissioners under Sec. 4057 G. C., and to possess the same powers and duties relative to the subject of playgrounds as these local authorities. Since, however, the powers and duties of said local authorities are merely supervisory in nature, such authority when transferred to the board of recreation as provided by Sec. 4065-3 G. C., could not vest in said board the power to directly purchase land and buildings since this power is not vested in such local authorities in the first instance. Thus it would seem that the said board of recreation under Sec. 4065-3 is clothed with no power in this respect."

I concur in the statements just quoted, and it is my opinion that the powers conferred by the statute on the recreation board do not include

the power to fix the salaries and compensation of officers or other employes whom the recreation board is authorized to appoint. There are provisions in the statutes giving certain boards the power to fix the compensation of their employes, for instance, a hospital board (with the approval of council) as provided in Section 4026, General Code; but no such authority is given to a recreation board.

Your next question relates to the possible liability of a municipal corporation for damages arising from the operation of the recreational facilities in question. In 28 Ohio Jurisprudence, page 1012, it is said:

> "Municipally owned and controlled parks, established and maintained for, and open to, the general public, are 'public grounds' within the meaning of that phrase in Section 3714, G. C., and since by that section the duty is imposed upon municipalities to keep them free from nuisance, they are liable for injuries resulting from a failure to perform such duty."

Section 3714, General Code, provides as follows:

> "Municipal corporations shall have special power to regulate the use of the streets, to be exercised in the manner provided by law. The council shall have the care, supervision and control of public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts, within the corporation, and shall cause them to be kept open, in repair, and free from nuisance."

There is no doubt but that parks and playgrounds belonging to a municipality are public grounds, but the liability which may arise from accidents or injuries occurring on such public grounds is predicated entirely on the existence of a nuisance, which the municipality has either caused or permitted to exist after due notice, express or implied, of its existence, and on the liability created by the statute last quoted. Selden v. Cuyahoga Falls, 132 Ohio St., 223; Gottesman v. Cleveland, 142 Ohio St., 410; Gaines v. Wyoming, 147 Ohio St., 491; Harris v. Findlay, 59 O. App., 355. In the case of Selden v. Cuyahoga Falls, supra, it was held:

> "1. In the construction and maintenance of a park and swimming pool for the use and benefit of the general public, a municipality acts in a governmental rather than a proprietary capacity.
>
> "2. While acting in such governmental capacity a municipality incurs no liability in tort for common-law negligence.
>
> "3. The term 'nuisance' is not synonymous with 'negligence' and does not necessarily rest upon the degree of care used,

although a nuisance may be and frequently is the consequence of a negligent act.

"4. The provision of Section 3714, General Code, requiring a municipality to keep its public grounds free from nuisance is in derogation of the common law.

"5. Such provision does not by implication impose liability for negligence not involving nuisance."

Such liability as the court in that case pointed out, arises only by virtue of the provisions of Section 3714, supra, which, as the court states, is in derogation of the common law and therefore is to be strictly contrued. Liability created by Section 3714 is based solely on the maintenance of a nuisance in any of the public places mentioned in the section.

Accordingly, it is well settled that the city incurs no liability for accident or injury which may occur in its parks or playgrounds, by reason of negligence not resulting in a nuisance. Ainslee v. Bellevue, 73 Oh. App., 577; See also, Aldrich v. Youngstown, 106 Ohio St., 342; Wooster v. Arbenz, 116 Ohio St., 281.

I do not deem it necessary for the purpose of this opinion to go into detail as to the circumstances under which a municipality may be or may not be liable for injury occurring in its parks or playgrounds. It is sufficient to determine that under certain circumstances liability may exist.

