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DEFENSE ORGANIZATION—CIVIL—SECTION 5295 G. C. DOES NOT CONFER ON COUNTIES AND INCORPORATED MUNICIPALITIES AUTHORITY TO FORM SINGLE COUNTY-WIDE CIVIL DEFENSE ORGANIZATION AS SEPARATE POLITICAL ENTITY—O. A. G. 168, MARCH 12, 1951, DISTINGUISHED.

SYLLABUS:

Section 5295, General Code, does not confer upon counties and incorporated municipalities the authority to form a single county-wide civil defense organization as a separate political entity. Opinion No. 168, dated March 12, 1951, distinguished.

Columbus, Ohio, April 12, 1951

Hon. Frank T. Cullitan, Prosecuting Attorney
Cuyahoga County, Cleveland, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"Pursuant to regulations promulgated by the Governor of Ohio under date of January 15, 1951, under authority of Sections 5291 to 5303, both inclusive, of the General Code, the Board of County Commissioners are proceeding to enter into a voluntary agreement with the municipalities of Cuyahoga County to establish a county-wide Civil Defense Organization to be effective when approved by a majority of the municipalities within the County, including the City of Cleveland, and a similar resolution adopted by the Board of County Commissioners.

"The governing body of the Organization is to consist of the members of the Board of County Commissioners and the executive heads of the participating municipalities. It also provides for an Executive Committee consisting of the three Commissioners, the Mayor of Cleveland, and five other members of the County Council, to be selected by such Council. The County Council is to appoint a Director of Civil Defense for the entire territory, provide a staff, determine fixed compensation for the Director and each member of his staff, and exercise various powers in furtherance of the objectives of the Organization. The said council is to receive funds and property and is to disburse such funds through a Clerk-Treasurer and Auditor and such other officers as the said Council shall determine.

"It is proposed that the expense of the Organization shall be apportioned three-tenths to the County of Cuyahoga and the remaining seven-tenths to the various municipalities proportionately on the basis of population and tax duplicate. A copy of the said agreement as set forth in a form of Ordinance to be adopted by each of the participating municipalities is attached hereto. A resolution embodying the same provisions is to be passed by the County Commissioners.

"The Board of County Commissioners requests your written opinion as to whether or not Sections 5291 to 5303, both inclusive, of the General Code, are broad enough to authorize the rules and regulations promulgated by the Governor of the State of Ohio under date of January 15, 1951, and whether or not the said Board may legally participate in the said voluntary agreement and appropriate and pay over to the said County Council county funds in accordance with the provisions of the said voluntary agreement."

The provisions of the Ohio civil defense statutes pertinent to this inquiry are as follows:

Section 5291:

"The governor shall promulgate and enforce, and as he deems necessary from time to time, amend or rescind, regulations with respect to the establishment of a civil defense organization for the state of Ohio for the purpose of providing a defense for its people against enemy action. Such regulations shall become effective upon being filed in the office of the secretary of state and thereupon shall have the full force and effect of law until amended or rescinded. They shall be made available for public inspection at the headquarters of the state and each local organization for civil defense, and at each other places and during such reasonable hours as may be fixed by the governor."

Section 5295:

"Each county and incorporated municipality of this state is hereby authorized to establish a local organization for civil defense in accordance with such regulations as shall be promulgated by the governor. Each local organization for civil defense shall have a director who shall be appointed by the county commissioners for the counties and by the chief executive for the incorporated municipalities, and who shall have direct responsibility for the organization, administration and operation of such local organization for civil defense, subject to the direction and control of such county commissioners and chief executive and not inconsistent with regulations promulgated by the governor. Each local organization for civil defense shall perform civil defense functions within the territorial limits of the political subdivision within which it is organized, and in addition, shall conduct such functions outside of such territorial limits as may be required pursuant to regulations promulgated by the governor."

That portion of the civil defense regulations promulgated by the Governor on January 15, 1951, which is pertinent to this inquiry, is Section 4c thereof. This section reads as follows:

"Section 4. Local Organizations.

" * * *

"c. Provided, however, that the board of county commissioners and the mayors or executive heads of the municipal corporations within any county may by agreement establish a county-wide civil defense organization when authorized by a resolution

of the board of county commissioners of such county and by ordinance passed by the legislative body of each participating municipal corporation within the county setting forth the manner of the discharge of the obligation of providing a defense for the people within such county against enemy action. Such county-wide civil defense organization shall have authority to appoint a director of civil defense for the territory comprising the county. Any such agreement shall become effective when approved by the legislative bodies of at least a majority of such incorporated municipalities, including the municipality having the largest population within such county, and by the state director of civil defense. When so established and upon the appointment of a civil defense director such county-wide civil defense organization shall have the power and authority to:

- “1) Receive and disburse funds
- 2) Acquire, own, hold, use and control property pursuant to the terms set forth in the resolution of the board of county commissioners and the ordinances of the respective municipal corporations.”

You have submitted for my consideration a copy of a resolution which it is proposed will be adopted by the county commissioners of Cuyahoga County and which it is proposed will be enacted as an ordinance by the several incorporated municipalities of that county. It appears that this resolution follows quite closely the plan of organization set out in Section 4c of the executive regulation quoted above.

Particular attention is invited to the provisions of Section 5295, above quoted, to the effect that “each local organization * * * shall have a director”; that he “shall be appointed by the county commissioners for the counties and by the chief executive for the incorporated municipalities”; and that he shall be “subject to the direction and control of such county commissioners and chief executive.”

Here are mandates by the legislature which cannot be ignored and which must be present in a local defense organization. The words “not inconsistent with regulations promulgated by the governor” cannot be extended beyond their plain meaning. They certainly do not confer upon the governor power to ordain a form of organization which would disregard all three of the conditions named. Much less would county commissioners and several municipal councils in a county find in this statute authority to set up an organization which would rise wholly independent of these conditions.

The organization which your letter suggests appears to me to be without legal sanction for the reasons: (1) that it proposes to set up a super organization not contemplated by the law; (2) that it would place the power of appointment of a director in a body which is neither the governing body of the county nor the executive officer of the municipalities affected; (3) that he could not be subject to the direction and control of either the county commissioners or of the executive head of any municipality.

It is to be remembered that a county is an agency of the state and possesses only such power as is conferred upon it by statute. 11 Ohio Jurisprudence, 244, Counties, Section 7. In view of the conclusion stated above, that the statute in this instance does not confer authority on counties to participate in the creation of a county-wide civil defense organization, it follows that such authority cannot be conferred by administrative rules promulgated by the executive.

A question somewhat similar to this was considered in my opinion No. 168, dated March 12, 1951. The syllabus in that opinion is as follows:

“Under the provisions of the statutes of Ohio relating to civil defense, and in accordance with the regulations promulgated by the Governor relative to civil defense, the board of county commissioners of Montgomery County has the right to contract with the city of Dayton for cooperative action in the appointment of a Director of Civil Defense, and properly may pay to such city an agreed portion of the expense of the operation of such organization.”

In that case I had in mind that each subdivision would form its own organization for civil defense, but that each agreed in effect (1) to appoint the same individual as director of its local organization, and (2) to share the expense of maintenance of such director's office in a stated proportion. Thus, in the course of that opinion I stated:

“It appears from the terms of the proposed ordinance of the city of Dayton, a copy of which you have submitted, that the ordinance when accepted by the county commissioners of Montgomery County is to constitute a contract whereby the city and county would appoint a director of civil defense for said county and city. Presumably both would exercise the power given them by law by appointing the same person. I can see no objection to this procedure in view of the language of the statute and the regulation to which I have called attention.”

It is thus to be observed that in that case the contract merely provided for a mutual aid plan or arrangement such as is clearly contemplated under the provisions of Sections 5294 and 5296, General Code. Such contract did not, as I understand the factual situation there involved, contemplate joint action to create a defense organization which is subject to the control of neither of the two subdivisions individually and one to which each has attempted to delegate its civil defense functions. It cannot be supposed, therefore, that the question here under consideration is covered by the conclusions reached in that opinion.

I would not be understood as questioning in any way the wisdom of providing for the creation of a county-wide organization for civil defense. I merely affirm the propriety, in the present state of limited war, of such creation being effected in accordance with constitutional legislative processes.

I should say parenthetically that because I recognize the seriousness of the civil defense problem and the importance of speedy and effective organization of the civil defense effort, I am bringing my conclusion herein to the attention of the Governor in the belief that he will wish to recommend to the General Assembly a broadening of the statutory authority of the several agencies and political subdivisions of the state to participate in the civil defense program.

For the reasons stated, in specific answer to your question, it is my opinion that Section 5295, General Code, does not confer upon counties and incorporated municipalities the authority to form a single county-wide civil defense organization as a separate political entity.

Respectfully,

C. WILLIAM O'NEILL

Attorney General