Accordingly, I come to your next question, which relates to the right of the municipality to take out insurance to protect it against such liability. The right of various political subdivisions and administrative boards to purchase liability insurance has been the subject of a number of opinions of this department. In an opinion No. 787, Opinions of the Attorney General for 1937, page 1455, it was said:

"As to property damage and public liability insurance, suffice it to say that this office has consistently held that a political subdivision cannot legally enter into a contract and expend public moneys for the payment of premiums on public liability or property damage insurance covering damages to property and injury to persons unless there is a liability created against the political subdivision by statute. Opinions of the Attorney General for 1934, Vol. II, page 1120. Where there is a liability created, however, the Attorney General in 1931 in the opinions for that year, Vol. I, page 303, held as disclosed by the syllabus:

'By reason of the liability created by Section 3298-17, General Code, boards of township trustees may lawfully protect

themselves against liability for damages by procuring liability or property damage insurance upon township owned motor vehicles and road building machinery while such vehicles and machinery are being operated in furtherance of the official duties of said trustees.' "

Section 3298-17 referred to in the above opinion provided:

"Each board of township trustees shall be liable, in its official capacity for damages received by any person, firm or corporation, by reason of the negligence or carelessness of said board of trustees in the discharge of its official duties."

In an earlier opinion, No. 2995, Opinions of the Attorney General for 1931, page 395, it was said:

"* * * *the liability imposed by the statute on township trustees for negligence or carelessness in the operation of motor vehicles and road building machinery* in the construction, reconstruction and repair of township roads or in the furtherance of any business of the township may lawfully be protected against by carrying of liability insurance." (Emphasis Added.)

In an opinion No. 4122, Opinions of the Attorney General for 1948, page 586, it was held, as disclosed by the fourth and fifth branches of the syllabus:

"4. The trustees of a municipal library have authority to procure liability insurance against possible liability created by Section 3714-1 of the General Code, for injury or loss to persons or property growing out of the operation of a bookmobile or other vehicle used on the public highways of the state.

"5. No liability attaches to boards of trustees of county, township, public school or county district libraries or to the political subdivisions which create and support them for damages to persons or property, growing out of the operation of bookmobiles or other vehicles operated by any of such libraries, and accordingly, said boards of trustees are without authority to procure insurance against such liability and pay for the same out of library funds."

The liability imposed upon a municipality and the right to procure insurance against damages on account of the same as to municipal corporations, as held by that opinion, was based on the provisions of Section 3714-1, General Code, which reads as follows:

"Every municipal corporation shall be liable in damages for injury or loss to persons or property and for death by wrongful

act caused by the negligence of its officers, agents, or servants while engaged in the operation of any vehicles upon the public highways of this state under the same rules and subject to the same limitations as apply to private corporations for profit but only when such officer, agent or servant is engaged upon the business of the municipal corporation.

"Provided, however, that the defense that the officer, agent, or servant of the municipality was engaged in performing a governmental function, shall be a full defense as to the negligence of members of the police department engaged in police duties, and as to the negligence of members of the fire department while engaged in duty at a fire or while proceeding toward a place where a fire is in progress or is believed to be in progress or in answering any other emergency alarm. And provided further, that a fireman shall not be personally liable for damages for injury or loss to persons or property and for death caused while engaged in the operation of a motor vehicle in the performance of a governmental function and provided further that a policeman shall not be personally liable for damages for injury or loss to persons or property and for death caused while engaged in the operation of a motor vehicle while responding to an emergency call."

The immunity from liability as to boards of trustees of public school or county district liabraries was based upon the fact that each of the organizations maintaining such libraries, is engaged in the performance of a governmental function, and in the absence of a statute creating liability none could arise, and therefore those bodies were without authority to procure insurance against such liability. The opinion to which I have just referred, made reference to a number of earlier opinions, in which the same distinctions were drawn. Among others, Opinion No. 5949, 1943 Opinions of the Attorney General, page 181, and Opinion No. 480, 1945 Opinions of the Attorney General, page 607.

Reference may also be made to the case of Insurance Company v. Wadsworth, 109 Ohio St., 440, in which the court sustained the right of a municipality operating a municipal light plant to procure insurance to protect it against liability arising from the operation of such plant. It is true that the court emphasized the fact that the city in the operation of such plant, was acting in a proprietary capacity and therefore might incur liability and, accordingly, had the right to protect itself by insurance. Notwithstanding the fact that the proposition with which we are here dealing involves an operation in a governmental capacity, yet the liability is created by a statute which takes a municipality out of the protection

of its governmental immunity. Accordingly, in my opinion, it makes no difference as to the reason why the liability may arise so long as it does or may exist, and the reason for protection and the right to secure protection by liability insurance is just as manifest in one case as in another.

If it be objected that no statute can be found authorizing municipalities to purchase such insurance, it may be answered that municipalities no longer need look to the legislature for authority relating to their local government, but derive their powers directly from the broad grant of home rule contained in Section 3 of Article XVIII of the Constitution. Perrysburg v. Ridgeway, 108 Ohio St., 245.

Your letter further raises the question whether, in the operation of public recreation grounds, a municipality may lawfully expend public recreation funds to pay the cost of medical expenses incurred for the benefit of a person injured in a city recreation program. It appears to me to be manifest that since a municipality may incur liability in the operation of such recreational facilities and has the right to expend money to insure itself against such liability, it should have the right to make reasonable expenditures by giving first aid to patrons of its playgrounds and parks, in case of injury, and by providing them with emergency medical attention. This would be justified on purely humanitarian grounds, in line with the many other gratuitous services which municipalities are rendering to their citizens in cases of emergencies of many kinds. It would be particularly appropriate in the case of injuries sustained in public parks, swimming pools and playgrounds to which children and adults are invited. A further reason would be the possible saving from damage claims of large amounts, for which, as pointed out, the municipality may under certain circumstances be liable. It should, however, be borne in mind that such medical care is to be confined to emergency treatment by way of first aid.

Your final question is as to the expenditure of public funds for the purchase of prizes and trophies to be given as awards for athletic events. This opens up a field as to which I have not been able to find any precedents, and certainly no express statutory authorization. However, as I have already stated, we no longer need to look to the statutes to determine whether a municipality possesses a certain power. If the question is as to a matter of local concern, the Constitution in Article XVIII, Section 3, furnishes the answer; for it gives to municipalities directly the right

to exercise "all powers of local self-government." In one of the first cases arising under this constitutional provision, Billings v. Cleveland Ry. Co., 92 Ohio St., 478, the court, referring to that provision of the Constitution, said:

> "The people made a new distribution of municipal powers * * *. The source of authority and the measure of its extent is the Constitution."

It may be conceded that in the exercise of its powers in matters of local self-government, a municipality may not spend its money for purposes which are in no way germane to its existence as a municipality. But public recreation for adults as well as children has for a long time been recognized as a highly beneficial element in good citizenship and as justifying the expenditure of public money.

In cultivating a wholesome spirit of competition by athletic contests, in connection with its playgrounds, a municipality is rendering a great public service to the community, and the proper encouragement of such competitive sports may have a great influence in preventing juvenile delinquency. To this end the granting of trophies and prizes may be considered helpful and perhaps essential. In this matter, a great measure of discretion must be lodged in the legislative body of the municipality.

It is my opinion that a reasonable expenditure of recreation funds appropriated for the purchase of trophies or prizes for such athletic contests may lawfully be made.

In specific answer to your questions, it is my opinion:

1. By virtue of the provisions of Section 4207, General Code, a member of a municipal council is prohibited from serving as a member of a recreation board appointed pursuant to Section 4065-3 of the General Code.

2. A recreation board appointed pursuant to Section 4065-3 of the General Code, may appoint the officers and employes named in Section 4065-2, General Code, but is without power to fix the compensation of such officers and employes; such compensation must be fixed by the municipal council.

3. By virtue of the provisions of Section 3714 of the General Code, a municipality may incur liability to one who suffers injury while using

its parks or playgrounds, where such injury is caused by a nuisance created or permitted to exist by the municipality or its employes.

4. A municipality has authority to purchase insurance to protect itself against such liability, and may pay for the same out of public recreation funds.

5. A municipality in operating its parks or playgrounds, may lawfully provide out of public recreation funds emergency medical care by way of first aid for persons injured while using such parks or playgrounds.

6. The council of a municipality may lawfully appropriate money raised by taxation for the purchase of prizes or trophies for successful contestants in athletic contests conducted by a recreation board or other authority charged with the maintenance, operation and supervision of its recreational facilities.

Respectfully,

C. WILLIAM O'NEILL
Attorney General